



REPUBLIC OF KENYA



**Narayan Builders Ltd v Imperial Bank Ltd (Civil Suit 31 of 2017)
[2025] KEHC 16958 (KLR) (18 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 31 OF 2017
DKN MAGARE, J
NOVEMBER 18, 2025**

BETWEEN

NARAYAN BUILDERS LTD PLAINTIFF

AND

IMPERIAL BANK LTD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the Complaint dated 20/3/2017 seeking the following reliefs:
 - a. Spent.
 - b. A proper and comprehensive account be taken to ascertain what, if any, monies due and owing by the Plaintiff to the Defendant for all the facilities relating to and arising out of the Defendant's relationship with the Plaintiff as banker after effecting the appropriate offsets.
 - c. The Defendant be compelled by way of a mandatory injunction to release and discharge the logbooks for the vehicles against payment of the correctly ascertained liabilities.
 - d. Interest at court rates.
 - e. Cost of the suit.
2. It was averred that the Defendant was the Plaintiff's banker until the Defendant went into liquidation around 12.10.2015.
3. The Defendant had accorded the Plaintiff two hire purchase facilities detailed as follows:
 - a. Kenya shilling overdraft facility account no. 7XXXXXXX27 secured by cash deposits in account Nos. 7XXXXXXX and 0XXXXXXX6 held respectively in the name of Lalji Kalyan Siyani and Nitaben Lalji Siyani.



- b. Hire purchase facility for TATA Truck LPK (6X2) Tipper Registration No. KCD 699F pursuant to hire purchase contract no. 017HPLC1515550001 dated 21.4.2015
 - c. Hire purchase facility for unit Isuzu FRR 9.9 TON GVW Truck Registration No. KBZ 699W pursuant to hire purchase contract no. 017HPLC142260001.
4. It was further averred that after the receiver of the Defendant was appointed, the Plaintiff has on numerous occasions visited the Defendant's branch with a view to getting information about the facilities status in vain.
 5. The Defendant however instructed auctioneers to recover the alleged outstanding amounts in spite of the overdraft facility arrangement.
 6. The Plaintiff is willing to settle all dues legally owing per the hire purchase agreement.
 7. The Defendants entered appearance and filed a statement of defence dated 23.5.2017 denying the averments in the Plaintiff.
 8. The Defendants also averred that the proclamation was not, malicious as it was within the rights of the creditors of the Plaintiff.

Evidence

9. The Plaintiff called PW1, Lalji Kalyan. She adopted her witness statements dated 21.3.2017 and 25.5.2023 and produced the documents in the Plaintiff's 2 lists of documents.
10. The Defendant did not cross examine PW1. The Defendant did not call witnesses and failed to attend court on the date set for defence hearing. The Defendant's case was as such closed after an application was made by the Plaintiff.

Submissions

11. The Plaintiff filed submissions dated 30.11.2023. It was submitted that Defendant failed to offset the deposits owed to it. They cited Sections 33(7) and 50(2) of the Kenya Deposit Insurance Corporation Act.
12. It was also submitted that the Defendant failed to call a witness or rebut the case of the Plaintiff.
13. It was further submission of the Plaintiff that the conduct of the Defendant in not releasing the security was unreasonable and in breach of contract as there were funds enough to offset the alleged debts. Reliance was placed on *Petrocity Energy (K) Ltd v Imperial Bank Ltd (In receivership) Mombasa HCCC No. 54 of 2019* consolidated with *Scarce Commodities Ltd v Imperial Bank Ltd (In receivership) Mombasa HCCC No. 55 of 2019*

Analysis

14. The burden of proof was on the Plaintiff ascertain the allegations in the Plaintiff. The court is aware that the burden of proof is set out in section 107-109 of the *Evidence Act*.
15. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows: -

In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%



as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

16. The degree on a balance of probabilities must carry reasonable probability but not so high as in criminal cases. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.

17. A party has a duty to prove matters within their knowledge. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.

18. The Plaintiff instructed the Defendants Receiver Manager to offset the balance of Ksh. 23,696,320.35 with the overdraft amounts so that the net balance would be Ksh. 196,320.35. This instruction was by the Plaintiff’s letter dated 18.1.2016.
19. However, according to the letter dated 10.3.2017, by the Defendant, the Defendant demanded Ksh. 42,466,350.43 being the amount that the Plaintiff was indebted to the Defendant as at 31.3.2017. The demand for the amount was accompanied with a condition that should the amount not be remitted by 10.4.2017, the Defendant would repossess the securities to wit TATA Tipper Lorry KCD 699F and Isuzu FRR Lorry KBZ 699W.
20. Whereas the Defendant failed to file a Defence or call a witness, I acknowledge that the burden of proof still remains with the Plaintiff. The Court of Appeal in the case *Charterhouse Bank Limited (Under Statutory Management Vs. Frank N. Kamau)* (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-



examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.

21. From the documents produced by the Plaintiff, particularly letters signifying approval for hire purchase finance dated 19.5.2014 and 21.4.2015 between the parties herein that the parties intended the impugned truck and lorry to be acquired by hire purchase. It not in dispute that the Defendant offered facilities in the manner pleaded and which the Plaintiff accepted. What appears to be the core of the dispute between the parties is the extend of security that was granted and the amount that was realizable. The terms were on hire purchase and it was the case of the Plaintiff that the arrears were Ksh. 23,696,320.35 and the Plaintiff had made available Ksh. 20,000,000/= which would offset the arrears to leave a balance of Ksh. 196,320/=.

22. A Hire Purchase Agreement in my view pertained an Agreement in which the owner of goods allows a person, known as the hirer, to hire goods for a period of agreed time by paying agreed installments. The Installments are preceded by an agreed initial deposit which the hirer must pay beforehand. The hirer has an option to buy the goods at the end of the Agreement if all installments are paid. As was stated by the Court in Eunice Kanugu Kingori v NIC Bank Limited [2018] eKLR,

Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying installments. The hirer has an option to buy the goods at the end of the Agreement if all installments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remain with the owner.

23. Even if it had been a hire purchase agreement however, failure of registration would not render the agreement unenforceable. In the case of Taawawa Supermarket Limited Vs Fina Bank Limited, Civil Appeal NO. 118 OF 2002, the Court of Appeal stated as follows concerning a hire-purchase agreement that had not been registered:

We may add that failure to register did not render the agreement void or the result that the company would be refunded all the money it paid under the agreement. It retained its validity as a contract inter se and was enforceable as such.

24. While addressing the question of non-registration, Ochieng J as he then was, in the case of Henry Chama Chama v Sammy Traders Limited [2021] eKLR stated as follows:

In the light of the said findings, it is clear that the contract between the Hirer and the Owner was not illegal. The non-registration of the hire-purchase agreement did not render the agreement illegal: it only rendered it unenforceable in the specific terms as stipulated in Section 5 (4) of the Hire Purchase Act.

25. The Plaintiff's case that the Defendant unreasonably and on breach of the hire purchase contract repossessed the 2 motor vehicle was not controverted. If the outstanding balance was Ksh. 23,696,320.35 under a hire purchase agreement where the hire purchase price was Ksh. 42,466,350.43,



the one may wonder why the Defendant was in hurry to repose the motor vehicle. The Plaintiff had settled more than 2/3 of the price and it was not available for the Defendant to yield the motor vehicle.

26. The Defendant was expected to plead that they repossessed the motor vehicles and sold them, to whom they were sold and at how much and prove that they sold the repossessed motor vehicles at the best available prices. This would be by way of a public auction. The parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

27. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled 'The Present Importance of Pleadings' published in [1960] *Current Legal Problems* at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.



28. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....’

29. The Defendant failed to call a witness and the case of the Plaintiff was largely uncontroverted. The allegations in the defence were mere averments not substantiated. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997 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.

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.

30. However, even in formal proof, the plaintiff has a duty to proof their case. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to defining Formal Proof stated thus:

... I have not seen judicial definition of the phrase Formal Proof. Formal in its ordinary Dictionary meanings - refers to being methodical according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.

31. On the other hand, the Plaintiff set out the particulars of the loan advanced and the supported the eventual current balance on loan by way of the correspondences that were not disputed. The Plaintiff particularly succeeded in proving breach of the hire purchase agreement that the due loan was less than 2/3 of the hire purchase price and the repossession of the goods was unlawful. On the prove of the allegations of breach of contract in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it



be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given....

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

32. Any attempt to haphazardly sell the Plaintiff's motor vehicle was unwarranted. The Defendant had the knowledge of the arrears and the particulars of the motor vehicles repossessed but failed to file an accountable sale for each of the repossessed motor vehicles. In this regard, Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:

'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party

33. The Plaintiff sought an injunction. The court is tasked to find whether an injunction was appropriate as prayed: the principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit leap-frogging by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both



that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

34. The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

35. The injunction sought by the Plaintiff was in the nature of a mandatory injunction to against the Defendant to compel return of the log books.

36. In the locus classicus case of *Kamau Mucuha vs. The Ripples Ltd.* Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:

...A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction.

37. Therefore, as it is not controverted that the Defendant still hold the logbooks to the motor vehicle. I find the prayer merited and allow it.

38. Finally, on costs, the award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

- (18) It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.



39. Given the facts that the defendant is in liquidation, an order for costs is futile. each party will bear their own costs.

Determination

40. In the upshot, I make the following Orders:

- a. An mandatory injunction is hereby issued directing the Defendant to forthwith release and discharge the log books in respect of Motor vehicle TATA Tipper Lorry Registration No. KCD 699F and Isuzu FRR Registration No Lorry KBZ 699W.
- b. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 18TH DAY OF NOVEMBER 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ongego for the Plaintiff

No appearance for the defendants

Court Assistant- Michael

