



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 74 OF 2015**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**MESHACK MARIERA ONGERI.....APPELLANT**

**AND**

**CREDIT BANK LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. K. Sambu, PM dated 6<sup>th</sup> May 2015 at the Chief Magistrates Court at Kisii in Civil Case No. 18 of 2012)**

**JUDGMENT**

1. The facts leading up to this appeal are not in dispute and are as follows. The appellant applied for and was granted a loan facility of Kshs. 1,000,000/- by the respondent to purchase motor vehicle registration number KBF 254H. The loan was to be serviced by monthly instalments of Kshs. 37,000/- per month over a period of 36 months and interest chargeable at 10%. The loan was secured by a chattel mortgage over the motor vehicle. The gravamen of the appellant's case was that after he defaulted in paying the loan, the respondent wrongfully and unlawfully repossessed the motor vehicle and sold it on 15<sup>th</sup> March 2011. The appellant alleged that the chattel mortgage instrument was not registered as required by law and as such the attachment and sale was illegal, null and void. The appellant sought a consequential declaration and damages for the resulting loss.

2. The respondent's case was that the appellant entered into a loan agreement with it, signed the loan agreement contract and chattels mortgage over the motor vehicle to create a security for repayment of the loan. The respondent contended that following default by the appellant, it was entitled to and it legally and contractually repossessed and sold the motor vehicle. The respondent counter-claimed Kshs. 1,024,343.05 being the amount due and outstanding from the appellant.

3. The trial magistrate dismissed the appellant's claim and entered judgment for the respondent on its counterclaim for the sum of Kshs. 1,024,343.05/-. It is this judgment that has precipitated this appeal. The thrust of the appeal as is apparent from the memorandum of appeal and the appellant's written and oral submissions is that the trial magistrate erred in not holding that the seizure and sale of the applicant's motor vehicle was illegal, null and void as the chattel mortgage instrument was not registered in the manner provided for under the ***Chattels Transfer Act (now repealed)*** ("the CTA").

4. On this issue the trial magistrate expressed the following view;

The bone of contention in this regard, between the parties is whether the chattels mortgage instrument was executed on 3<sup>rd</sup> March 2009 and registered after the expiry of the statutory period of 21 days from the date of its execution or that the same was executed on the 10<sup>th</sup> March 2009 and registered on the 25<sup>th</sup> March 2009 well within the 21 days.

The trial magistrate dismissed the appellant's claim because the appellant did not call an expert witness to confirm his assertions that the chattels mortgage instrument was altered, doctored and or tampered with by inserting the date "10<sup>th</sup> March 2009". The court ruled that since there was default, the respondent was entitled to attach and sale the motor vehicle in accordance with the agreement between the parties.

5. The appellant submitted that the transaction between the parties was null and void, taking into consideration the provisions of **sections 5, 6(1), 9 and 13** of the CTA. **Section 5** provides that registration of an instrument shall be effected by filing it in the office of the Registrar. **Section 6(1)** provides that the instrument may be registered 21 days from the day on which it is executed while **section 9** empowers the High Court to extend the time for registration of the instrument if it is not filed within the 21 days. The appellant also relied on **section 13** of the CTA to buttress his case that the instrument was void.

6. Counsel for the appellant pointed out that the appellant attested and signed the chattels mortgage on 3<sup>rd</sup> March 2009 but the document was tampered with and altered to read 10<sup>th</sup> March 2009 in order to bring it within the 21-day registration period. The appellant contended that the act of alteration amounted to forgery, which of itself is an offence and that no order of extension was sought from the High Court. Consequently, the instrument was void ab initio and could not confer rights on the respondent.

7. The respondent rebuffed the appellant's contention and submitted that the documents were clear that the chattel mortgage instrument and the affidavit were all signed and dated 10<sup>th</sup> March 2009.

8. Resolution of this contention is a factual and legal issue and as I noted earlier, the trial magistrate resolved the matter in favour of the respondent. This court though, as the first appellate court, has a duty to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that the trial court saw and heard the parties and giving allowance for that, and to reach an independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co.* [1968] EA 123).

9. The appellant's testimony largely mirrored his arguments. He stated that he signed the affidavit on 3<sup>rd</sup> March 2009 and the affidavit produced by the respondent which had a date that was overwritten was an affidavit that was tampered with. In his view, the chattel instrument dated 10<sup>th</sup> March 2009 was improperly registered and not the one he executed. Stephen Ongeche Omwenga (PW 2), the advocate and commissioner for oaths, who witnessed the appellant's signature on the affidavit accompanying the chattels mortgage instrument, testified that the appellant appeared before him with an instrument dated 3<sup>rd</sup> March 2009 together with an affidavit which he commissioned and dated the same day. He told the court that the affidavit produced by the respondent and countersigned was not the one he had commissioned.

10. The respondent's witness, Wainanina Francis Ngaruiya (DW 1), a legal officer at the respondent bank, testified that after the appellant's application for a loan was accepted, it prepared the security documents which included a chattels mortgage instrument dated 10<sup>th</sup> March 2009 which was registered on 25<sup>th</sup> March 2009.

11. I have looked at the original chattel mortgage instrument and it is dated 10<sup>th</sup> March 2009. The Stamp Duty embossed on the document is also dated 10<sup>th</sup> March 2009. The appellant's affidavit attached to the chattel mortgage instrument is dated 10<sup>th</sup> March 2018 although the date "10<sup>th</sup>" appears to have been altered by superimposing that date on what appears to be "3<sup>rd</sup>". What is clear is that the chattel mortgage instrument itself is dated 10<sup>th</sup> March 2009 and is signed by the appellant and witnessed by his advocate, PW 2. When PW 2 was asked in cross-examination whether he also witnessed the chattels mortgage instrument, he told the court that he could not recall seeing the document and that the page could have been altered or even plucked out. I have looked at the PW 2's stamp on both documents and the signature of both the appellant and PW 2 and they are both similar and it is therefore more likely that the document was signed on 10<sup>th</sup> March 2009 and that the affidavit was merely altered to reflect the reality of the date. Even if the signature and date in the chattel mortgage instrument was altered or even forged, nothing was said of the commissioner for oaths stamp of that document which was not disputed.

12. Even if I came to a different conclusion, I find and hold that such a finding would not alter the outcome of the case. The purpose of registration of securities is to protect the lender against claims by third parties as registration provides constructive notice to the public of the lender's interest. A reading of the statute supports this position for two reasons. First, the *CTA* does not require all instruments of the nature of a chattel mortgage to be registered. This is confirmed by section 4 of the *CTA* thereof which provides that;

4. Registration of instrument to be notice All persons shall be deemed to have notice of an instrument and of the contents thereof when that instrument has been registered as provided by this Act: Provided that if registration of the instrument is not renewed pursuant to the provisions of this Act, prior registration shall not be deemed to operate as notice after the lapse of the period within which renewal is required by this Act.

13. Second, the **section 13** of the *CTA* provides instances where the instrument shall be void in certain cases. It states that;

13(1) 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, so far as regards the property in or right to the possession of any chattels comprised in or affected by the instrument which, at or after the time of bankruptcy, or of the execution by the grantor of the assignment for the benefit of his creditors, or of the execution of process (as the case may be), and after the expiration of the period within which the instrument is required to be registered, are in the possession or apparent possession of the person making or giving the instrument, or of any person against whom the process was issued under or in the execution of which the instrument was made or given, as the case may be.

(2) So long as an instrument continues to be registered hereunder, the chattels comprised in that instrument shall not be deemed to be in the possession, order or disposition of the grantor, within the meaning of the Bankruptcy Act (Cap. 53).

14. The provisions I have set out show that the *CTA* is intended to protect the lender from third party claims. In *Geoffrey Njenga v Godfrey Karuri and Another NBI ML HCCC No, 795 of 1999 [2000] eKLR*, Mbaluto J., considered such an argument 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 2nd 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 2nd defendant. It is therefore plain from 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.

15. 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 *Walsh v Lonsdale [1882] 21 Ch D 9*, *Clarke v Sondhi [1963] EA 107* and *Meralli v Parker, [1956] 29 KLR 26*). In this case, the appellant readily admitted that he was indebted and he offered the motor vehicle as security for the loan, the respondent was within its rights to repossess and sell the vehicle to recover the debt.

16. I dismiss the appeal with costs to the respondent which I assess at Kshs. 40,000/-.

**DATED and DELIVERED at KISII this 19<sup>th</sup> day of July 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Gichane instructed by Bosire Gichana and Company Advocates for the appellant.

Mr Godia instructed by Nyachae and Ashitiva Advocates for the respondent.