



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL NO. E035 OF 2024

**TRUDA
MUHINJI.....
APPELLANT**

IMALI

VERSUS

**MOGO AUTO
LIMITED.....
RESPONDENT**

(Being an appeal from the Ruling of the Small Claims Court by the Honourable Gladys. W. Kiamah (Adjudicator) in Kakamega SCC Case No. E575 of 2022 delivered on 5th day of February 2024)

JUDGEMENT

1. This appeal arises from a judgment delivered in Kakamega SCC Case No. E575 of 2023 on 5th February 2024, where the Claimant/Appellant had filed a claim seeking judgement for the sum of Kshs. 150,000 for loss of user and for the sum of Kshs. 510,000/=compensation for the value of the vehicle allegedly illegally attached, plus costs of the claim.

2. The dispute concerned a loan agreement dated 26th August 2023 between the parties, in which the Appellant secured a vehicle loan from the Respondent. The Claimant contended that the Respondent wrongfully repossessed the vehicle without proper issuance of a default notice as mandated under **Sections 66** and **67** of the **Movable Property Security Rights Act**. She argued that, although she had defaulted on one instalment due to the vehicle being involved in an accident, she had communicated this to the Respondent and continued making payments thereafter. She also claimed that she was never duly served with the required statutory notice before the repossession.
3. The Respondent, however, argued that it had issued a "Notice of Suspension" dated 6th November 2023, and a subsequent communication offering options to settle the loan, including voluntary surrender of the vehicle.
4. The trial court found in favour of the Respondent, holding that the Notice of Suspension sufficed as adequate notice under the Act and dismissed the Claimant's suit.

5. The Appellant was dissatisfied with the decision of the trial court and filed this appeal on the following grounds:-

1) The learned Magistrate erred in law and fact by failing to find that the repossession of the Motor vehicle in question by the Respondent was procedurally flawed by virtue of Section 67(1) and 2(2) of the Movable Property Security Rights Act and that the Appellant's evidence of lack of service of default notice was not sufficiently mitigated by the respondent.

2) The learned judge erred in law and fact in failing to give due weight and consideration to the appellant's case and in failing to find that the appellant had discharged her burden of establishing that she was not served with the default notice.

3) The learned judge erred in law and fact by failing to find that the respondent had been unable to discharge its evidentiary burden of proving that it indeed effected service of the default notice to the appellant, and further by inferring, to the appellant's disadvantage, that the Notice of Suspension letter

filed by the Respondent automatically translated to proper service of the said letter.

4) The learned judge erred in law and fact in failing to give due weight and consideration to the fact that the appellant had cleared all her arrears that were due at the time of repossession and had continued to pay monthly instalments for the months the vehicle was in custody of the respondent.

Appellant's Submissions

6. The Appellant argued that the trial court erred both in law and fact by failing to find that the repossession of her motor vehicle by the Respondent was procedurally flawed for non-compliance with Section 67(1) and (2) of the Movable Property Security Rights Act.
7. She contended that the Act requires the secured creditor to serve a clear and comprehensive default notice before any enforcement action, including repossession. The Appellant testified that she was not served with such a default notice before the vehicle was repossessed.
8. The Appellant submitted that the Respondent relied upon a Notice of Suspension of Loan Facility as proof of

compliance. The Appellant challenged its sufficiency, contending that the Respondent had not proven proper service of the notice in accordance with the law. In particular, there was no evidence establishing that actual delivery of the notice had been effected, whether by physical service, registered post, or electronic means, such as WhatsApp. The Appellant argued that service of such notices cannot be presumed; instead, it must be proved by presenting credible and verifiable evidence.

9. The Appellant relied on the ***Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others [1996] eKLR***, where the court held the view that the burden of proving service of statutory notices lay on the party required to issue the same. She also relied on ***Elite Intelligent Transport Systems Ltd v Gulf Africa Bank Ltd [2020] eKLR*** and ***Real People Kenya Ltd & Another v Nyandega t/a Akmal Enterprises & Another [2022] KEHC 2118 (KLR)***, highlighting that there must be strict adherence to the notice requirements before any enforcement of security rights may occur.

Respondent's Submissions

10. The Respondent argued that the trial court was correct in holding the repossession of the Appellant's vehicle to be valid and in legal compliance with the provisions of the Movable Property Security Rights Act (MPSRA), 2017, particularly Sections 65-67, governing post-default enforcement rights.
11. The Respondent emphasised that there was a valid Asset Finance Loan Agreement and Security Agreement dated 26th August 2023 entered into between the parties, which permitted repossession upon default. It was the Respondent's case that the Appellant had defaulted in her repayment obligations and was duly notified of the said default.
12. The Respondent submitted that the Notice of Suspension of Loan Facility dated 6th November 2023 was properly delivered to the Appellant at her registered contact address, thus complying with the provisions of Section 67(1) and (2) of the Act.
13. The notice highlighted that arrears amounted to Kshs. 38,378 and warned that the vehicle may be repossessed if the arrears are not paid within 24 hours.

Further, a letter confirming payment was issued on the 14th day of November 2023, giving the Appellant options to clear the arrears, restructure the loan, or surrender the vehicle. The Respondent contended that the Appellant surrendered the vehicle to their staff after allegedly refusing the other options.

14. The Respondent argued that the trial court correctly found that sufficient and lawful service was effected, and that the repossession was procedurally sound. Additionally, it submitted that this appeal improperly invites the High Court to reassess factual evidence, contrary to the limits of an appeal under **Section 38(1) of the Small Claims Court Act**, which restricts appeals to matters of law only. The Respondent cited ***Momentum Credit Ltd v Keiwua (Appeal E015 of 2024)***, where the High Court held that appeals under Section 38(1) of the Small Claims Court Act lie only on points of law. Thus, the Appellant's attempt to revisit the evidence is improper.

Analysis and Determination

15. The issues for determination herein are;
 - a) *Whether the appeal raised points of law.*

b) Whether the trial court erred in law by finding that the Respondent's repossession complied with Section 67(1) and (2) of the MPSRA, particularly regarding the sufficiency and service of the default notice.

c) Whether the appeal is merited.

16. The Appellant contends that the repossession was procedurally flawed due to non-compliance with Section 67(1) and (2) of the Movable Property Security Rights Act, 2017, as no proper default notice was served. The Respondent relies on the "*Notice of Suspension of Loan Facility*" dated 6th November 2023, claiming it met the statutory requirements that required a formal written notice.
17. The question as to whether or not the notice was served is the point of law and not of fact. This is because the service of notice is a legal requirement whose absence would render the action undertaken by the Respondent in its absence irregular.
18. Section 67(1) mandates a default notice that clearly specifies the nature of the default, remedial actions, and a rectification period. The trial court accepted the

Notice of Suspension as sufficient. However, the Appellant argues that this notice was deficient in form and service.

19. I have perused the Notice of Suspension of the Loan Facility dated 6th November 2023. The same does not contain the Appellant's address of service, as provided in the Asset Financing Loan Agreement and Security Agreement dated 26th August 2023. Although the aforesaid agreements do not specify how the default notice should be served, it would be expected that service would be by registered post through the Appellant's given postal address, or even by WhatsApp, through the mobile number furnished by the Appellant.
20. The Appellant contended that she was not served with statutory notice and therefore it was on the Respondent to prove service. All the Respondent did was to file copies of the suspension notice dated 6th November 2023 and the confirmation of payment dated 14th November 2023. With nothing to prove that the Appellant was duly served with the Notice dated 6th November 2023, the seizure of the subject vehicle on

14th November 2023 during the service of the confirmation of payment was irregular.

21. As earlier stated, Section 67(1) requires service of a non-compliance notice drawn in accordance with Section 67(2). It is well settled that service of such notices are either through physical delivery to the Debtor's registered address or via agreed electronic means. The Respondent asserted delivery to the Appellant's registered address but provided no Affidavit of Service, postal receipt, or electronic acknowledgement, being a WhatsApp read receipt.

22. In ***Nyangilo Ochieng Omuom and another v Kenya Commercial Bank Ltd [1996] KECA 205(KLR)***, the Court of Appeal held that the lender must demonstrate by credible evidence that the Statutory Notice was duly and properly served. It is not enough to assert that a notice was issued; actual or constructive delivery must be proved. In this case, the absence of evidence of delivery constituted a misdirection in law.

23. In ***Real People Kenya Ltd and another v John Nyandega T/a Akmal Enterprises and another [2022] KEHC 2118 (KLR)***, the High Court quashed a

repossession for lack of verifiable evidence of service, emphasising that creditors must provide concrete proof, such as a courier receipt or affidavit. The Respondent's failure to adduce such evidence as a certificate of posting addressed to the Appellant on the date she was alleged to have been served, coupled with the Appellant's uncontroverted testimony of non-service through her WhatsApp number, which was provided in the agreement, should have weighed in her favour.

24. The trial court's reliance on the Respondent's mere assertion of service violated the principles in ***Kirugi & Another v Kabiya & 3 Others [1987] KLR 347***, where the Court of Appeal held that unproven assertions cannot discharge a statutory burden.
25. Consequently, this Court finds that the learned Adjudicator erred in law by equating the "Notice of Suspension" with a proper default notice under the MPSRA. The document did not meet the statutory form, period, and evidentiary requirements outlined in Sections 66 and 67.
26. The Appellant further submits that she cleared all arrears and continued making payments post-accident,

which the trial court failed to consider. The Respondent's letter of 14th November 2023, offering options to settle or surrender the vehicle, suggests ongoing communication but does not negate the defective notice of 6th November 2023. If the Appellant cleared the arrears of Kshs. 38,378/= before repossession, as alleged, this would undermine the Respondent's justification for enforcement under Section 66.

27. The trial court's failure to interrogate this evidence constitutes a misapprehension of the MPSRA's requirements. In ***Atik Mohamed Omar Atik & 3 Others v Joseph Katana & Another [2019] eKLR***, the Court of Appeal held that repossession absent a valid default (e.g., cleared arrears) is unlawful. The trial court's failure to address this issue constitutes an error of law, as it affects the legality of the repossession.
28. The court note that at the time of repossession, the Respondent was in default, albeit by one month. She was therefore in breach of the loan agreement. It was held by the court in the case of ***Real People Kenya Ltd and another v John Nyandega T/a Akmal***

Enterprises and another (supra), both parties must not benefit from omissions and breaches of each other. The circumstances in this case are that the Respondent had only paid Kshs.17,000/= on 24th September 2023 out of the expected payment of Kshs. 25,000/=. At the time of repossession, she was in default of the October payment on top of the earlier deficit. There is no telling whether she would have regularised her repayments had the vehicle not been repossessed. She was certainly prejudiced by the repossession. However, she had a contractual obligation to repay the loan, which obligation can only be discharged upon full repayment of the loan.

29. In light of the foregoing analysis, this Court finds that:
- a) The Respondent failed to comply with the statutory notice provisions under Sections 66 and 67 of the Movable Property Security Rights Act.
 - b) The “Notice of Suspension of Loan Facility” did not constitute a valid default notice under the Act.
 - c) The repossession of the Appellant’s motor vehicle was therefore procedurally unlawful and the trial

court misdirected itself in law by holding otherwise.

30. Accordingly, the appeal succeeds. The judgment of the Small Claims Court delivered on 5th February 2024 in SCC. No. E575 of 2023 is hereby set aside, and in its place, judgement is entered for the Appellant in the following terms-:

- a) A declaration is hereby made that the repossession of the Appellant's motor vehicle was unlawful and in contravention of Sections 66 and 67 of the MPSRA.
- b) The Respondent shall pay the Appellant compensation for the value of the repossessed vehicle at Kshs. 510,000/= and Kshs. 150,000/= for loss of user.
- c) The Respondent shall offset the balance owing on the loan from the decretal sum.
- d) The Appellant is awarded half the costs of the appeal and half the costs of the primary suit.

Dated, signed, and delivered at Kakamega, this 19th day of December 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Otiato for the Appellant

No appearance for Mr. Oriema for the Respondent

Court Assistant: Polycap

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