



**Gumba v Faulu Micro Finance Bank (Civil Appeal E093 of 2022)  
[2023] KEHC 21491 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21491 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E093 OF 2022  
RPV WENDOH, J  
JULY 18, 2023**

**BETWEEN**

**LEONARD OKUMU GUMBA ..... APPELLANT**

**AND**

**FAULU MICRO FINANCE BANK ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. D. Onyango Chief Magistrate (CM) dated and delivered on 4/7/2022 in Migori CMCC No. 1 of 2020)*

**JUDGMENT**

1. This is an appeal from the judgement and decree of Hon. D. Onyango (CM) dated and delivered on 4/7/2022. The appellant Leonard Okumu Gumba filed a suit *vide* a plaint dated 3/1/2020 which was further amended on 14/10/2021 seeking the following orders:-
  - a. Vehicle registration No. KAW 715M Toyota Spacio and the Logbook be given back to the plaintiff.
  - ab. Vehicle registration No. KAW 715M Toyota Spacio and the Logbook be given back to the plaintiff or in the alternative value equivalent to the subject matter at the initial value Kshs. 400,000/=.
  - b. Compensation for loss of income.
  - c. Relief on public embarrassment caused to the plaintiff during the forceful repossession of the vehicle at the church in full glare of other congregants.
  - d. Cost of the suit.
  - e. Interest on a, b, c and d.



- f. Any other relief fit to be granted in the circumstances.
2. The appellant pleaded that he was approached by his brother, one John Otieno Gumba (principal borrower), to assist him secure a loan of Kshs. 250,000/= offered to him by the respondent. It was stated that the loan was to be secured by motor vehicle KAW 715M (suit motor vehicle); that the respondent offered the principal borrower a loan of Kshs. 150,000/= instead and it was unsecured as indicated in the letter of offer. It was further pleaded that the loan term was 18 months payable on a monthly basis of Kshs. 10, 640/=. The appellant contended that on 5/8/2019 while in church, Sunny Auctioneers repossessed the suit motor vehicle; that the borrower had arrears in the months of May, June. In July and August 2019 through mobile money (Mpesa) the borrower made payments of Kshs. 24,000/= to the respondent.
  3. The appellant stated that prior to the repossession, there was no communication from the respondent about the alleged loan default; that the respondent should be held liable for defrauding him Kshs. 400,000/= being the value of the suit motor vehicle, loss of income generating business i.e eggs and trees supply. The appellant pleaded that since the loan was unsecured, there was no reason for the respondent to attach his motor vehicle leaving the principal borrower's motor vehicle which he had already registered with the respondent.
  4. The respondent entered appearance and filed a defence dated 8/2/2020 which was later amended on 29/10/2021. The claim was denied and the appellant put him to strict proof.
  5. In his judgement, the trial Magistrate found that the respondent was legally entitled to sell motor vehicle KAW 715M in the event that the appellant defaulted in his obligation in the loan advanced to the principal debtor.
  6. Aggrieved by the trial court's judgement and decree, the appellant filed the memorandum of appeal dated 1/8/2022 which set out the following grounds:-
    - a. That the learned Magistrate erred in failing to consider the evidence on record in a judicious manner;
    - b. That the trial court erred in law by holding that the loan due was Kshs. 132, 606/= instead of Kshs. 21, 280 and twelve months was remaining to complete payment;
    - c. That the trial court erred in law and in fact in finding the appellant liable of a loan he did not sign thereof as a guarantor on the SME loan form;
    - d. That the trial court erred in awarding the respondent based on illegible, deleted and doctored documents of the loan application form produced after leave of court;
    - e. That the trial court erred in finding that the matter in question was not about failing to pay the debt but the initial breach of contract by the respondent, giving Kshs. 150,000/= instead of approved Kshs. 250,000/=;
    - f. That the trial court erred in law by not finding that the purported offer letter was not signed by all parties;
    - g. That the trial court ought to have held that the respondent had no right to attach the appellant's chattel mortgage since Sunny Auctioneer never had a court order.
- Thus, the appellant prayed: -
- i. The appeal be allowed and the judgment of the trial court be set aside.



- ii. Costs of the appeal be borne by the respondent.
  - iii. Such further orders as the court may deem just and expedient.
7. The appeal was canvassed by way of written submissions and both parties filed their respective submissions. It was submitted by the appellant that the bank materially varied its agreement with the principal debtor; that the bank released a sum of Kshs. 150,000/= instead of the agreed amount of Kshs. 250,000/=. It was also contended that the guarantee had been obtained by means of misrepresentation made by the creditor through illegible and doctored documents; that the creditor's witness Mr. Oduor, on 30/9/2020 requested for 21 days to produce page 81 of the letter of offer which was not the binding one; that a look at the document disbursing the Kshs. 150,000/= the guarantee document had no logo of the appellant; that the loan document shows that the loan type was unsecured loan and that discharges any guarantor.
  8. On whether the respondent exhausted all the available remedies before attachment, it was submitted that the principal debtor's motorcycle was enough to realize the outstanding loan amount; that the appellant came to know of the existing loan facility when the respondent attached his car.
  9. The appellant also submitted that the chattel which the respondent relied on, was not jointly registered in both names of the appellant and the respondent and the chattels document bears no stamp for registration and stamp duty. The appellant relied on the case of *Wanjohi Resma Commercial Limited v Thugi River Estate & Another* (2005) eKLR and Section 13 (1) of the *Chattel Transfer Act*. The appellant submitted that the letter produced for Kshs. 150,000/= loan is inadmissible since the respondent's branch manager testified that the letter should bear the signature of authorized officers. To support this position, the appellant relied on the case of *Seko Limited v Selina C. Kanda & 6 Others* (2017) eKLR.
  10. On their part, the respondent submitted. It was submitted that the respondent established that there was a loan contract between the principal debtor, John Otieno Gumba and the appellant was the guarantor; that the contract of guarantee between the appellant and the respondent was produced as DEXH2; that there was no evidence of any illegality, irregularity or fraud on part of the respondent when enforcing its statutory right to sell the motor vehicle registration no. KAW 715M.
  11. The appellant filed a reply to the respondent's submissions. It was submitted that the guarantor form the respondent is referring to which signed was for a loan of Kshs. 250,000/= was altered to show a loan of Kshs. 150,000/= without the consent of the guarantor and therefore the respondent failed to honour their obligation.
  12. This being the first appellate court, this court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motorboat Co. Ltd* (1968) EA 123.
  13. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & Another* (1988) eKLR.
  14. Guided by the above decisions, I have carefully considered the memorandum of appeal, the record of appeal, the proceedings in the trial court and the respective parties' submissions. The gravamen dispute which emerges from the parties herein is whether the repossession of the motor vehicle registration



- number KAW 715M was illegal in light of the loan terms signed between the respondent and John Otieno Gumba, the principal borrower.
15. The letter of offer dated 6/12/2018 shows that the loan advanced to the principal borrower was Kshs. 150,000/=. The respondent in its further amended statement of defence admitted at paragraph 4 and also through its witness Michael Okindo (DW1). The letter of offer also stated that the security being offered was a joint registration and chattels mortgage over the suit motor vehicle. The loan was also guaranteed by the personal guarantees and indemnities of Leonard Okumu Gumba and Lilian Adhiambo Adika to cover Kshs. 150,000/=.
  16. The appellant has vehemently contended that the principal borrower had already advanced his motorcycle as security for the loan. The correct position is that by a letter of offer dated 25/8/2025, the principal borrower took a loan of Kshs. 90,000/= for a period of 9 months. The security was his motorcycle KMDG538E and the personal guarantees and indemnities of Nicholas Ongondo Ochuodho and Awino Mery Yogo. That is not the subject matter in dispute but the executed letter of offer dated 6/12/2018.
  17. The appellant apart from being a personal guarantor of the principal debtor, did offer the suit motor vehicle as security of the loan facility advanced by the respondent to the principal debtor. The security was to be registered jointly by the appellant and the respondent as the chattels mortgage over the loan amount. The appellant argues that the repossession and sale was illegal because the chattels was neither registered nor stamped capable of giving attachment rights to the respondent.
  18. Section 6 (1) of the *Chattels Transfer Act* (CTA) provides:-

“The period within which an instrument may be registered is twenty-one days from the day on which it was executed.

Provided that when the time for registering an instrument expires on a day whereon the Registrar’s Office is closed, the registration shall be valid if made on the next following day on which the office is open.”
  19. Section 13 of the *CTA* provides:-

“Every instrument unless registered in the manner provided under this part, shall upon the expiration of the time for registration or if the time for registration is extended by the High Court upon the expiration of the extended time be deemed fraudulent and void as against:-

    - (a) The official receiver or trustee in bankruptcy of the estate of the person whose chattels or any of them are comprised in the instrument;
    - (b) The assignee or trustee acting under any assignment for the benefit of the creditors of that person;
    - (c) any person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any court authorising the seizure of the chattels of the person by whom or concerning whose chattels the instrument was made, and against every person on whose behalf the process was issued.”
  20. When a creditor intends to use an instrument to secure its interest over an advanced loan, the law requires that they should register their interest within 21 days. The law further states that failure to register their interest, it becomes void against the official receiver or trustee in bankruptcy of the estate



of the person whose chattels or any of them are comprised in the instrument, their assignee or trustee and/or any person executing in the process of a court authorizing the seizure of the chattels .

21. Majanja J in *Mesback Mariera Ogeri v Credit Bank Limited* (2018) eKLR held that Section 13 of the *CTA* was applicable to and intended to protect the lender from third party claims.

22. In *Geoffrey Njenga v Godfrey Karuri and Another* (2000) eKLR, Mbaluto J. considered an argument on the validity of registration of an instrument under Section 13 of the *CTA* and dismissed it in the following terms: -

“The next issue that has to be determined in this matter relates to the validity of the Chattels Transfer Instrument in respect of motor vehicle registration number KAC 596R executed by the plaintiff in favour of the 2<sup>nd</sup> defendant. It is common ground that the instrument was not registered; neither was there a proper affidavit in Form 1 in the First Schedule to the *Chattels Transfer Act*. Mr. Mbigi claims that the effect of non-registration is to render the instrument ineffectual. With due respect, I do not agree with that contention. Section 13 of the *Chattels Transfer Act* provides that an unregistered instrument shall be deemed fraudulent and voidable as against certain persons who are specified in the section. Those persons do not include the 2<sup>nd</sup> defendant. It is therefore plain from the wording of the wording of the section that failure to register an instrument does not in any way affect the rights and obligations under the instrument of the grantor and the grantee as between themselves.”

23. The appellant therefore is not one of the parties contemplated under Section 13 of the *CTA*. Be that as it may, one of the terms in the letter of offer was that the chattels was to be registered and a registration fees of Kshs. 2,500/= was payable upfront. The letter further stated that there was to be a joint registration and chattels mortgage over the suit motor vehicle. There is no evidence which was led before the trial court or any suggestion made by the respondent that they registered the chattels mortgage. In the absence of registration, what then is the effect?

24. Majanja J in the case of *Mesback Mariera Ogeri (supra)* further held that:-

“The appellant is not one of the parties contemplated under section 13 aforesaid as failure to register the chattel mortgage instrument remains a contract inter-parties (see *Walsb v Lonsdale* [1882] 21 Ch D 9, *Clarke v Sondhi* [1963] EA 107 and *Meralli v Parker*, [1956] 29 KLR 26).”

25. As observed hereinabove, the letter of offer was particular that the chattels was to be jointly registered between the appellant and the respondent which was not done. Parties had a contract in which they agreed to perfect the security and they are bound by that contract. Parties who agree to the registration of a chattel mortgage instrument to demonstrate perfection of the charge are bound by the same.

26. In my view, the respondent was at fault in failing to register the chattel document. The registration was relevant as it was the only legal way in which the respondent would have repossessed the suit motor vehicle in the event default by the principal borrower. Whilst the trial magistrate was correct in finding that the appellant being a guarantor offered the suit motor vehicle as security, the trial court erred in not considering that the security pledged was in fact a chattels instrument which was to be registered as a pre-condition for the loan being disbursed to the principal borrower. The registration or non-registration of the chattel went to the root of the issues between the parties. The repossession and subsequent sale of the suit motor vehicle was therefore an illegality.



27. The appellant prayed for return of the suit motor vehicle and/or a sum of Kshs. 400,000/= being the value of the suit motor vehicle. As for the prayer of returning the suit motor vehicle, the same has been overtaken by events. On the refund of the value of the suit motor vehicle, the appellant did not have evidence of the value by way of valuation or the cost of the vehicle. It would not have been possible for the appellant to know the value of the suit motor vehicle through valuation, since it had already been sold.
28. Be that as it may, the court has considered the Notification of Sale of Movable Property dated 12/8/2019 by the auctioneers. The notification of sale approximated the value of the suit motor vehicle to be Kshs. 300,000/=. The court will be persuaded by this value and award the appellant Kshs. 300,000/= as the damages for the illegal sale of the suit motor vehicle.
29. On the prayer for compensation for loss of income, the appellant did not lead proper evidence to guide the court on how the suit motor vehicle assisted him in transporting his tools of trade. On the eggs business, what the appellant produced as receipts for the eggs business, seems like the daily business permit levied by the Municipal Council for small scall business. The appellant also produced a Local Purchase Order (LPO) which is engrossed with the stamp of the Migori County Government dated 8/12/2015. The LPO was for the supply and delivery of seedlings. The court was not told the relationship between the LPO and any of the businesses which the appellant purports to have been engaged in. In any event, the repossession of the suit motor vehicle, took place in the year 2019. The appellant did not demonstrate to the trial court if at the time of repossession, he was still engaged in the said business.
30. The appellant asked for relief for embarrassment for the forceful proclamation which took place in church. The respondent did not rebut this position pleaded by the appellant. Therefore, this court will take it that the proclamation took place in church which caused the appellant to suffer embarrassment. However, the appellant did not call any evidence from the church member to corroborate his testimony on proclaimed in the presence of the other church members and due to his standing in the society, his reputation was lowered in the eyes of right thinking members of the society. There is also no evidence of the number of people who witnessed the repossession.
31. Having found that the repossession was illegal, the appellant is entitled to compensation for the embarrassment suffered. In exercising its discretion, this court awards a sum of Kshs. 150,000/= to the appellant for public embarrassment in light of the unlawful and illegal proclamation of the suit motor vehicle.
32. The appeal succeeds and the following orders do issue:-
- g. The Appellant is hereby awarded a sum of Kshs. 300,000/= as damages for the illegal and unlawful repossession of his motor vehicle KAW 715M.
  - h. The Appellant is hereby awarded a sum of Kshs. 150,000/= for the unlawful and illegal public embarrassment during the repossession of the suit motor vehicle;
  - i. The Appellant is hereby awarded half the costs of the lower court suit and half the costs of this appeal.
  - j. Interest on the damages and costs to run from the date of this judgement.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 18<sup>TH</sup> DAY OF JULY, 2023.**

**R. WENDOH**

**JUDGE**



Judgment delivered in the presence of;

In person for the Appellant.

Mr. Otieno for the Respondent.

Nyauke Court Assistant.

