



M'Mbui & Another v Kenya Women Microfinance Bank PLC (Civil Appeal E112 of 2022) [2024] KEHC 13698 (KLR) (5 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E112 OF 2022
CJ KENDAGOR, J
NOVEMBER 5, 2024**

BETWEEN

FRIDAH KATHURE M'MBUI & ANOTHER APPELLANT

AND

KENYA WOMEN MICROFINANCE BANK PLC RESPONDENT

JUDGMENT

Background

1. In 2015, the Respondent advanced the Appellants a loan of Kshs.4,875,500/= to purchase a motor vehicle. The loan was secured by a Chattels mortgage over Motor Vehicle KCE 212L Isuzu FVR. The Appellants defaulted and fell into arrears. The Respondent instructed Auctioneers to repossess and dispose of the motor vehicle. The motor vehicle was sold but the proceeds of the sale were insufficient to clear the loan and a balance of Kshs.2,552,454.23/= is outstanding. The Appellants refused to clear the said balance and the Respondent instituted a case, Civil Suit No 276 of 2019, in which they prayed for judgment against the Appellants for the sum of Kshs.2,552,454.23/=.
2. The Appellants were duly served and filed a defense, in which they generally claimed that the Respondent's repossession and sale of the motor vehicle was premature, unprocedural, and wrongful. However, they did not file any documents or witness statements and hence did not adduce evidence in support of their defense. The Respondent filed a list of documents, a list of witnesses, and called a witness- its audit manager, who testified in Court. The Court entered judgment for the Respondent against the Appellants jointly and severally as prayed in the plaint dated 2nd October, 2019.
3. The Appellants were dissatisfied with the judgment and appealed to this Court through a Memorandum of Appeal dated 18th August, 2021. They enumerated the following grounds of Appeal;



1. The Learned Trial Magistrate erred in law and fact in that she failed to find that the Appellants' motor vehicle registration number KCE 212L was prematurely, unprocedurally, illegally, and wrongfully repossessed by the Respondent and sold to a third party.
 2. The Learned Trial Magistrate erred in law and fact in that she failed to find the Respondent denied the Appellants their equity right of redemption when it sold the Appellants' said motor vehicle.
 3. The Learned Trial Magistrate erred in law and fact in that she did not consider the particulars of illegalities and breach of contract which were tendered by the Appellants against the Respondent.
 4. The Learned Trial Magistrate erred in law and fact in that she failed to find that the Respondent did not follow the Provisions of the [Auctioneers Act](#) when it repossessed and sold the Appellants' said motor vehicle.
 5. The Learned Trial Magistrate erred in Law and fact in that having found that the Respondent did not prove the service of statutory notices upon the Appellants, she proceeded to find that the same were duly served upon the Appellants.
 6. The Learned Trial Magistrate erred in Law and fact in that she found that the valuation of the Appellants motor vehicle was done but failed to find that the Appellants were not given an opportunity to call a valuer of their choice.
 7. The Learned Trial Magistrate erred in Law and fact in that she found that the Respondent did prove its case against the Appellants on a balance of probabilities in view of its documents and statements on record.
 8. The Learned Trial Magistrate further erred in law and fact in that she failed to consider the Appellants' submissions and the judicial authorities thereof.
 9. That the decision of the Learned Trial Magistrate is against the weight of evidence and the same is bad in law.
4. They asked this Court to allow the appeal and set aside the judgment and decree of the Court in Meru Civil No. 276 of 2019. They also asked the Court to make a finding that the Respondent did not prove its case against the Respondents and dismiss the same.
 5. The Appeal was canvassed through written submissions.

The Appellants' Written Submissions

6. The Appellants submitted that the Respondent's public auction of the motor vehicle KCE 212 ISUZU FVR was unprocedural and illegal because it breached the Appellants' right of redemption and the [Auctioneers Act](#) (Cap 256). They argued that in law a creditor is required issue a notice in writing to the borrower notifying them of the default and requiring them to make good the default within a particular period of time and in default may either sue the grantor or take possession of the movable property amongst other options. They submitted that the procedure for repossession under the [Auctioneers Act](#) and Rules was blatantly ignored because they were not issued with a Proclamation, Redemption notice, and notification for advertisement.
7. In their submissions, the Appellants picked an issue with fact that the demand notice was sent to them one day before the public auction. They also pointed out that the Respondent sent a letter of instructions to the auctioneers before sending out demand notices to the Appellants. They also stated



that the Respondent did not provide a breakdown indicating the auctioneers' charges, legal charges, and the outstanding balance after the sale. Due to these issues, the Appellants submitted that the Respondent's 'hands' are soiled by the flagrant breach of regulations and thus did not prove their claim against the Appellants to the required standard. They did not cite any authorities.

The Respondent's Written Submissions

8. The Respondent submitted that the lower Court arrived at the right decision because the Appellant never filed any counter-claim or suit challenging the contract of financing/chattel mortgage in respect of KCE 212L or seeking for orders or declaration that the said repossession was premature, unprocedural, illegal, and clogged their right of redemption. It argued that the Appellants' failure to file a counter-claim or a suit on sale of the chattel mortgage is a fundamental defect which cannot be cured.
9. The Respondent also submitted that the Appellants did not produce any evidence disputing the loan due and owing or indicating that they settled the amounts that were owing. It submitted that the Appellants had a casual approach to litigation because they never complied with Order 11, despite being given several opportunities to. It submitted that the Appellants did not provide evidence to challenge the procedure or the service of notices because they supported these arguments by stating that the Appellants elected not to call witnesses or rely on document. They relied on the case of *NCBA Bank Kenya PLC (Formerly NIC Bank Kenya PLC) v Okonya (Civil Appeal E116 of 2022)* [2024] KEHC 6251 (KLR).

Issues for Determination

10. Each party identified several issues for determination and made considerable arguments around those issues. However, I have looked at their respective submissions and I find that these are the issues for determination;
 - a. Whether the Respondent proved the claim of Kshs.2,552,454.23/= against the Appellants.
 - b. Whether the Public Auction of the Motor Vehicle was irregular and unprocedural.

The Duty of the Court

11. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Respondent proved the claim of Kshs.2,552,454.23/= against the Appellants

12. The Respondent argued that it proved its case at the lower Court to the required standard and that the Appellants did not produce any evidence to rebut its case. It argued that the Appellants did not produce any evidence to dispute the outstanding amount of Kshs.2,552,454.23/=. On the other hand, the Appellants maintained that the Respondent did not prove its claim against the Appellants to the



required standard. The lower court ruled in favor of the Respondent and held that the Respondent had proved its case against the Appellants on a balance of probabilities.

13. I have relooked at the evidence placed before the lower Court with a view to ascertaining whether the Respondent proved its claims as outlined in the Plaint. In the Plaint, the Respondent sought for judgment against the Appellants for the sum of Kshs.2,552,454.23/=. The Respondent called its audit manager who testified in court that the Respondent was claiming the sum of Kshs.2,552,454.23/=. The manager's oral testimony was not rebutted or controverted by the Appellants in cross-examination. In addition, the Appellants did not call any witness to testify and did not produce any document to rebut the Respondent's claim.
14. My perusal of the typed Court proceedings revealed that the Appellants were given adequate time and several opportunities to file their witness statements but they failed to file. The proceedings show that on 27th January, 2020, the Appellants told the Court that they had not fully complied with Order 11 Civil Procedure Rules and requested the court for 14 days to comply. The court gave them 30 days to comply. However, the Appellants had not complied with Order 11 Civil Procedure Rules by the time the matter came up for hearing on 17th August, 2020.
15. On that day – 17th August, 2020, the Court once again gave the Appellants 14 days to comply. On 25th February, 2022, the Appellants told the Court they had not filed their witness statements and sought leave to file documents. The Court gave them leave and ordered them to comply with Order 11 Civil Procedure Rules within 30 days. However, the Appellants had not filed the said statements and documents by the time the matter came up for hearing on 22nd March, 2022.
16. Consequently, I find that the Appellants' failure to adduce any evidence at the lower Court means that the evidence adduced by the Respondent against them was uncontroverted and therefore unchallenged. I associate with the holding of the Court in *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000*, where the Court held that;

“No witness was called to testify on behalf of the defendant and, consequently, the evidence tendered on behalf of the plaintiff stands uncontroverted”.
17. Similarly, in *Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another 2019 eKLR*, the Court held as follows;

“22. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements”.

Whether the Public Auction of the Motor Vehicle was Irregular and Unprocedural

18. The Appellants questioned the procedure and the manner in which the Respondent exercised the power of sale. They argued that the process to selling the motor vehicle through public auction was marred with irregularities and violation of procedural rules. On the other hand, the Respondent maintained that they followed the procedure and served the Appellants with the required notices. The Respondents also argued that the Appellants did not produce any evidence to question the legality of the public auction process.



19. I have relooked at all evidence placed before the lower Court to assess whether the Appellants proved the alleged illegalities or breach of auction procedures. The Appellants' assertions that the public auction process was unprocedural are comprehensively outlined under their Statement of Defense dated 5th December, 2019. The Appellants also made the same assertions in their written submissions dated 9th May, 2022, where they claimed that the Respondent did not serve them with the statutory notices prior to the auction. They also claimed that, after the auction, the Respondent did not give them a breakdown indicating the auctioneer's charges, legal charges, and the outstanding charges.
20. Apart from making these assertions in the submissions, the Appellants did not call any witness or produce any documentary evidence to prove their assertions that the Respondents did not follow the procedure in conducting the public auction. The question that comes up at this point is whether, the Appellants' assertions in the Statement of Defense and the written submissions are enough to prove the alleged procedural violations.
21. The Courts have consistently held that submissions are not part of the evidence in a case. In the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, the High Court in Machakos held as follows;
- “ 18. In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents. It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions”.
22. Similarly, the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR held as follows:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
23. The Courts have also held that averments in pleadings are not evidence. In *CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1)* [1978] KLR 103; [1976-80] 1 KLR 835, the court held as follows:-
- “Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as



anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

24. In the instant case, I take the view that the Appellants’ assertions that the auction was un-procedural remained mere statements of fact because the Appellants failed to substantiate their pleadings. I associate myself with the holding of the court in the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, which, while citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 observed as follows;

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

25. Also, in *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007*, the Court while citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:-

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

26. In the overall analysis, this Court finds that the Respondent proved the claim of Kshs.2,552,454.23/ = against the Appellants on a balance of probabilities. It also finds that the Appellants did not adduce evidence to prove that the public auction of the motor vehicle was irregular and un-procedural.

Determination

27. I find nothing to suggest that the trial Magistrate improperly exercised her discretion or arrived at the wrong decision. The upshot is that this appeal fails.

28. I dismiss this appeal with costs to the Respondent.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 5TH DAY OF NOVEMBER, 2024.

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

No attendance for parties

