

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL APPEAL NO. E174 OF 2023

FRANCIS MUGAMBI LAICHENA
.....APPELLANT

VERSUS

PLATINUM CREDIT LIMITED..... 1ST
RESPONDENT

ROBERT T/A ANTIQUE AUCTIONS AGENCIES..2ND
RESPONDENT

(Being an appeal from the judgment of the Small Claims Court at Nairobi by Hon. D.S.Aswani delivered on 3rd August 2023)

JUDGMENT

Background

1. The Appellant filed Nairobi Small Claims Court Case No. E1827 of 2023 vide a plaint dated 14th March 2023 seeking, inter alia, a declaration that the proclamation and subsequent repossession of his motor vehicle registration number KBT 236V were illegal, unlawful, null and void *ab initio*; an order for the release of the said vehicle; compensation for loss of user at the rate of Kshs. 5,000 per day from the date of attachment; and costs of the suit.

2. The Appellant's case was that in November 2022 he obtained a loan of Kshs. 200,000/= from the 1st Respondent, secured by the said motor vehicle. The loan was repayable in six (6) monthly instalments of Kshs. 46,000 each. Due to financial constraints, the Appellant defaulted, leading to the issuance of a proclamation notice dated 7th March 2023 by the 2nd Respondent demanding Kshs. 173,850.79, which the Appellant disputed.
3. The Respondents filed a statement of defence dated 12th May 2023 contending that as at 17th March 2023, the Appellant owed Kshs. 207,492/= and that the repossession of the vehicle was lawfully undertaken upon expiry of the seven-day proclamation notice.
4. Upon evaluating the evidence, the learned trial magistrate found that the 1st Respondent acted within its contractual and statutory rights to recover the outstanding loan amount through repossession and accordingly dismissed the Appellant's claim.
5. Aggrieved by the decision, the Appellant lodged this appeal vide a Memorandum of Appeal dated 7th August 2023, raising seven grounds as follows:
 - i. *That the learned trial magistrate erred in law and in fact in failing to appreciate the provisions of Rule 12(1) (b) of the Auctioneers Rules 1997 as the appellant was not served physically with the proclamation as required thus arriving at an impugned decision.*

- ii. *That the trial magistrate erred in law in failing to appreciate the provisions of rule 12(1)(c) of the Auctioneers Rules 1997 where the proclamation by the 2nd Respondent was done before the 1st Respondent issued instructions.*
 - iii. *That the learned magistrate erred in law in failing to appreciate the provisions of Order 22 rule 5C (3) of the Civil Procedure Rules where the 2nd Respondent served the appellant with the proclamation notice past business hours thereby arriving at a wrong decision.*
 - iv. *The learned trial magistrate erred in law by failing to appreciate the provisions of the Auctioneers Act that the Respondent could only attach proclaimed goods after the expiry of the mandatory 7 days' notice.*
 - v. *That the learned magistrate erred in law in failing to consider the principle of law that parties are bound by their pleadings and arrived at a verdict on issues not pleaded before the court.*
 - vi. *That the learned magistrate erred in law by failing to consider the case before the court and arrived at a verdict on issue not pleaded.*
 - vii. *That the learned trial magistrate erred in law by failing to consider the Appellant's submissions and the authorities relied thereto.*
6. The Appellant urged the court to allow the appeal and set aside the judgment of the Small Claims Court delivered on

3rd August 2023, allow the statement of claim and the costs of the appeal and that of the trial court be provided for.

7. The appeal was heard by way of written submissions. The Appellant's submissions are dated 24th February 2025, while those of the Respondents are dated 17th March 2025

Appellant's submissions

8. The Appellant contends that the proclamation notice was invalid for want of personal service contrary to Rule 12(1)(b) of the Auctioneers Rules, 1997. He further argued that the 2nd Respondent acted prematurely and without valid instructions from the 1st Respondent in contravention of Rule 12(1)(c).
9. It was his case that the attachment was carried out before the expiry of the statutory seven-day notice period, rendering the entire process unlawful. He submitted that the trial court misapprehended the law and arrived at an erroneous decision.

Respondents' Submissions

10. The Respondents submit that the learned Trial Magistrate correctly applied the provisions of the Auctioneers Rules, 1997 and properly held that the repossession of motor vehicle KBT 236V was lawful.
11. They maintain that the Appellant was duly served with the proclamation notice dated 6th March 2023 through his email and phone number as provided in the loan agreement

and statutory declaration, in compliance with Rules 12(1)(b) and 12(1)(c) of the Auctioneers Rules, 1997.

12. According to the Respondents, the Appellant had expressly authorized all correspondence, including notices and demands, to be sent via email and postal address as captured in the loan documents. The claim of non-service was therefore insincere and aimed at frustrating lawful recovery.
13. It was further submitted that the repossession was effected only after expiry of the mandatory seven-day notice, and was therefore valid. Reliance was placed on **Emrre Global Investors Ltd v Housing Finance Company of Kenya Ltd & 2 Others [2014] eKLR**, where the Court held that a borrower in default is presumed to be aware of such default and requires no further reminder beyond reasonable notice.
14. The Respondents also cited **Godfrey Nyaga v Housing Finance Company of Kenya Ltd (Civil Appeal No. 134 of 1987)**, where the Court of Appeal affirmed that where a party exercises a statutory right lawfully, the court ought not to interfere unless the right is exercised oppressively.
15. They submit that the trial court correctly found that parties are bound by the terms of their contract and that the court cannot rewrite the same for them, citing **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd &**

Another [2002] EA 503 and Gatobu M’Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR.

16. On costs, the Respondents invoked the principle that costs follow the event, relying on *Terra Craft Ltd v Waliubah & Another* [2024] KEHC 872 (KLR), and urged the Court to dismiss the appeal with costs.

Analysis and determination

17. This being an appeal from the Small Claims Court, it is guided by Section 38 of the Small Claims Court Act, 2016, which limits appeals to *matters of law only*. The Court of Appeal in **Mwangi v Kihiu [2021] eKLR** reaffirmed that an appellate court may only intervene where the trial court misapplied the law in evaluating evidence or determining liability.
18. The main issue for determination, therefore, is whether the learned trial magistrate *misapprehended the law* governing proclamation and attachment under the Auctioneers Rules, 1997. The appellant contends that the proclamation was not properly served in accordance with the Rules, whereas the respondent maintains that service was lawful and procedurally sound.
19. Service of proclamation is a fundamental procedural requirement under **Rule 12(1)** of the **Auctioneers Rules, 1997**, which provides that:

“A proclamation of attachment shall be in writing and shall be served upon the debtor or upon an

adult member of his family in accordance with Rule 12(1)(b), and no attachment shall be carried out unless and until the expiry of seven days from the date of service of the proclamation.”

20. Further, Rule 12(1)(c) requires that such proclamation must be issued before the auctioneer proceeds with attachment or sale, and it must specify the amount claimed and the date of the intended sale.
21. The Appellant disputes physical service of the proclamation, asserting non-compliance with Rule 12(1)(b). Conversely, the respondent produced evidence showing that the auctioneers issued the proclamation notice via email to the appellant's last known address, that is, laichenamugambiadvos@gmail.com on 6th March 2023. The Appellant subsequently acknowledged receipt via WhatsApp on 7th March 2023. Despite acknowledgment, the Appellant did not settle the outstanding debt, prompting repossession of the vehicle on 14th March 2023.
22. The question, therefore, is whether electronic service via email and WhatsApp satisfies the requirements of Rule 12(1)(b). The Court notes that in modern commercial practice, service through electronic means is permissible where there is acknowledgment of receipt. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] EA 503**, the Court recognized that contractual dealings in modern settings must reflect technological realities. Likewise, Section 83 of the Evidence Act, Cap 80,

recognizes electronic records and communication as admissible evidence of communication.

23. In the present case, the Appellant's express acknowledgment of receipt via WhatsApp constitutes valid proof of service. The purpose of service is to notify the debtor of the intended attachment and afford them an opportunity to respond. Once acknowledgment is demonstrated, the means of service becomes immaterial so long as it achieves this objective.
24. The evidence further shows that the proclamation was issued on 6th March 2023, and the repossession was carried out on 14th March 2023 after the expiry of the seven-day statutory period. The repossession was, therefore, procedurally compliant with the Auctioneers Act and the Auctioneers Rules, 1997.
25. The Court aligns with the holding in **Emrre Global Investors Ltd v Housing Finance Company of Kenya Ltd [2014] eKLR**, where it was stated that a borrower aware of their default cannot feign ignorance when lawful recovery measures are undertaken. Similarly, as held in **National Bank of Kenya Ltd v Pipeplastic Samkolit (supra)**, the Court cannot rewrite a contract voluntarily executed by the parties.
26. On the basis of the foregoing, this Court finds that the service of the proclamation notice was lawful, valid, and effective. Consequently, the repossession of the Appellant's

motor vehicle was properly executed in accordance with the loan agreement and the governing law.

27. I find no error of law on the part of the learned trial magistrate to warrant appellate interference. The trial court correctly applied the law to the facts before it.

28. Accordingly, the appeal lacks merit and is hereby dismissed.

29. The judgment and decree of Hon. D. S. Aswani in Milimani Small Claims Cause No. E1827 of 2023 – Francis Mugambi Laichena v Platinum Credit Limited & Robert t/a Antique Auctioneers is hereby upheld.

30. Costs of this appeal are awarded to the Respondents.

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **16th** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Kirui h/b for Mr. Yego for Appellant

Ms. Nyabuto h/b for Ms. Kogai for Respondents

Court Assistant: *Carlos*