



**Mwananchi Credit Limited v Opiyo (Civil Appeal E184 of 2021)  
[2023] KEHC 27546 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 27546 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E184 OF 2021  
F WANGARI, J  
AUGUST 1, 2023**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... APPELLANT**

**AND**

**BERNARD OMONDI NJAWE OPIYO ..... RESPONDENT**

**JUDGMENT**

1. The Appellant filed this appeal against the decision by Hon. E.K. Makori, Chief Magistrate as then he was, in Mombasa CMCC 769 of 2020. The appellant was the defendant in the said matter. The Appeal had 6 grounds of appeal.
  - i. That the learned Magistrate erred in law and fact in his judgment by failing to consider the totality of the evidence adduced by the Appellant.
  - ii. That the learned magistrate erred in law and fact in his judgment by making a finding that the plaintiff totally shouldered the burden of repaying his loan.
  - iii. That the learned magistrate erred in law and in fact in his judgment by holding that the Respondent had exercised his right of redemption before the sale of the motor vehicle.
  - iv. That the learned magistrate erred in law and fact in his judgment by making a finding that the entire sale was illegal and defrauding to the plaintiff.
  - v. That the learned magistrate erred in law and fact in his judgment by making a finding that the plaintiff is entitled to compensation and to damages equivalent to the value of his motor vehicle as at 15<sup>th</sup> August, 2018.
  - vi. That the learned magistrate erred in law and fact in his judgment by questioning the Appellant on the auction sale of motor vehicle registration number KBN 659N to the appellant when the sale was conducted by a different entity.



2. I have summarized the above into 2 grounds.
  - i. The Court erred in finding that sale was illegal.
  - ii. The court erred in awarding compensation equivalent to the value of the vehicles as at 15/8/2018.

### **Pleadings**

3. The Respondent vide an amended plaint dated 30/7/2020 averred that he took a loan of Ksh. 900,000. Including interest and bank charges, the total amount was Ksh. 1,336,188 with monthly installments of Ksh. 111,349. The Respondent is stated to have paid 9 instalments amounting to Ksh. 1,022,241. He received a notice to pay Kshs. 484,385, as at 1/8/2019. Despite there being a dispute on the balance, his motor vehicle was reposed.
4. The parties negotiated and he paid 3 last installments in a sum of Kshs. 400,000 to the Appellants Family Bank Account. Total received by the Respondent was Ksh. 1,402,141, where there was an overpayment of Kshs. 65,953 above loan and other charges. His view that upon payment of Kshs. 400,000, he was entitled to receive his vehicle. However, it transpired that Startruck Auctioneers sold the same with no knowledge of the REspondent.
5. The Respondent therefore prayed for the following orders: -
  - i. A declaration that the loan advanced to the plaintiff is full repaid and the lien/security in favour of the defendant over motor vehicle registration Number KBN 659N Volkswagen Touareg V6 Station wagon discharged.
  - ii. The defendant be compelled to unconditionally release to the plaintiff motor vehicle registration number KBN 659N Volkswagen Toureg V6 station wagon plus assessed value equal to ascertained depreciation to date find the alternative the full purchase price of a similar vehicle from the dealers at the current market value.
  - iii. Damage for breach of contract
  - iv. Cost of this suit.
  - v. Interest to the date of final settlement.
  - vi. Any other remedy that the Honourable court shall deem fit to grant to meet the ends of justice in this matter.
6. The Appellant in the amended statement of defence denied that the Ksh. 400,000 was the final instalment by the REspondent nor did he settle the outstanding loan amount.
7. They admit to have instructed Startruck Auctioneers to sell the vehicle but denied that it was done fraudulently. They sated that the vehicle was properly reposed and later disposed of fetching a sum of Kshs. 1,300,000 leaving a balance of Kshs. 240,958.92 which is still due and owing to the Appellant.

### **Analysis**

8. The Appellant was faced with a case of figures and numbers as per paragraph 3, 4, 5 and 6 of the amended plaint. This case remained, unanswered. The Appellant does not address the specific claim of 12 instalments of Kshs. 111,349 and does not address the demand for Ksh. 484,385. The circumstances in which Ksh. 400,000 was paid are not addressed. The specific demand by Upscale Auctioneers and



their whereabouts is not equally addressed. The said auctioneers issued notices. These notices were complied with. The emergence of Startruck Auctioneers is not explained.

9. The appellant wishes that the court blames the Startruck Auctioneers. The court could not do so for 4 reasons.

- i. There is no evidence that the said Auctioneers were ever instructed.
- ii. There is already instructions to Upscale Auctioneers.
- iii. The Appellant is the disclosed principal in this case.
- iv. In any case, if the Appellant wished to be indemnified, Order 1 Rule 15 of the Civil Procedure Rules on 'Notice to third and subsequent parties' is open to them.

10. The defence as drawn does not meet the Standards of the Court of Appeal set out in the case of Raghbir Singh Chatte vs National Bank of Kenya 1997 eKLR, which was held as follows;

“The position in law as I have always understood it to be, is that a mere denial or general traverse in a defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to constitute an admission of the issues raised in the plaint.”

11. The Appellant failed in their pleadings to displace the Respondents case.

12. I have considered the evidence on record, the submissions by both the Appellant and the Respondent. The Respondent stated that his vehicle, was illegally sold when he had already cleared his loan. He was not notified of any penalties. Though he gave cheques as security for Ksh. 1,300,000, he made his payments via Mpesa amounting to Ksh. 1,400,000. He had delayed payment for only for one month but still paid. His last installment was to be on 5/10/2019 but he cleared on 24/10/2019.

13. The defendant director Dennis Wangeika testified that he was a director of the Appellant. He adopted his statement. He admitted that the total sum payable was Kshs. 1,336,188. He stated that the Respondent issued cheques that bounced. This is a matter coming up for the first time in the hearing. It is not in their defence. He also changed and stated that the balance as at 23/7/2019 was Ksh. 896,266. This figure is equally not pleaded it is not in his statement. It turned up in court.

14. It contradicts his written statement and instruction to Upscale Auctioneers. He did not evaluate any valuation they did for the vehicle but admitted that for insurance the vehicle was insured at 3,000,000. I don't believe the evidence of the Appellants witness. It is clear that as the court below stated, that the Appellant was not truthful. The vehicle was sold for a debt without informing the Appellant that the debt it is due and owing.

15. I concur with the court below that the Appellant action in selling the vehicle was a fraudulent. There is a no evidence of the payment of money after 24/10/2019. There is no evidence of any bids received by dint of Rule 18 (3) of the Auctioneers Rules and Regulations which provides as follows;

Proceeds of sale

- (1) Payment by a purchaser at a sale of seized goods shall be in form of cash, banker's cheque or electronic funds transfer.
- (2) Payment by a purchaser in all other cases shall be in such forms as the auctioneer shall think fit.



- (3) On receipt of the proceeds of sale the auctioneer shall issue a receipt for it and in the case of immovable property sign a memorandum of sale.
- (4) The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 22, rule 70 of Civil Procedure Rules (Cap. 21, Sub. Leg.).
16. To make matters worse, the auction took place on 24/10/2019. The Respondent paid the final instalment on that day, as per the instructions by the Appellant in order to redeem his vehicle. The auction is said to have been carried out on a later date and contrary to the provisions of Section 21 of the *Auctioneers Act* 2006, that provides on how an auction sale should be conducted.
17. The auctions were said to be instructed orally. Letters of instructions must be issued. The totality of the evidence is that the Appellants robbed the Respondent of the said motor vehicle. It is highly doubtful that there was a sale. I therefore agree with the court below that the purported sale was null and void and was actually fraudulent.
18. On the amounts due, they said was for 320,038. The appellant paid the same. The claim for overpayment by Kshs. 65,953 was not denied. However, the Respondent did not claim for the same in the lower court. Parties are bound by their pleadings. The same can therefore not be refunded.
19. Regarding the value of the vehicle, I note that the same was insured at Ksh. 3,000,000. Further it was used as security for Ksh. 1,336,138. The insurance cannot over insure. The tendency in that sector is to under insure. The valuation report gives the vehicle the value of Kshs. 4,500,000, as at 15/8/2018.
20. There is nothing mentioned about the loss. It is thus a proper valuation. The court was correct in awarding Kshs. 4,500,000 as the loss of value or damages received. The court herein could not differ with the court below simply because, I could have arrived at a different conclusion on damages.
21. In *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
22. Therefore, I do not find merit in the Appeal. The Defence witness was lying on oath and had the audacity to tell the court below that they orally instructed Star truck.

### **Determination**

23. The upshot of the foregoing is that I find no merit in this appeal and make the following orders: -
1. The Appeal has got no merits and is hereby dismissed.
  2. The judgment of the lower court upheld.
  3. Costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF AUGUST, 2023**

**F. WANGARI**



**JUDGE**

In the presence of:

Bulowa Advocate h/b for Khaemba Advocate for Appellant

N/A for Respondent

Court Assistant

