



**Kanyuira v Indoafrika Finance Ltd & another (Civil Appeal E155 of 2022)
[2024] KEHC 13774 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E155 OF 2022
HI ONG'UDI, J
NOVEMBER 7, 2024**

BETWEEN

JANE MUTHONI KANYUIRA APPELLANT

AND

INDOAFRICA FINANCE LTD 1ST RESPONDENT

LEGACY AUCTIONEERS 2ND RESPONDENT

*(Being an appeal from the Ruling/Order of Honourable B. Ochieng (CM)
in Nakuru MCCC No. E305 of 2022, delivered on 13th October 2022)*

JUDGMENT

1. This appeal arises from the ruling and order dated 13th October, 2022 delivered in Nakuru Chief Magistrate's court MCCC No. E305 of 2022. In the said suit, the appellant (who was the plaintiff) vide the plaint dated 28th March, 2022 prayed for several orders against the respondents (who were the defendants). Concurrently, she filed an application dated 28th March 2022 and the trial court in its ruling dated 13th October 2022 found the application to be devoid of merit and dismissed it.
2. Being aggrieved with that Ruling the appellant filed the memorandum appeal dated 10th November, 2022 on the following grounds:
 - i. That the learned trial magistrate erred in law and fact completely ignoring the application dated 28th March, 2022 and submissions dated 17th of May 2022 raised in its entirety and therefore making a ruling/order which is not based upon the same.
 - ii. That the learned trial magistrate erred in law and in fact and misdirected himself by dismissing the application dated 28th March 2022 exposing the appellant to loss of motor vehicle registration number KCC 050M which was repossessed illegally.



- iii. That the learned trial magistrate erred in law and in fact in failing to hold to account the respondent for confiscating the appellant's personal effects and documents that were in the subject motor vehicle and not ordering their release.
 - iv. That the learned trial magistrate erred in law and in fact in failing to or bar NTSA from transferring and/or effecting any changes in ownership of the motor vehicle registration number KCC 050M make Toyota Harrier which is in the name of the appellant even in the interim.
 - v. That the learned trial magistrate erred in law and in fact by failing to acknowledge that payment was made to the respondent in a bid to offset the loan balance in failing to do so he dismissed the appellant's application with bad facts and bad law.
 - vi. That the learned trial magistrate erred in fact and law by placing full reliance on the respondents replying affidavit and converting the same into a ruling of the court without examining the veracity of the annexed document which were not served upon the appellant.
3. The Appeal was canvassed through written submissions.

Appellant's submissions

4. These were filed by Oenga, Maingi & Omondi advocates and are dated 8th March 2023. Counsel identified five issues for determination.
5. On the first issue as to whether the appellant had established a prima facie case, counsel submitted in the affirmative and referred to the case of Star & Garters Restaurant & Another v National Bank of Kenya Limited [2019] eKLR where the court cited the case of Mrao Ltd V First American Bank of Kenya & 2 others [2003] e KLR where a prima facie case was defined as follows;

“A case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter”
6. The second issue is where the balance of convenience lies. On this he submitted that the principle of balance of convenience dictated that if the court was in doubt as to whether the plaintiff/appellant had established a prima facie case with probability of success, and the damages would not be adequate compensation for the losses suffered, the balance of convenience should tilt in favour of preserving the suit property. In support of this position he cited the case Bryan Chebii Kipkoech v Barnabas Tuitoek Bargarioria & another [2019] eKLR.
7. The third issue is whether the motor vehicle was rightfully repossessed. Counsel submitted in the negative and cited the decision in National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd & Another [2002] EA 503 where the Court of Appeal held as follows;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”
8. On the fourth issue on whether the repossession and sale of the motor vehicle without notice or an order of the court is illegal, he submitted that the respondent never gave the applicant a notice of sale, notice of attachment, notice of redemption and/or notice to repossess the subject motor vehicle. He



placed reliance on the decision in *David Karobia Kiiru v Lverage Company Ltd Civil Case Number 24 of 2013*.

9. Lastly, on whether the sale of the motor vehicle by the 1st respondent was illegal, he submitted that the respondent failed to give the appellant any notice and also failed to advertise the motor vehicle pursuant to the provisions of Rule 16(2) of the Auctioneers Rules of 1997.
10. In conclusion, he urged the court to set aside the ruling delivered on 13th October, 2022 and vacate the resultant orders.

Respondents' submissions

11. These were filed by Donex Juma advocates and are dated 8th March 2023, where counsel identified three issues for determination.
12. The first issue is whether the instant appeal is overtaken by events. He submitted in the affirmative and added that motor vehicle registration number KCC 050M Toyota Harrier had already been sold to one Julius Mwaura Mwangi. Thus, allowing the appeal would be tantamount to making orders in vain for reasons that the respondents were no longer in possession of the said motor vehicle.
13. The courts' attention was drawn to the case of *Intex Constructing Limited vs Flora Marigu and Another (Misc. Application No. 119 of 2015)* (Embu), the honourable court observed thus:

“The plaintiff's application has been overtaken by events as the motor vehicles have already been sold to third parties. It would be futile to grant the orders sought in this application bearing in mind that the court shall not issue orders in vain.”
14. The second issue is whether the appellant should be allowed to escape paying her just debts. He submitted that the instant appeal ought to be dismissed for reasons that the appellant had not denied being indebted to the 1st respondent. Further, that the respondent disbursed the loan and the subject motor vehicle was charged as security but the appellant defaulted in making payments as agreed in the loan agreement. He placed reliance on the decisions in *Sammy Japheth Kavuku v Equity Bank Limited & Another (Civil Case No. 84 of 2013)* (Mombasa) and *Mrao Limited V First American Bank* (supra).
15. In conclusion, he submitted that it was within the respondents' rights to sale the subject motor vehicle once the appellant defaulted and failed to redeem the security once the relevant notices were issued to her. He urged the court to dismiss the appeal with costs to the respondents.

Analysis and determination

16. This being a first appeal, this court is called upon to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See
 - i. *Selle & another V Associated Motors Boat & Others* 1968 E.A 123.
 - ii. *Peters V Sunday Post Limited* [1958] E.A 424.
17. Having carefully perused the proceedings, the ruling and the record of appeal as a whole including both parties' submissions, I find that the issue arising for determination is whether the appeal herein has merit.
18. The appellant contends in her memorandum of appeal that the learned trial magistrate erred in law and in fact in by completely ignoring her application dated 28th March, 2022 and submissions dated 17th of May 2022 and therefore making a ruling/order which was not based upon the same. Further,



that in dismissing the said application he exposed the appellant to loss of motor vehicle registration number KCC 050M which was repossessed illegally.

19. On their part, the respondents argued that the instant appeal is overtaken by events since the respondents were no longer in possession of the subject motor vehicle. They further argued that the instant appeal ought to be dismissed for reasons that the appellant had not denied being indebted to the 1st respondent.
20. The trial Magistrate in his ruling noted that the subject motor vehicle had already been sold to an innocent third party and the respondents were therefore not in possession of the same. Thus, it was his finding that the application had been overtaken by events. Besides that, the trial Magistrate also noted that the appellant did not dispute having taken a loan from the respondents. Further, that the appellant had defaulted in payment and had not responded to the demand letters from the 1st respondent informing her to make good the default by paying in instalments. It was therefore the trial Magistrate's finding that the applicant's application lacked merit and the same was dismissed.
21. Upon perusal of the court records I confirm that indeed vide the ruling dated 13th October 2017 the appellant's application was dismissed. The reasons given by the trial Magistrate for the said dismissal were that:
 - i. It was undisputed that the appellant took a loan from the 1st respondent vide the loan application form and loan offer letter marked as "LN-1" and LN-2" respectively.
 - ii. He also noted that the application had been overtaken by events since the certificate of sale marked as LN- 8 & 9 (pages of the record of appeal) confirmed the 1st respondent had exercised its power of sale to repossess and sell the subject motor vehicle in order to recover the accrued loan amount.
22. The dispute between the parties herein arose from a contract and this court should be reluctant to interfere with the terms agreed on by the parties unless the same is shown to be illegal, unconscionable or fraudulent as doing so would amount to re-writing the contract for them. I am guided by the decision in *Desai & Others vs Fina Bank Ltd* [2004] 2 EA 46 at 51, where it was held as follows: -

“.....the function of the court is to enforce what is agreed between the parties and not what the court thinks ought to have been fairly agreed between the parties...”
23. This court having perused the said documents concurs with the trial Magistrate's findings on the same and notes that no evidence was adduced by the appellant to counter the said documents. Further, the appellant's contention that the trial Magistrate did not consider her submissions is false since the Ruling under paragraph 5 noted that the court considered the appellant's submissions filed on 17th May 2022.
24. Both parties were bound by the terms and conditions of their contract. There is no dispute that the appellant had defaulted in repayment of the loan, and the contractual terms had to be applied. I do not find any good ground to make this court fault the trial court over the dismissal orders issued on 13th October, 2022.
25. The upshot is that the appeal herein lacks merit and is hereby dismissed with costs. The ruling by the trial court is upheld.

Orders accordingly



**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 7TH DAY OF NOVEMBER, 2024 IN
OPEN COURT AT NAKURU.**

H. I. ONG'UDI

JUDGE

