Platinum Credit Limited v Sigira (Civil Appeal E011 of 2013)
[2023] KEHC 20107 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20107 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E011 OF 2013

RN NYAKUNDI, J

JULY 17, 2023

BETWEEN

PLATINUM CREDIT LIMITED ..... APPELLANT

AND

MARGARET JEROTICH SIGIRA ..... RESPONDENT

(Being an Appeal from the judgment of Honourable Richard O. Odenyo (SPM), delivered at Eldoret on 22nd February, 2022 in Civil Suit No. 1244 of 2017)

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Abok Odhiambo & Company Advocates

Kiboi & Tawai Company Advocates

1. The appeal herein emanates from the decision of Hon. Richard O. Odenyo (SPM), delivered on February 22, 2022, in Eldoret Chief Magistrate's Court Civil Case No. 1244 of 2017. By an amended Plaint dated 2410, 2019, the Respondent sought for the following orders;

    a. A mandatory injunction against the Appellant andor his agents to release and further be restrained from further taking motor vehicle registration number KCM 817M Toyota HiAce as long as she continues paying the outstanding loan amount if any.

    b. An order compelling the Appellant to handover the contract documents to her so that she could make an informed decision on how to settle the outstanding loan if any together with the original logbook and number plate for the suit motor vehicle.

    bb. A declaration that there is no interest and or penalties applicable with effect from the time when the suit was instituted due to the illegal seizure of the suit motor vehicle.

c. An order that accounts be take to establish the exact loan amount paid and the balance if any.

A declaration that any purported sale to a 3rd Party of the suit motor vehicle was null and void ab inition.

cc. An order of compensation for loss of business as from 251 2017 to the date of judgment at the rate of Kshs.10,000 per day.

c. Costs and interests of the suit.

d. Any other relief that the Court may deem fit.

2. By an amended Defence dated 27112019, the Appellant denied the averments by the Respondent and in turn stated that the Respondent herein duly executed the loan agreement form thus binding herself to the terms and conditions thereof; whereupon the suit motor vehicle was offered as security for the loan amount.

3. Having heard the parties, the trial Magistrate entered judgment in favour of the Respondent in terms of prayers; a, b, bb, c, cc and d of the plaint.

4. Aggrieved with that judgment, the appellant a lodged a memorandum of appeal dated January 18, 2023 the following grounds, namely:

1. The Learned Senior Principal Magistrate erred in law and fact in failing to properly frame, consider and determine all the issues that were raised before him.

2. The Learned Senior Principal Magistrate erred in law and fact in misapprehending the claim and the evidence before him.

3. The Learned Senior Principal Magistrate erred in law and fact in making findings and orders that were incapable of execution and compliance.

4. The Learned Senior Principal Magistrate erred in law and fact in issuing orders that were overtaken by events.

5. The Learned Senior Principal Magistrate erred in law and fact in giving a judgment against the weight of the evidence before him.

6. The Learned Senior Principal Magistrate erred in law and fact in purporting to re-write the contract between the Appellant and the Respondent.

7. The Learned Senior Principal Magistrate erred in law and fact in raising and determining issues that were not before him.

5. The appeal was canvassed vide written submission. On 23rd May, 2023 Counsel for the Appellant filed submissions dated 23rd May, 2023 whereas 17th May, 2023 Counsel for the Respondent also filed submissions 15th May, 2023.

The Appellant's Submissions

6. On whether the Respondent proved that she was entitled to the reliefs sought, Counsel for the Appellant Mr. Abok submitted that the primary contractual documents between the parties was the import financing loan application which was duly filled and executed by the parties following the Respondent's request for a loan. Counsel further submitted that in terms of (Clause 7A), the loan applied for attracted interest and sundry expenses bringing the total sum payable to Kshs.1,157,454

which sum was payable within (30) days as per (Clause 1.1). Counsel maintained that the default clause gave the Appellant liberty to charge a penalty at the rate of 5% for every 15 days thereafter in (Clause 6). Counsel argued that from the foregoing terms of contract between the parties, the Respondent was not entitled to any of the reliefs granted and that the suit was fit for dismissal.

7. Counsel further submitted that the Respondent herein sought for a mandatory injunction but conceded during hearing that the suit motor vehicle was in her custody. Counsel maintained that the trial Magistrate therefore erred in ordering that the Appellant releases the suit motor vehicle to Respondent when in fact the said vehicle was already in her possession. With regard to restraining the Appellant from taking the suit motor vehicle so long as she continued paying the outstanding loan amount, Counsel argued that by doing this the Court was simply imposing fresh terms of engagement between the parties. Counsel further submitted that agreement provided for repayment within (30) days of clearance of duty which was in June 2017. Counsel contended that it was therefore unconscionable for the Court in December, 2022 to restrain the Appellant from realising its security.

8. Counsel further submitted that the trial Court erred in granting prayer (b) of the prayers sought wherein the Respondent sought an order compelling the Appellant to handover the contract documents plus the original logbook and number plate. Counsel maintained that the Appellant had already filed and served it exhibits in Court which documents the Court found to have to have been duly signed by the Respondent herein. Counsel contended it was therefore superfluous for the trial Magistrate to again issue an order compelling the Appellant to hand over the same documents to the Respondent. Counsel maintained that according to the import of the finance loan agreement at (Clause 4:1:2) the loan herein could be converted in a log book finance loan which was done on 282017 when the respondent duly signed the said form. Counsel argued that by (Clause 1) of that form the vehicle was security for the loan and by (Clause 3.1) it was to be jointly registered. Counsel further submitted that the logbook herein was deposited with the Appellant as part of security and thus the Court could not order for the release for the said logbook without proof that the loan amount had been repaid in full. Counsel maintained that do so was ideally re-writing the contract for the parties. Counsel cited the case of *National Bank of Kenya Limited V Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR to buttress his arguments on the issue.

9. Counsel further submitted that in granting prayer (bb) which sought a declaration that there was no interest or penalties with effect from the time of filing the suit due to the illegal seizure of the suit motor vehicle the Court was contradicting its own findings. Counsel argued that the Court had made a finding that the agreement between the parties provided for interest on the loan advanced. Counsel maintained the loan advanced was payable within (30) days and by the time the suit was being filed, (30) days had already lapsed meaning that the Respondent was in default. Counsel further argued that no evidence was ever adduced by the Respondent that by the time she was filing the suit, she had made any payments at all. Counsel added that there was absolutely no basis to issue the said declaration. Counsel maintained that there is no law or convention that suspends accrual of interest and penalties once a debtor in default files a suit.

10. Counsel faulted the trial Magistrate for granting prayer (c) which sought for accounts be taken. Counsel argued that it in not the duty of judge to be an accountant further that taking and settlement of accounts is not done by a judge. Counsel further contended that the Respondent herein failed to take out the requisite directions for taking accounts as provided for under Order 20 Rule 1 and 3 of the Civil Procedure Rules.

11. Counsel further submitted that in granting prayer (cc) to the effect that any purported sale to a 3rd party of the suit motor vehicle was null and void ab initio was a superfluous order as; no evidence was led by the Respondent to demonstrate how the sale was null and void, the contractual documents allowed the

Appellant to sell the vehicle being a security held and finally the evidence on record clearly showed that the alleged sale had already been reversed and the suit motor vehicle handed over to the Respondent. Counsel maintained that there was therefore no basis for the said declaration as the said prayer had already been overtaken by events.

12. In the end, Counsel submitted that in allowing the above prayers, the trial Court had laboured under the impression that that the Appellant herein had acted in bad faith by retaining the suit motor vehicle's number plate but failed to explain how this could justify the grant of the orders sought. Counsel maintained that the Appellant's primary obligation was to advance money to the Respondent to clear the vehicle and pay duty which was done and the Respondent had no issue with it. According to Counsel it was then upon the Respondent to repay the loan of Kshs.1,157,454= within (30) days from 30th June, 2017 which she failed to do. Counsel added that the loan was then converted into a logbook financing loan under which the Respondent was to pay the loan in (12) months which she again failed to make any payments till February, 2019 when she paid Kshs.800,000=. Counsel argued that nowhere in the contact documents was it stipulated that the loan would be repaid by proceed from the use of the vehicle.

Analysis & Determination

13. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (See *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

14. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

> This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

Issues for Determination

15. In my view the only issue for determination is; whether the trial Magistrate erred in grating the orders sought by the Respondent

16. At the trial Court the Respondent the Respondent testified as (PW1) adopting her witness statement. She told the Court that she bought the suit motor vehicle from Japan at USD 13,800=. She further told the Court that she paid Kshs.18,584.00= on 1582017 to the Appellant vide Mpesa and another Kshs.3,915.00= also vide Mpesa. She also told the Court that on 1972017, she paid Kshs.100,000= to the Appellant through its bank account held at Co-operative bank and also a further Kshs.3,909.00= through the bank. She told the Court that on 2772017 she made Kshs.3,915= cash payment to the Appellant and further that on 1422019, she made a cheque payment of Kshs.800,000= to the Defendant.

17. The Respondent further testified that on 462017 she paid Kshs.42,000= to the welders to fix seats on the suit motor vehicle and also paid Kshs.150,000= to Blue line transport Sacco so that she may become a member of the said Sacco in order to have her vehicle accepted. She stated that on 262017

she paid Kshs.14,000= for safety belts and that on 3012019 she paid Kshs.20,000= to spray pain the vehicle and a further Kshs.8,000= to fix a car tracker. She also told the Court that on 252017 she paid Kshs.20,000= to Trans Trading Limited in Japan.

18. She told the Court that she is in Court because even after paying the Appellant, she has not been given her vehicle. She stated that when she bought the vehicle it was said to have a capacity of (2) passengers and that she intended it to carry (11) passengers. She further stated that she was unable to change the vehicle because the Appellant had the vehicle's log book and other documents prompting her to write a demand letter to the Appellant but the Appellant declined to give her the said documents.

19. She told the Court that she expected to get a daily income of Kshs.10,000= from the Blue Sacco and prayed that judgment be entered against the Appealing as prayed.

20. She denied being in breach of the agreement between herself and the Appellant and further stated that the signatures on some of the agreements are not hers but rather forged.

21. On cross-examination she told the Court that she bought the suit motor vehicle in February, 2017 and was funded by her husband on Stephen Sang. She reiterated that she did not use the loan that she had obtained from the Appellant to buy the suit motor vehicle but had approached the Appellant later for a loan. She told the Court that when she approached the Appellant, she was seeking money to do clearance at port and that the money she sought was Kshs.930,332.00=. She told the Court that she did not open account with the Appellant and that it was the Appellant who had cleared the suit motor vehicle from the port. She further told the Court that loan application shows that Kshs.1,107,454.00= was advanced to her but did not know how much was legal fees nor any other breakdown. She told the Court that she never signed the alleged loan form and never got a statement form the Appellant. She stated that there was a time she had paid Kshs.100,000= to the Appellant through its Co-operative bank account. She told the Court that the Appellant had cleared the vehicle from the port in Mombasa on her behalf but did not know how much was spent. When referred to the logbook loan application form, she admitted the photo therein was hers and that she had given the Appellant her photograph. She denied writing the letter dated 3062017 and denied the signature therein. She admitted to knowing that the Appellant is a loan giving institution and that it charges interest. She told the Court that she had paid the Appellant Kshs.2,330,332= in an effort to clear the loan although she could not remember the dates the said payments were made. She also told the Court that there was no deadline for her repay the Appellant the loan amount.

22. She stated that by the time of filing of the case she had not be told by the Defendant how much was outstanding. She told the Court that she had instituted the proceedings therein because she wanted the suit motor vehicle to be released to her. She told the Court that she is now in custody of the suit motor vehicle but could not remember when she gained possession of it. She told the Court that she has been in possession of the suit motor vehicle from December, 2017 and that she had filed the present case so as to force the Appellant to release the logbook and number plate. She told the Court that she does not know whether she had repaid all the outstanding loan amount.

23. Richard Simbala (DW1), an employee of the appellant, testified, adopting his witness statement dated 1182019. He told Court that on 3062017, the Respondent approached the Appellant with view of obtaining a loan for purposes of clearing a vehicle she has purchased. He stated that she cleared and had it registered ad KCM 718 M. He told the Court that the Appellant was only paying the duty and the clearance charges. He stated that the entire loan amount to repaid was Kshs.1,157,454.00= which included stamp duty charges of Kshs.957,708=, port charges of Kshs.25,000=agency fees of Kshs.10,000=, legal fees of Kshs.5,000=, processing fees of Kshs.4,000= and interest audit fees of Kshs.105,146.00=.

24. He told the Court that the said agreement was reduced into writing which the Respondent signed and the loan was repayable within one month after clearance of the suit motor vehicle. He stated that the Appellant facilitated the payment of loan in time but the Respondent did not honour her obligation to repay the loan amount within one month. He told Court that option that that was available to the Defendant was repossess the suit motor vehicle in an effort to realize it security. The second option that was available was for the Respondent to correct the loan into a long-term loan. He stated that the Respondent took the second option and was advised to pay 10% of the loan and thus paid Kshs.103.999.00=. The Appellant then closed the said account and corrected into a long-term loan that is the log book financing loan which she duly executed that agreement which was done on 282017. The Appellant thus opened a new account for the Respondent.

25. He told the Court that the total amount outstanding was now Kshs.1,059,693.00= which was to be repaid within (12) months in equal instalments of Kshs.171,573= for the net (9) months and that the last three instalments she was to pay Kshs.152,989.00=. He testified that the new loan amount attracted a legal fee of Kshs.5,000= involving tracking fees of Kshs.1,1000= transfer charges of Kshs.5,555.00= and that the Respondent's referees were the same people as in the first loan. He maintained that the Respondent never disputed the new loan terms and signed the new agreement and actually started paying.

26. He told Court that the Respondent yet again delayed in repaying the 2nd loan prompting the Appellant to instruct the auctioneers to repossess the suit motor vehicle with view of selling and realization of the security. He told the Court that the Respondent got orders restraining the Appellant from selling the suit motor vehicle but the Appellant was not in receipt of the said order and further instructed the auctioneers to see to it that the suit motor vehicle was sold. That later on the buyer of the suit vehicle at a public auction called the Appellant and informed it that the Respondent had gotten another order from Court and thus the police impounded the suit motor vehicle but instead of returning it, the police released it to her.

27. He stated that on 1422019, the Appellant received a cheque of Kshs.800,000= form the Respondent's Advocate and she never made any other payment to date. He further told the Court that as the buyer of the suit motor vehicle could not wait for the determination of the case, the Appellant had to refund him his money. He further testified that as a result of the same the Appellant re-opened the Respondent's loan account and as at 2282019, the Respondent owed the Appellant Kshs.1,928,866.21= which amounts continues to accrue interest. He told the Court that upon clearing the suit motor vehicle the same was handed over to the Respondent and she started using and as at now she is still using it.

28. He told Court that by the time the auctioneer repossessed the suit motor vehicle there was no order restricting the said repossession and that the order they received had been overtaken by events as the auctioneer had already sold the suit motor vehicle. He admitted that the suit motor vehicle's log book is still in the Appellant's possession and it shows that the suit motor vehicle had the capacity of two passengers. He told the Court the Respondent had not disclosed to the Appellant what she wanted to do with the vehicle. He further stated that the Respondent did not request the Appellant to modify the carrying capacity and that the Appellant was not aware that she wanted to run a matatu business.

29. He told Court that a log book is not a requirement for purposes of changing capacity. He stated that the suit motor vehicle is still registered in the name of Respondent.

30. As Lord Diplock explained in *Photo Production Ltd vs Securicor Transport Ltd* (1980) AC 827 at 848 " parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and where they do, the statements in determinative, but in practice a commercial contract never states all the primary obligations of

the parties in full, many are left to be incorporated by application of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words"

31. It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements under the contract. It is by that means equally that the law of this country it provides the legal regime as a means to afford a remedy for breach of any terms agreed by the parties made with sufficient consideration to effectuate the contract. The essence of a contract is either an oral or written agreement stipulating the terms of the parties sufficient to regulate the intention expressed from an objective contract. The learned author *Cheshire and Fifoot on the Law of Contract* 4th ed. At pp. 21, 22 put it succinctly as follows: "A contracting party..... is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done."

32. I have drawn attention to this appeal and the entire contract in contestation there is no evidence which shows lack of good faith and honesty by the appellant in the transactions which demanded observance of promises and agreements between the individuals with a commercial interest in mind. In furtherance of the circumstances of entering into a contract the respondent has not shown that to assent the terms of the contract with the appellant they had been obtained by unfair, dishonest, or fraudulent means entitling him not to meet her side of the bargain.

33. What do the courts steer from? It is not the role of the court to interfere in the drafting of a contract agreed between two commercial parties even when one party has a superior bargaining power. The basic principle of Kenyan law of contract is that parties to a contract are free to determine for themselves what primary obligations they will agree to govern the relationship and which terms must be kept out of the moral turpitude of the contract. In fact this means that courts of law are perfectly within the realm of their jurisdiction to let the parties enter into ill advised contracts and bear the burden of the consequences arising out of the impugned contract.

34. Whatever the parties in this appeal may have said, written or done with whatever intent they may have contracted whether consciously, expressed or inherent latent and the legal consequences that drew from that bargain is ultimately not able to be interfered by this court. This is by interpreting their contact and language as it may have been manifested in the binder instrument. Sometimes I get the impression that the respondent took the approach in the lower court of subjecting the contract as being unconscionable, common to penalty cases regarded as conferring excessive interest or charges to stifle the agreement. In effect therefore calling for the court of equity to come to her aid in the broader sense of defining the contractual obligations of the parties. That is clearly shown from the declarations made by the trial court in the impugned judgement. Indeed, the subject matter of the contract in issue is motor vehicle KCN 817M. In the wisdom of the learned trial magistrate the following declarations were made in favour of the respondent:

    a. Mandatory orders of injunction against the Defendant andor their agents andor assignees andor workers andor employees to release and further restrained form further taking the subject motor vehicle KCM 718M Toyota Hiace as long as the plaintiff continues paying established loan amount if any exists.

    b. An order to compel the Defendant to hand over the contract documents to the plaintiff to enable the plaintiff make informed decision on how to settle the outstanding loan amount if any and the original log book and number plate of motor vehicle KCM 718 Toyota Hiace

c. A declaration that there is no interest andor penalties applicable with effect from the time of filing suit due to illegal seizure of the said motor vehicle KCM 718 M Toyot Hiace

d. An order that the accounts be taken to establish the exact loan paid and the balance if any

e. A Declaration tht any purported sale to 3rd party and the subject motor vehicle KCM 718 Toyota Hiace was null and void ad abnitio

35. At this juncture it worth mentioning that the Appellant herein is the business of lending money at an interest. It is also worth noting that if Court's were used to entertain defaulters for credit facilities as the Appellant would close shop without a remedy. The Respondent herein wilfully approached the Appellant with the view of being assisted to clear her motor vehicle from the port. The Respondent thus obtained a loan facility of Kshs.1,157,454= which amount was to repaid with (30) days from the date of clearing the suit motor vehicle. A loan agreement was duly executed by the parties on 3062017 and the Appellant went ahead and cleared the Respondent's suit motor vehicle from the port.

36. A perusal of the loan agreement on record clearly reveals the terms and conditions to be observed by the parties therein. Having obtained the said loan facility, the Respondent defaulted in repaying the said amount within the stipulated (30) days prompting the Appellant to either repossess the suit motor vehicle or restructured the terms of the agreement. Consequently, the Appellant restructured terms of the initial loan agreement to a long- term loan agreement and appropriate legal instruments executed including the log book of the motor vehicle to that effect. In the new arrangement the Respondent was required to pay Kshs.152,989= for the outstanding loan amount being Kshs.1,059,693=. The Respondent was thus advised to pay 10% of the initial loan amount as a commitment in good faith to foreclose the initial loan account.

37. The Respondent yet again fell into arrears prompting the Appellant to repossess the suit motor vehicle so as to realize its security. Before the Appellant to exercise it to right to sale the Respondent herein obtained interim orders stopping the said sale.

38. There is no doubt that the Appellant herein has been so lenient with the Respondent giving her several opportunities to make good her debt which she chose not to. I must point out when the Respondent approached the Appellant, she wilfully offered the suit motor vehicle as security for the loan facility and cannot be heard to complain that the Appellant has refused to release the log book to the suit motor vehicle. The terms of the loan agreement was to attract additional charges including legal fees and tracking fees which the Respondent was duly aware of having signed the said agreement. Thus the Respondent did not have the liberty to make the re-payments of the loan at any time when she elects without complying with the terms of the restructured loan agreement. This means repayment of the principal and accrued interest. In my view the Respondent herein cannot be said to have acted in good faith for paying Kshs. 800,000= two years after her initial payment of Kshs.100,000= and the additional Kshs.3,909=.

39. This appeal is essentially what one can call and hire purchase contract under which the hirer determining the contract had to pay a sum of money there by guaranteeing the appellant as the owner with a beneficial interest to hold a lien in the event of the contract not being fully implemented the motor vehicle was to be sold to remedy the default. As I mentioned earlier in this discourse even equitable principles will have a problem at any rate to come to the aid of the respondent. I do not therefore see in which circumstances equitable jurisdiction could have been exercised by the learned trial magistrate to grant the substantive orders rendering the entire contract inoperative. There are no equitable principles to be adverted to in repudiating the contract by either party. It is true unless in clear terms defined in the whole contract the court has no power to re-write or mend a man's bargain

entered freely, voluntarily with both intention and conduct implicit in the agreement. I hold a strong view that the trial court had no inherent power to interfere with a freely negotiated contract in respect of which their were allegation of fraud, mistake, misrepresentation or unconscionable conduct on the part of the appellant. What the learned trial magistrate deed as pointed out in his judgement was to adjust the terms of the contract which altered entire bargain and the relationship prompted such an agreement. Some of the final orders in the impugned judgement were muddled up and not analogously capable of being executed as the trial court had become functus officio. There was no room for an interdict to monitor compliance with orders in clauses (c)& (d) which declared as follows:

(c) That a declaration that there is no interest andor penalties applicable with effect from the time of filing suit due to illegal seizure of the said motor vehicle KCM 718 M Toyota Hiace

(d) That an order that the accounts be taken to establish the exact loan paid and the balance if any

40. In other words, the interconnected issues and the extent which the terms of the contract could be departed from by the court so as to render them void or causing excessing hardship was a matter to be dealt with at the trial on the merits by the session learned magistrate. The approach of the trial court to the penalty and restraint of sale of the subject motor vehicle stems from an idea that the respondent was not withholding any principal amount or interest due and owing to the appellant. One might indeed regard impugned judgements as having written off the loan together with interest or any other tariffs payable to the appellant. Though apparently different in contract agreements the express and implied terms expressed in the contract involve certain obligations, rights, duties, or exceptions and it is not for the court to import a different interpretation other than that specifically mentioned and intended by the parties. Those terms sometime share a common feature and truly they are to be subjected to judicial interpretation when such a need arises to give effect to the terms which bind them. It is for the courts to look outside and beyond the particular transaction between the individual parties before it giving due regard to more general considerations of commercial contracts and public policy. Looked at in this way from the appeal perspective it would seem the contract in question may have been frustrated by the impugned judgement. Speaking for myself without going into the neat gritty of the issues which may have informed the trial court below the issues of an original loan amount, and the further restructured loan agreement which constituted the entire claim remained to be the predominant cause of action which could have verified by the trial court as required. The itemised declarations as distinctively defined in the decree *prima facie* from the body of the judgement on matters of transactions and accounts recorded therein on the part of the respondent remained sketchy. The appellant witnesses in their answer to the claim correctly put the contested issues in perspective. Similar in *RE Molton Finance Ltd* (1967) 3 All ER 843, (1968) Ch 325 Lord Denning MR added that: " When an equitable mortgage or charge is created by the deposit of title deed, there is an implied contract that the mortgage or charge may retain the deeds until he is paid. This implied contract is part and parcel of the equitable mortgage or charge. It is not a separate legal or common law lien. It has no independent existence apart from the equitable mortgage or charge."

41. To sum up the cluster of ground of appeals in a nutshell the respondent appears to be a drowning business lady to a financial ruin arising out of the loan agreements entered with the appellant. The forceful tide if not stopped may sweep a way to bankruptcy due to the outstanding amount claimed by the appellant.

42. In the end, having considered the appeal, submissions and the law, the appeal herein succeeds against Respondent with costs to the appellant

It is so ordered.

DELIVERED, SINGED, DATED AT ELDORET THIS 17TH DAY OF JULY 2023

.....

R. NYAKUNDI

JUDGE