Kahiga v KCB Bank Kenya Limited (Civil Appeal E004 of 2025)
[2026] KEHC 887 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CIVIL APPEAL E004 OF 2025

JN NJAGI, J

JANUARY 29, 2026

BETWEEN

JAMES NJOROGE KAHIGA .... APPELLANT

AND

KCB BANK KENYA LIMITED .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. P. E. Nabwana, SRM, in Mpeketoni PMC Civil Case No. E022 of 2023 delivered on 2/1/2025)

JUDGMENT

1. The Appellant herein was advanced a loan facility by the respondent which was used to purchase a motor vehicle registration No.KCZ 594 L Isuzu lorry. The loan was to be serviced in monthly instalments of Ksh.155,000/=. After the purchase of the motor vehicle, it was registered in the joint names of the Appellant and the Respondent. The Appellant started to service the loan. In the month of November 2022, the motor vehicle was involved in an accident and was taken to a garage for repairs. In the month of February 2023, the Appellant fell into arrears of his loan repayments. The Respondent instructed an auctioneer, (whose appeal case was withdrawn) to repossess the motor vehicle which was done. The motor vehicle was then parked at the Respondent`s bank premises at Mpeketoni. The Appellant went there and inspected the motor vehicle and found it vandalized. He called a mechanic, PW2 who inspected the motor vehicle and noted down the missing parts.

2. The appellant sued and claimed in the suit that the repossession of the motor vehicle was illegal, that the motor vehicle was undervalued for the purposes of sale and that the motor vehicle was vandalized while under the custody of the respondent who should replace the missing parts as follows before releasing it to the Appellant: gear box, break booster, two batteries, broken inside mirror, one sidemirror for rear review, injector drive, ATF container, propeller shaft, stater motor, tubor, main fold computer and clutch pressure plate. He sought for the following reliefs:

a. A permanent injunction restraining the defendant, by itself, its agents, servants, representatives, employees, assignees or any other person claiming and/or acting under it from undervaluing Motor Vehicle Registration No.KCZ594L make Isuzu, type Lorry/Truck and from giving instructions to the 2nd defendant or any other person or entity to sell by public auction the Plantiff's said Motor Vehicle Registration No.KCZ594L make Isuzu, type Lorry/Truck and from effecting any such adverse action to the Plaintiff's said Motor Vehicle.

b. A declaration that the impounding or possession of Motor Vehicle Registration No.KCZ594L make Isuzu, type Lorry/Truck registered in joint of the plaintiff and the 1st Defendant by the 2nd Defendant was illegal null and void and the same was undervalued at Kshs.2,800,000/= with the intention of selling the same at the same undervaluation.

c. An order that the Plaintiff be allowed to pay the outstanding loan arrears estimated at Kshs.4,000,000 as at 25th March, 2023 at the agreed instalments of Kshs.155,000/=.

d. An order compelling the 1st defendant to purchase new motor vehicle parts as tabulated in paragraph 10 herein above and the same be fixed to the subject motor vehicle to restore the motor vehicle to its original status and thereafter release the motor vehicle to the Plaintiff upon satisfaction by the Plaintiff.

e. Costs of the Suit.

f. Any other or further relief that the Court shall deem fit and just to grant.

3. The Respondent denied the claim. The suit proceeded by way of viva voce evidence wherein the Appellant testified as PW1 and called his Mechanic, PW2, as a witness in the case. The Respondent called the bank manager at their Mpeketoni branch, DW1 and the auctioneer, DW2, as witnesses in the case.

4. The trial magistrate in his judgment held that the repossession flouted legal procedures and was thus null and void. That the same should start afresh. The rest of the case was dismissed. Each party was ordered to meet its own costs. The Appellant was aggrieved by the decision of the trial court and lodged the instant appeal.

5. The grounds of appeal are that:

   1. The learned trial Magistrate erred in law and fact in failing to appreciate that the Appellant had proven his case to the required threshold being on a balance or probability.

   2. The learned trial magistrate erred in law and fact in holding that the Respondent's defence succeeded and at the same time, affirming that the possession of the Appellant's motor vehicle by the Respondent flouted the law and therefore null and void the consequence of which was that the learned trial Magistrate ought to have directed the Respondent to repair the lorry and return it to the Appellant.

   3. The learned trial Magistrate erred in law and fact by deviating from the Appellant's case in the manner the court framed the issues for determination that were not in contention and in so doing disregarded the gravity of the Appellant's case.

   4. The learned trial Magistrate erred in law and fact in ordering that the repossession of the lorry by the respondent start afresh ignoring the fact that, the lorry was significantly vandalized while in actual and physical control of the Respondent thus, it was prudent for the court to direct the Respondent to repair it first before handing it back to the Appellant.

5. The learned trial Magistrate erred in law and fact in holding that the Appellant had failed to demonstrate or prove the damage and vandalism done on the lorry while in actual and physical possession of the Respondent which finding is in total disregard of the evidence adduced by the Appellant including the motor vehicle assessment done by the Appellant's mechanic one, Mzee Ali Idana that revealed missing parts including: gear box, brake box, brake booster, two batteries, broken inside mirror, ne side mirror, turbo, main fold, computer box and clutch pressure plate.

6. The learned trial Magistrate erred in law and fact in holding that since part of the amount claimed is proved to be due, a chargor (the Respondent) cannot be restrained by an injunction which finding runs counter to the law which bars exercise of chargor's rights where due process has been flouted.

7. The learned trial Magistrate erred in law and fact in failing to address the Appellant's claim that the Respondents maliciously undervalued the lorry to his detriment and unjustly so.

6. The Appellant sought to have the judgment of the trial court vacated and or set aside and for judgment to be entered against the Respondent as prayed in the Plaint dated 18th September 2023.

7. The appeal was canvassed by way of written submissions of the respective counsels for the Appellant and the Respondent.

Appellant`s submissions

8. Counsel for the Appellant submitted on 2 issues – on the repossession of the motor vehicle and on the vandalism done on the vehicle while under the custody of the Respondent.

9. On the issue that the repossession of the motor vehicle was illegal, counsel submitted that the finding was arrived at based on the wrong misinterpretation of the facts and the law. That section 8 of the Auctioneers Rules provides that an auctioneer seizing or repossessing goods under court warrant shall be responsible for the safe custody of the goods repossessed until the same are sold or the seizure is withdrawn. That the auctioneer in this matter after repossessing the motor vehicle kept it at the premises of the Respondent which was contrary to the provisions of the Auctioneers` Rules. That the same exposed the motor vehicle to danger, interference or vandalism by the Respondent.

10. Counsel submitted that the implication of the finding that the repossession was illegal, null and void was that the Respondents were liable for the vandalism done on the vehicle. That in that case the court ought to have ordered the Respondent to repair the motor vehicle and surrender it back to the Appellant. Additionally, that the Appellant`s default in servicing the loan could be partially attributed to the Respondent`s own actions or omissions and hence its right of sale could not be enforced on account of contributory breach.

11. On the issue of vandalism, counsel for the Appellant submitted that the trial court disregarded the evidence adduced by the Appellant and more so that of the Appellant`s mechanic, PW2 whose assessment revealed that the lorry had missing parts including the gear box, break box, break booster, two batteries, broken inside mirror, turbo, main fold, computer box, and clutch pressure break.

12. It was submitted that the evidence of the assessment of the Appellant`s mechanic PW2 was unchallenged and thus proved the vandalism on a balance of probabilities. As to what amounts to

prove on a balance of probabilities, reliance was placed in the case of William Kabogo Gitau v George Thuo & 2 others (2010) 1 KLR 526, where Kimaru J, (as he then was) held that:

> 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 is 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.

13. In view of the foregoing, counsel for the appellant urged the court to allow the appeal.

Respondent's submissions

14. Counsel for the Respondent submitted on two issues - whether the Respondent was justified in repossessing the motor vehicle and whether the motor vehicle was vandalized and undervalued.

15. On repossession, counsel submitted that Clause 11.1 and 11.2 of the Letter of Offer and Acceptance gave power to the Respondent to repossess and sell the motor vehicle in the event of default of the loan repayments. That the Appellant admitted in cross-examination that he went into arrears of the loan repayments after the motor vehicle was involved in a road accident in November 2021. That the Respondent was in the premises just enforcing the agreement between the parties and was thus justified in repossessing the motor vehicle.

16. It was submitted that the Appellant was issued with several demand letters dated 15/6/2022, 30/6/2022 and 11/9/2023, demanding that the loan arrears be regularized. That the Respondent thus complied with Section 67 of the Movable Properties Securities Act which provides that:

    67. Relief for non-compliance

        (1) If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be.

17. It was submitted that the Appellant was served with a Proclamation Notice dated 8th February 2023, D.Exh.10, giving him 7 days` notice of the repossession of the motor vehicle. That the Respondent having complied with the law, he could not be restrained by an order of injunction in exercising its right of sale. Reliance in this proposition was placed in the case of Mechanical Engineering Plant Limited & others v Standard Chartered bank Limited HCCC No. 92 of 2007 where the court stated that:

> .when part of the amount claimed is admitted or proved to be due, a chargor cannot be restrained by an injunction.

18. Further reliance was placed in the case of Daniel Kamau Mugambi v Housing Finance Company of Kenya Limited [2006] KEHC 1790 (KLR), quoting the case of Francis J,K. Ichatha v Finance Company of Kenya Limited Civil Application No. 108/05, where the Court of Appeal stated that:

> " A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent a debt of which he expressly undertook to pay."

19. The Respondent submitted that in repossessing the motor vehicle it was just enforcing the agreement between the parties. That where there is an express agreement between the parties, the courts cannot rewrite the same by imposing new arrangements for repayment. In this respect, they relied on the case of National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another (2002) EA 503 where the Court emphasized that a court cannot rewrite the contract of the parties.

20. On the issue of vandalization of the motor vehicle, the Respondent submitted that there was no evidence that the Respondent had vandalized the motor vehicle. That the evidence on record showed that the vehicle was in a deplorable state and already dismantled when it was repossessed.

21. It was submitted that the Respondent did not have anything to do with the repairs as the motor vehicle was comprehensively insured with UAP and the Respondent was only a financier of the vehicle.

22. It was submitted that a party ought to approach the court with clean hands and not with evidence that is less than candid or which is meant to mislead. The Respondent in this respect cited the case of NCBA Bank PLC v Cyrus Ndungu Njeri t/a Digital Tours & Logistics (2021) where it was observed that:

> "What is meant by having "regard to the interest of the mortgagor?" there is similar legislations in England (see section 101 of the Law of Property Act (1925))...In Halsbury's Laws of England, 4th ed. Vol. 32 para. 276 it is stated:
>
> If the mortgager seeks relief promptly a sale will be set aside if there is fraud or if the price is so low as to be in itself evidence of fraud.
>
> ...So far as mortgagees are concerned the law is set out in Cuckmere Brick Co. Ltd vs Mutual Finance Ltd (1972) 2 ALL E.R. 633, (1971) Ch.939. If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible...There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care."

23. On the issue of the valuation of the motor vehicle, the Respondent submitted that the Appellant`s mechanic PW2 did not avail any valuation and assessment report to show the extent of the alleged damage or loss of spare parts. That he did not avail any professional certificate in support of his qualification as a mechanic.

24. It was submitted that the contention by the Appellant that the Respondent vandalized the vehicle with the intention of lessening the value of the motor vehicle so as to sell it at low price was not proved as the Appellant did not avail any valuation report that would show the actual value of the motor vehicle that was said to be a former shell of itself.

25. It was submitted that the Respondent had no reason of lessening the value of the motor vehicle since if the vehicle was in good condition it would attract good price.

26. The Respondent submitted that the Appellant failed to tender evidence in support of the claim for repair of damaged parts on the motor vehicle.

Analysis and determination

27. This being a first appellate court, it was held in Selle vs Associated Motor Boat Co. [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. I have considered the grounds of appeal, the grounds in opposition thereto, the record of the trial court and the submissions by the respective advocates for the parties. The issues for determination are:

    (1) Whether the repossession of the motor vehicle was lawful;

    (2) Whether the Respondent vandalized the motor vehicle;

    (3) Whether the motor vehicle was undervalued; and

    (4) Whether the Appellant was entitled to the prayers sought.

Whether the process of repossession of the motor vehicle was unlawful

29. The trial magistrate held that the repossession of the motor vehicle flouted the rules of procedure as set out under Rule 12 of the subsidiary legislation to the *Auctioneers Act* which demands that a Proclamation Notice be served upon the owner of the goods sought to be attached. That the owner is required to append his signature to the Proclamation Notice and where the owner refuses to sign, the auctioneer is required to issue a certificate to that effect. That in this case the Appellant denied being served with the Proclamation Notice. That there was no evidence that the Appellant was served with the Notice as he did not sign accepting service. That the auctioneer claimed that he called the Appellant to pick his documents which he refused, but the auctioneer did not try any other mode of service such as through WhatsApp. Consequently, the court held that there was no satisfactory evidence that the Appellant was served with the Proclamation Notice and as such the motor vehicle was un-procedurally impounded and or repossessed.

30. The court further held that when the auctioneer took away the vehicle, the Appellant was absent and the auctioneer did not prepare an inventory as to its status by a qualified mechanic or a motor vehicle assessor. That the photographs produced by the auctioneer could not inform the court of the mechanical status of the vehicle with certainty.

31. The question then is whether the Appellant was served with the Proclamation Notice. Counsel for the Respondent submitted that the auctioneer testified that he served the same on the Appellant. That the Appellant admitted in cross-examination that he was showed a 'letter' by the auctioneer which showed that he wanted to repossess the motor vehicle.

32. I have considered the evidence adduced at the trial court in respect to the Proclamation Notice. Though the Appellant denies being served with the said notice, he said in cross-examination that he was showed a letter by the auctioneer which indicated that he wanted to repossess the motor vehicle. He also stated

that after he was shown the said letter, the motor vehicle stayed at the garage for one month before it was taken to the bank premises.

33. The trial magistrate in his judgment held that there was no evidence that the Appellant was served with the Proclamation Notice. I have looked at the Proclamation Notice filed by the auctioneer which is on page 167 of the Record of Appeal. Affixed to the document are the following words:

    I Brayan Mwangi have served the Proclamation to James Njoroge who has declined to sign but has retained the original copy.

34. The time of service is indicated on the document together with the date of service which is indicated as 08/02/2023. The auctioneer has signed the Proclamation Notice.

35. In my view, the affixed stamp serves as a certificate as required under Rule 12 of the Auctioneers Rules that the Appellant was served with the Proclamation Notice but refused to accept service. The Appellant must have been lying that he was only shown a repossession letter. He did not identify the said 'letter'. The fact that repossession took place a month after the Appellant was purportedly shown the 'letter' is a clear indication he was served with the Proclamation Notice as testified by DW2. The trial magistrate did not consider the certificate of service affixed to the Proclamation Notice before arriving at a finding that the Appellant was not served with the Proclamation Notice. I find that the Appellant was served with the Proclamation Notice. The auctioneer complied with the Rules in impounding the motor vehicle. The repossession was consequently procedural.

Whether the Respondent vandalized the motor vehicle

36. It was the evidence of the Appellant that the motor vehicle broke down at Gongoni in Malindi and he called a mechanic from Mpeketoni named Maina to go and repair the motor vehicle. That the vehicle was later towed to the garage of the said Maina at Mpeketoni. That 2 days later the auctioneer went to the garage and repossessed the motor vehicle. It was taken to the parking yard of the appellant at Mpeketoni.

37. It was further evidence of the Appellant that after the repossession he went to the said parking yard and checked the lorry. He saw that it did not have some parts. He summoned a mechanic PW2 to inspect the lorry and note down the missing parts. That the respondent summoned the mechanic called Maina to represent them during the inspection. That both mechanics confirmed the missing parts. The appellant produced the list of the missing items as exhibit in the case.

38. The Appellant`s mechanic, PW2 testified that he was indeed called by the Appellant to go to KCB offices. That on getting there the Appellant asked him to check whether the lorry had missing parts. He did so and found the following parts missing – the gear box, break booster, two batteries, broken inside mirror, one side mirror for rear view, injector drive, ATF container, propeller shaft, stater motor, turbo, main fold, computer and clutch pressure plate.

39. I have considered the above evidence. There is no dispute that the motor vehicle was vandalized. The witness for the Respondent DW1 told the trial court that the motor vehicle was undervalued because it had been vandalized. This was an admission that the motor vehicle was indeed vandalized.

40. The Appellant testified that after he took the motor vehicle to the garage of Mr. Maina, he instructed him to remove the crank shaft for repair which necessitated removing the engine and the gear box. That the latter two were removed. That he found them at the cabin of the motor vehicle after the motor vehicle was repossessed.

41. The auctioneer, DW2, testified that when he went to the garage to repossess the motor vehicle, he found the engine dismantled from the vehicle. That he put it in the vehicle and ferried it to the Respondent's yard together with the motor vehicle. That he took photographs of the motor vehicle and the dismantled parts. However, the court notes that the photographs of the dismantled parts that DW2 filed with the court are not clear and visible.

42. The Appellant alleged that the motor vehicle was vandalized at the parking yard of the Respondent after it was repossessed. It was his evidence that the vehicle was being repaired by the mechanic called Maina. That it is the said Maina who dealt with it both at Gongoni and at Mpeketoni.

43. The trial magistrate in his judgment faulted the Appellant for not calling the mechanic who opened the lorry for repairs yet he is the one who knew what the lorry had or did not have when it was taken to his garage.

44. Since the motor vehicle was repossessed while at the garage of Mr. Maina, it was, in my view, incumbent upon the Appellant to prove that the missing parts were in the vehicle when the vehicle was repossessed. Mr. Maina as the mechanic under whose care the vehicle was before it was repossessed was best placed person to tell the court whether or not the missing parts were in the vehicle when it was repossessed. The Appellant did not tell the court why he opted to instruct a different mechanic to inspect the motor vehicle instead of calling the person under whose custody the vehicle was before it was repossessed. He did not explain to the trial court why he was not calling Mr. Maina as a witness in the case.

45. Further to this, the evidence adduced before the trial court does not disclose the date the inspection was done on the motor vehicle - whether it was on the same day the vehicle was repossessed or it was on a subsequent date. The report of the mechanic who inspected the motor vehicle PW2 was not dated and as such it could not assist on that end. If the vehicle was not inspected on the day of the repossession, there was no way of knowing whether the missing parts were in the vehicle or not when the same was repossessed. It was upon the appellant to adduce evidence that the missing parts were in the vehicle when it was repossessed. Having failed to adduce evidence to that end, he had no basis of alleging that the parts went missing after the motor vehicle was taken to the parking yard of the Respondent. The parts may have gone missing when the vehicle was under the custody of Mr. Maina. Accordingly, I find no evidence to prove that the motor vehicle was vandalized while under the custody of the Respondent.

Whether the motor vehicle was undervalued

46. It was the evidence of the Appellant that the Respondent wrote him a letter dated 11th September 2023 informing him that they had conducted a valuation on the motor vehicle which returned a valuation of Ksh.2,800,000/= and they threatened to sell the motor vehicle after 7 days unless he paid the outstanding arrears of Ksh.5,341,003.50. It was the contention of the Appellant that the motor vehicle was undervalued. The trial court did not make a finding on the issue.

47. In my view, the only way of countering the valuation done by the Respondent was by the Appellant engaging another expert to conduct a valuation on the motor vehicle. Without such expert evidence, the Appellant has no basis of arguing that the motor vehicle was undervalued when he at the same time concedes that the motor vehicle was vandalized, was in a bad state and is a shell of its former self. The Appellant`s argument on undervaluation of the motor vehicle is therefore dismissed.

Whether the Appellant was entitled to the prayers sought

48. The appellant was seeking for, inter alia, a permanent order of injunction against the Respondent to restrain them from proceeding with the sale of the repossessed motor vehicle. The trial court while

dismissing the prayer for permanent injunction cited the case of Andrew Kamau Mucuha v Ripples Limited (2001) eKLR where the Court of Appeal held the following on mandatory injunctions:

> " In all the treatises, precedents and court arguments etc whenever an issue of a mandatory injunction arises it is clearly understood and accepted that such an injunction should issue in the clearest and special cases only. It should issue with utmost care and even reluctance. This Court appreciates this stance well. The rationale of this stance should be that the effect of an order for a mandatory injunction is that the party against whom the order is made should do or undo something. Many side effects may follow such an act. So it is well understood as to why Courts issue such orders with care and even reluctance."

49. It is therefore clear that a permanent injunction as sought by the Appellant ought to be issued with a lot of care. In the case of Mechanical Engineering Plant Limited & others v Standard Chartered bank Limited (supra) that was cited by the Respondent, it was held that a chargor cannot be restrained by an injunction where part of the amount claimed is proved to be due. The order for permanent injunction as sought by the appellant will preclude the Respondent from recovering their money even when the Appellant is in breach of his obligations to service the loan. An order for injunction as sought by the Appellant could therefore not issue.

50. The Appellant was further seeking that he be given time to pay the loan by monthly instalments of Ksh.155,000/= as earlier agreed by the parties. Since the Appellant is in default of his loan repayments, it is for him to negotiate with the Respondent to see whether they can allow him to continue paying the money as earlier agreed. Otherwise this court cannot interfere. It is trite law that parties are bound by terms of contracts they enter into and that a court of law cannot rewrite a contract for the parties, see National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another (supra). That being so, the prayers sought by the Appellant were not deserved.

51. In view of the foregoing, I do not find any merit in the appeal and the same is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 29TH DAY OF JANUARY 2026,

J. N. NJAGI

JUDGE

In the presence of:

Mr. Omwancha for Appellant

Miss Osewe for Respondent

Court Assistant - Rahma