K-Rep Bank (K) Limited v Ismael (Civil Appeal 2 of 2023)
[2025] KEHC 14075 (KLR) (2 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 2 OF 2023

REA OUGO, J

OCTOBER 2, 2025

BETWEEN

K-REP BANK (K) LIMITED ..... APPELLANT

AND

ABDI NOOR ISMAEL ..... RESPONDENT

(Being an Appeal from the Judgement and Decree at the Chief Magistrate's Court in Bungoma, CMCC No. 152 of 2016 delivered by Hon. T.M. Olando, Principal Magistrate on 2nd December 2022)

JUDGMENT

1. The present Appeal emanates from a suit in the trial court instituted by the Respondent vide Plaint dated 30th March 2016 against the Appellant, seeking a declaration that the selling of his motor vehicle Registration No. KBG 512E below the market value was unlawful and hence he ought to be compensated.

2. The Plaintiff/Respondent's case was that the Defendant/Appellant, through its Bungoma branch, granted him loan facilities of Kshs. 2,000,000/=; Kshs. 500,000/= overdraft; and Kshs. 250,000/=, amounting to Kshs. 2,750,000/=, for which he issued a legal charge over title No. Bokoli/Chwele/1856, belonging to Titus Mzee Soittah, his guarantor, and his motor vehicle, Registration No. KBG 512E, valued at Kshs. 1,870,000/= as per the Valuation Report dated 23rd April 2013. He averred that his vehicle was maliciously and unlawfully sold off by Garam Investments Auctioneers upon instructions from the Defendant/Appellant for Kshs. 400,000/=, which was far below the market value of Kshs. 1,680,000/=, and that so far, he had already paid about Kshs. 1,800,000/= in addition to the proceeds of the vehicle in a bid to reduce the loan, hence his prayer for compensation.

3. The Appellant entered appearance and filed a Statement of Defence dated 17th February 2017, in which they denied the contents of the Plaint, particularly that it wrongly auctioned the Plaintiff's

motor vehicle. They averred that the Plaintiff/Respondent defaulted on paying the loan, which led to the auction of his vehicle and the bank exercising its Statutory Power of Sale over Bokoli/Chwele/1856. The Defendant/Appellant also stated that the Plaintiff had filed a suit before the Chief Magistrate's Court via Civil Suit 452 of 2012 to prevent the bank from exercising its Statutory Power of Sale, and that the Plaintiff had never made any payments to settle the outstanding loan arrears as alleged in the Plaint.

4. The matter proceeded to a full trial with the Plaintiff testifying as PW1 and producing the Letter of Offer (P.Exh1), Charge for Kshs. 850,000 (P.Exh2), Further charge for Kshs. 1,750,000 (P.Exh3), Search for Bokoli/Chwele/1856 (P.Exh4), and Valuation and Receipt P.Exh 5(a) and (b). The Appellant called on the evidence of Nelson Aluoch Wasonga, DW1, who was their branch manager and who produced 11 exhibits listed in the Defendant's list of documents filed alongside the defence and dated 12th April 2019.

5. At the conclusion of the trial, the trial court found that the Plaintiff/Respondent had proven his case on a balance of probabilities and entered judgment in his favour as prayed in the Plaint, together with costs and interest of the suit.

6. Dissatisfied with this decision, the Appellant filed the present Appeal through a Memorandum of Appeal dated 19th January 2023, seeking to set aside the trial court's judgment and raising six (6) grounds of appeal as follows:

    1. The Learned Magistrate erred in law and fact by totally failing to appreciate and take into account the evidence adduced by the Appellant during the hearing of the matter.

    2. The Learned Magistrate erred in law and fact by failing to hold that the suit was sub-judice, a fact that was not controverted by the Respondent.

    3. The Learned Magistrate erred in law and fact by relying on a valuation report prepared by an independent valuer who did not give evidence in the matter hence the probative value of the said evidence was not enough to arrive at a finding in favour of the Respondent.

    4. The Learned Magistrate erred in law and fact by relying on a valuation report that was prepared way long after repossession and sale of the suit motor vehicle had already been undertaken by events.

    5. The Learned Magistrate erred in law and fact in failing to evaluate the evidence on record and hence failing to realise that the valuation report on record had long been overtaken by events.

    6. That the Learned Magistrate erred in law by failing to exercise his discretion in the best interests of justice, equity and fairness.

    7. The Appeal was admitted for hearing and the parties took directions to canvass it by way of written submissions.

The Appellant's Submissions

8. Counsel for the Appellant argued that the Respondent owed the Appellant money, which formed the legal basis for auctioning the suit vehicle. They contended that the valuation report relied upon by the trial court was not credible because it was dated 23rd April 2013, whereas the vehicle had been auctioned on 5th July 2012. They argued that the court should have drawn a negative inference from the Respondent's failure to address this discrepancy. The case of Bukenya and Others vs. Uganda (1972) E.A. 549 was cited in this regard.

9. Counsel argued that the trial court erred in failing to analyse and appreciate the Appellant's evidence through DW1, and that the Respondent did not discharge his burden of proof on a balance of probabilities as required under Section 109 of the *Evidence Act*. This was demonstrated in the cases of Re H (Minors) (1966) 2 WLR 8,4; Job Evanson Okello vs. Stephen Z.K. Njoroge (2005) eKLR; and Miller vs. Minister of Pensions (1942) 2 All ER.

10. On the issue of sub-judice, Counsel submitted that the Respondent had filed other suits in Bungoma HCCA No. 8 of 2018 and Bungoma CMCC No. 152 of 2016 (sic) [I note that this should be Bungoma CMCC 452 of 2012 because CMCC 152 of 2016 is the suit from which the present Appeal emanates], and since the Respondent did not file any reply to the Defence or lead evidence to demonstrate that the cause of action in the aforementioned suits was not the same as the one before the trial court, then it meant that he conceded on the issue of sub-judice and therefore, the trial court could not arrive at a different conclusion.

The Respondent's Submissions

11. Counsel for the Respondent submitted that the Appeal was time-barred and against the tenets of Section 79G of the *Civil Procedure Act* which provided for a time limit of 30 days to file an appeal and therefore it was irregular, illegal and improperly filed before the court; that in this case, judgment in the trial court was delivered on 2nd December 2022 and the Memorandum of Appeal dated 19th January 2023 was filed on 24th January 2023 which was almost 2 months from the date when judgment was delivered and therefore, it should be dismissed.

12. On the matter of the valuation report, counsel submitted that firstly, the Respondent denied ever signing a chattels mortgage instrument as security for the loan facility and argued that the loan was secured by the title deed belonging to Titus Mzee Soittah. They contended that the Appellant could not produce the said security documents for joint registration before the court nor provide evidence demonstrating that they followed the correct procedure in auctioning the vehicle. Additionally, they pointed out that the auction was carried out without a pre-sale valuation report by the Appellant to establish the vehicle's value prior to sale or use as security. Counsel further submitted that the impugned valuation report was properly served upon the Appellant before the trial began, and that no issues were raised by the Appellant at that time, nor was the Respondent ever cross-examined on it during the trial. Therefore, because the production and validity of the report were never contested at trial, it was admissible as evidence and possessed probative value, which the trial court rightly relied on. Counsel argued that this issue was being raised on appeal merely as a subsequent attempt and that Equity could not favour those who were indolent.

13. On the issue of the existence of a similar suit, Counsel submitted that it was the Appellant's duty to present evidence to the court to prove this assertion, and that failure to so did meant that such a suit did not exist.

Analysis And Determination

14. This being a first appellate court, the principles upon which this court acts are well settled. These principles were espoused in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, thus: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

15. I have considered the evidence adduced in the lower court, the grounds of Appeal, and the submissions of the parties. The issues for my determination are as follows: -

    i. Whether the Appeal is time-barred

    ii. Whether the suit before the trial court was Sub-judice.

    iii. Whether the Respondent proved his case on a balance of probabilities.

Whether the Appeal is time-barred

16. Section 79G of the *Civil Procedure Act* provides as follows: -

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

17. I note that the impugned judgment by the trial court was delivered on 2nd December 2022, and the Memorandum of Appeal is dated 19th January 2023 and filed on 24th January 2024. The appeal was filed within the prescribed period. Order 50 Rule 4 sets out a holiday computation period during which time does not run. This Rule states that the period between December 21st and January 13th is excluded from the calculation of time, meaning time does not run during this period unless a judge orders otherwise. In my view, the appeal was filed within the timeframe in which an appeal should have been filed. I also noted that the Respondent never raised this issue at the point of admitting the appeal, either through a preliminary objection or otherwise. It appears to be an afterthought, in my opinion, but nonetheless, I shall address it.

18. The Supreme Court of Kenya in the case of Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 Others [2014] eKLR set out the principles applicable in considering an appeal that was filed out of time thus: -

> " The underlying principles a court should consider in exercise of such discretion should include:
>
> a. .Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
>
> b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
>
> c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
>
> d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
>
> e. Whether there will be any prejudice suffered by the respondent if the extension is granted;

f. Whether the application has been brought without undue delay."

a. dispute resolution mechanisms shall be promoted, subject to clause (3);

b. justice shall be administered without undue regard to procedural technicalities; and

c. the purpose and principles of this Constitution shall be protected and promoted.

19. In line with the above, I find that it would be against the interests of justice to prevent the Appellant from pursuing his right of appeal. I reject the Respondent's submissions that the Appeal should be dismissed and therefore proceed to consider the appeal on its merits.

Whether the suit before the trial court was sub-judice

20. The Doctrine of Sub Judice is encapsulated under Section 6 of the *Civil Procedure Act* as follows: -

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

21. The principles governing the doctrine of sub-judice were enunciated by Mativo J. (as he then was) in the case of Republic v. Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, as follows: -

" For the doctrine of Sub Judice to apply the following principles ought to be present:-

(a) There must exist two or more suits filed consecutively;

(b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...."

22. The essence of the doctrine of Sub-Judice is to prevent a multiplicity of suits and the potential embarrassment to the courts when different decisions are made on the same subject matter. This was aptly explained by the High Court of Uganda in Nyanza Garage v. Attorney General HCCS No. 450 of 1993 as follows: -

" In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating

and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

23. According to the Appellant herein, the Respondent had instituted a suit in Bungoma CMCC No. 452 of 2012, which I confirmed from the Record of Appeal at page 59 via Plaint dated 13th July 2012. I note that the parties to that suit are the same as those in the present suit, except for an additional party listed as the 2nd Plaintiff, who was the Respondent's Guarantor-Titus Mzee Soittah. I also observed that the contents of the Plaint refer to the loan facility advanced by the Appellant to the Respondent, and specifically, paragraphs 1-5 of the said Plaint are similar to the same paragraphs in the Plaint in this present Appeal.

24. In the earlier suit CMCC No. 452 of 2012, the Plaintiffs (Respondent and Mr. Titus Mzee) sought orders directing the defendant/Appellant to produce records of account for the said loan, along with a declaration that the Plaintiffs were entitled to redeem the charged property. They also requested the court to grant an injunction restraining the bank/defendant from auctioning the land parcel No. Bokoli/Chwele/1856 in order to recover the loan. I have compared this prayer to the one in the suit before the trial court from which this Appeal emanated, and I noted that the Plaintiff/Respondent sought a declaration that the sale of his vehicle to recover the loan was below market value, unlawful, and deserving of compensation.

25. In my view, the claim by the Respondent in both suits centred on the same subject matter, namely the loan facility provided by the Appellant and the securities used to secure it. In other words, while it was not in dispute that the Appellant granted a loan facility to the Respondent, the Respondent appeared to contest the Appellant's exercise of his rights to a statutory sale over the said securities, which were the subject of both suits. In light of this, I find that the issues raised in the two suits are similar, the parties involved are the same, and the reliefs sought are also comparable. Therefore, the suit from which this Appeal originated, filed in 2016, was sub-judice when considered alongside the earlier case pending in court, filed in 2012.

26. I further note that in the first suit, the Respondent conceded that his vehicle was auctioned by the Appellant at paragraph 7 of the Plaint dated 13th September 2012, but he did not raise any issue with the auction at that time. It is now strange and somewhat peculiar for the Respondent to institute a subsequent suit in CMCC 152 of 2016, claiming that the vehicle was sold at a throw-away price. In my view, the subsequent suit Bungoma CMCC 152 of 2016 appears to be an afterthought, as evidenced by the fact that the Respondent produced a valuation report prepared on 23rd April 2013, long after the vehicle had been sold on 5th July 2012. If he indeed had issues with the sale at that time, they should have been raised during the initial suit in 2012. However, he failed to do so, which supports the view that the claim in the current suit is a belated attempt to cover gaps he did not address in the first suit of 2012.

27. Based on the foregoing analysis, the Respondent's actions demonstrated that he intended to bring the Appellant to court through two different cases arising from the same subject matter, which was against the principles of res sub-judice. In other words, instituting multiple suits over the same issue was, in my view, an abuse of the court process that the trial court ought never to have tolerated. I also find further fault with the trial court's lacklustre consideration of this issue, as the Appellant never proved the existence of the previous suit when Record contained a copy of a Plaint filed in CMCC 452 of 2012.

28. It is my finding therefore, that the suit before the trial court was substantially similar to the one filed in Bungoma CMCC 452 of 2012 and therefore was sub-judice. In the circumstances, the said suit ought to have been dismissed by the trial court.

29. Having arrived at the above findings, the third issue for my determination is now moot. I find that the appeal has merit and is hereby allowed. The judgment dated 2nd December 2022 is hereby set aside, and the suit in the trial court is dismissed with costs to the appellant. The appellant shall also have the costs of the trial court suit.

30. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 2ND DAY OF OCTOBER 2025.

R.E. OUGO

JUDGE

In the presence of:

Mr. Alovi - For the Appellant

Mr. Masiga h/b Mr. Wekesa -For the Respondent

Wilkister - C/A