

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARSEN**  
**CIVIL APPEAL NO. E008 OF 2024**

**CO-OPERATIVE BANK OF KENYA  
LIMITED.....APPELLANT**

**-VERSUS-**

**FREDRICK RUO NGUGI.....  
RESPONDENT**

***(Being an appeal from the judgment and decree of P. E. Nabwana,  
SRM in Mpeketoni CMCC No. E009 of 2023 delivered on 18/7/2024)***

**JUDGMENT**

1. The Appellant herein advanced the Respondent a loan facility in the sum of Ksh. 3,258,900/= for the purchase of a motor vehicle reg. No. KCF 978H. An Asset Finance Hire Purchase Agreement dated 2<sup>nd</sup> September 2015 was executed. The Appellant made a down payment of Ksh. 362,1000/= and was to pay the loan by monthly instalments of Ksh.80,537.16 for a period of 60 months. Meanwhile, the motor vehicle was registered in the names of both the Appellant and the Respondent. The Respondent commenced to service the loan but later fell into arrears to the sum of Ksh. 2,200,000/=. The Appellant repossessed the motor vehicle and sold it in recovery of the loan. Even then, the Appellant demanded for more money from the appellant as the sale had not raised the full amount owing. The Appellant sued. He contended that the repossession was unlawful as he was not given a notice before repossession; that he was not notified before the motor vehicle was sold and further that the motor vehicle having been sold

the debt must have been fully repaid. He sought for orders, inter alia, that:

- A declaration that the asset financing facility remains fully secured by the asset itself,
- A declaration that in the absence of a statutory demand or lawful orders of the court the omissions resulting into the repossession and sale of the motor vehicle was unprocedural and unlawful,
- A declaration to the effect that the Respondent's liability to the appellant remains effectively extinguished and negated,
- A declaration that the Respondent is not indebted to the Appellant and an order to issue unconditionally discharging the notices of recalling the debt dated 13<sup>th</sup> March, 2023 and 3<sup>rd</sup> April, 2023.

2. The Appellant denied the claim and contended that notice was issued to the respondent before repossession. They asserted that the repossession and sale of the motor vehicle was lawful. That the sale of the motor vehicle did not extinguish its right to pursue any shortfall. They made a counterclaim for the shortfall of Ksh. 1,567,160.73/= with interest at 16.53% per annum.

3. After a full trial, the trial magistrate held that the respondent was entitled to notice prior to repossession which the appellant failed to issue. That the sale was unlawful for the reasons that the sale was not advertised. The court further held that a substantial amount had been paid which precluded the Appellant from selling the property. The court

consequently held that the unlawfulness of the sale extinguished the Appellant`s right to pursue any purported shortfall.

4. The Appellant was aggrieved by the judgment and lodged the present appeal. The grounds of appeal are that: -

**1. That the learned trial magistrate erred in law in invoking the movable Property Security Rights Act CAP 499A when that statute was inapplicable.**

**2. That the learned trial magistrate erred in law and fact in concluding that the sale of the security violated either the Movable Property Security Rights Act CAP 499A or the Hire Purchase Act Cap 507.**

**3. That the learned trial magistrate erred in law and in fact in concluding that the Appellant`s right to pursue the counterclaim was extinguished by the sale of the security.**

5. The appellant sought to have the judgment set aside and be substituted with an order dismissing the Plaintiff`s (Respondent`s) suit and allowing the Defendant`s (Appellant`s) counterclaim dated 1<sup>st</sup> August, 2023.

6. The appeal was canvassed by way of written submissions of the respective counsels appearing for the parties.

### **Appellant`s submissions**

7. The appellant submitted on three main grounds, to wit:

- (1) Whether the invocation by the trial court of the Movable Property Security Rights Act CAP 499A was proper;
- (2) Whether the sale was unlawful; and

(3) Whether the right to the Appellant`s counterclaim was extinguished.

8. On the first issue, the Appellant submitted that the magistrate wrongly invoked the provisions of the Movable Property Security Rights Act as the issue was not raised by the parties in their pleadings or arguments. Secondly, that the Act came into force on 16<sup>th</sup> May 2017 while the hire purchase agreement between the parties was signed on 2<sup>nd</sup> September 2015. That it is settled law that an Act of parliament cannot apply retrospectively unless so provided in the Act, which is not the case in the matter herein. The Appellant in this respect relied on the case of **Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority (2016) KECA 411 (KLR)**.

9. The other argument in respect to the Act is on derogation by Agreement. It was argued that even if the Act was applicable, the requirement of notice could be contractually waived. That section 67 of the Act which requires the giving of notice explicitly states that notice may be derogated by agreement between the parties. That Clause 5 of the Hire Purchase Agreement between the parties herein provided that repossession could occur without notice in case of default. That the respondent admitted the default. Therefore, that the trial court erred in holding that notice was critical.

10. On the second issue, the appellant faulted the trial court for the finding that the sale was unlawful for being "secretive" and because more than two-thirds of the price had been paid. He submitted that evidence showed the sale was publicized on the appellant's website wherein multiple bids were received and a winner was declared. They

argued that the Respondent was not entitled to special notification after defaulting.

11. Counsel also argued that the law does not mandate that only a sale by public auction is lawful as private sales are also permitted nor can it be that a sale has to be by public auction for it to be transparent. It was counsel's submission that the magistrate's calculation regarding the one-third payment rule was also factually incorrect.

12. On the third issue, the Appellant faulted the trial court in holding that the right to counterclaim was extinguished by the violations committed by the Appellant. The Appellant submitted that the trial magistrate acknowledged that the appellant was indebted to the respondent. It was submitted that even if violations had occurred, they would entitle the Respondent to damages and not the extinguishment of a lawfully owed debt. It was submitted that the trial court did not cite any authority for his conclusion.

13. The Appellant further argued on the doctrine of election as established under section 90 of the Land Act Cap.300. He also referred to section 67 of Cap.499A. He submitted that the magistrate misunderstood the legal precedent in the case of **Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) (2017) eKLR** and submitted that the law does not state that a creditor who repossesses and sells collateral loses the right to sue for the remaining debt balance. It was submitted that the law only prevents the simultaneous exercise of these rights. It was further submitted that Section 65(2) of Cap 499A explicitly allows a creditor to pursue the debtor for any shortfall after selling the collateral.

## **Respondent`s Submissions**

14. Counsel for respondents identified two issues for determination: first, whether the repossession and subsequent sale of the suit motor vehicle was lawful and procedural and secondly whether the Respondent is indebted to the Appellant as pleaded in the counter claim.

15. On the first issue, counsel submitted that the Respondent was never made aware of the intention to sell the suit motor vehicle. Counsel relied on the case of **NCBA Bank PLC v Cyrus Ndung'u Njeri t/a Digital Tours and Logistics (2021) eKLR** where the court held that the consumer of service including banking services are entitled to the protection of their economic interests which interests include the right to the best possible market price when the secured creditor resorts to selling the security being sold can be ascertained.

16. On the second issue on whether the Respondent is indebted to the Appellant as pleaded in the counter claim, counsel submitted that the Respondent contended that the amount had been extinguished by the fact that the bank had unlawfully repossessed and sold the suit vehicle. He contended that the Appellant ought to have served the plaintiff with a notice before repossessing the suit motor vehicle. That failure to follow due process by any financial institution may occasion sanctions. He relied on Section 68 of the Movable Property Secured Rights Act stating that where the creditor has committed a wrongful act as against the contract, the creditor cannot sue under Section 68 (1) (b).

17. Counsel submitted that the Hire Purchase agreement was clear that the only security realizable under the facility was the suit vehicle which the defendant sold. He argued that if the defendant desired to

have any additional securities, he ought to have prepared additional amendments thereto. He relied on the cases of **Dinesh Kumar Zaverchard Jetha v Guaranty Trust Bank (Kenya) Limited (2017) eKLR** and that of **In Re Hi-Plast Ltd (2019) eKLR**.

18. The Respondent urged the court to dismiss the appeal with costs.

### **Analysis and determination**

19. I have carefully considered the grounds of appeal, the record of the trial court and the submissions by the respective counsels for the parties. This being a first appeal the duty of this court is to reconsider the evidence, evaluate it and draw its own conclusions. In **Peter M. Kariuki -vs- Attorney General (2014) eKLR** the Court of Appeal held, inter alia, as follows:

**“We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”**

20. At the same time, the court should stay alive to the fact that it did not hear the witnesses testify nor did it observe their demeanor and therefore give credit to that.

### **The trial court`s judgment**

20. The trial magistrate in his judgment held, inter alia, that the Appellant did not serve the Respondent with a notice to repossess the motor vehicle, nor did he serve him with notice to sell the motor vehicle whilst the Respondent had an interest in the vehicle as a co-registered owner of the motor vehicle.

21. The court further held that failure by a lender to follow due process may occasion sanctions. That section 68 (1) (b) of the Movable Properties Act presupposes that where the creditor has committed wrongful acts as against the contract, the creditor cannot sue.

22. The trial magistrate held that the hire purchase agreement was clear that the only security realizable under the agreement was the suit motor vehicle which the Appellant sold without following the due process. That the Appellant should have sought for additional securities if the secured security was not sufficient. The court cited the case of **Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) Limited (2017) KEHC 2495 (KLR)** where it was held that:

Among the remedies of the chargee against a “defaulting chargor” is the power of sale. It targets the charged property and not the chargor on his personal covenants. Therefore the chargee cannot sue the Principal Debtor and at the same time “exercise power of sale” the Guarantor’s charged property. But cannot sue the Guarantor personally and at the same time sell the charged property. However, that is not the case herein. I find that the target herein is the charged property. As such the suit HCCC No. 379 of 2005 has no legal effect herein unless the Respondent has already obtained Judgment therefrom and satisfied the debt over which the Respondent is liable to pay.

23. The trial magistrate in his judgment held that failure by a lender to follow due process may occasion sanctions. That section 68 (1) (b) of

the Movable Properties Act presupposes that where the creditor has committed wrongful acts as against the contract, the creditor cannot sue.

24. The court, referred to the doctrine of election and stated that once a bank decides to pursue a remedy available to them, they cannot pursue another remedy that may be available without first having followed due procedure and law when trying to realize the first security.

25. The issues for determination are;

- 1. Whether the repossession and sale of the security was unlawful**
- 2. Whether the sale extinguished the debt.**
- 3. Whether the counterclaim should have been allowed.**

***Whether repossession was unlawful***

26. The trial court invoked the provisions of the Movable Properties Security Rights Act to hold, inter alia, that the repossession of the motor vehicle was unlawful. Upon considering the issue, I am in agreement with the submission by the Appellant that the trial magistrate wrongly invoked the provisions of the said Act in that the hire purchase agreement between the parties was entered into in the year 2015 while the Movable Properties Security Rights Act came into force in 2017. It is trite law that an Act of Parliament cannot operate retrospectively unless the Act states so. In the case of **Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority** (supra), the court stated that:

**The general rule is that statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence, are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implications, it appears that this was the intention of the legislature.**

27. There is no provision in the Movable Properties Security Act that indicates that it was to operate retrospectively. Consequently, the provisions of the Act were not applicable in this case.

28. The Appellant contends that the repossession of the motor vehicle was lawful as the same was allowed by Clause 5 of the Hire Purchase Agreement between the parties which provided that repossession could occur without notice in case of default. The Respondent on the other hand contends that the repossession of the motor vehicle was unlawful as he was not given notice before repossession.

29. I have looked at clause 5 of the Hire Purchase agreement between the parties. The same states that in the event the hirer was in default of punctual payment of any of the hire rentals, the owners “may immediately terminate the hiring and they shall without previous notice or demand become entitled to the immediate possession of the motor vehicle and to retake and resume possession”. The clause therefore provided for repossession without notice in the event of default of payment by the Respondent.

30. Section 29 of the Hire Purchase Act Cap. 507, however provides as follows:

**Limitation on enforcement of agreement**

**An owner shall not be entitled, by reason of the hirer’s failure to carry out any obligation under a hire-purchase agreement, to enforce—**

(a)....

**(b) any provision in the agreement for the payment of an amount of damages, or for forfeiture or penalty, or for the acceleration of the payment of an instalment, unless he has made written demand to the hirer to carry out the obligation in question within a specified period of not less than fourteen days beginning with the date of service of the demand and the hirer has failed to comply with the demand.**

31. The Hire Purchase Agreement that was entered into between the parties therefore provided for repossession of the motor vehicle in case of default of payment by the Respondent without the Appellant issuing a notice to the Respondent. This was contrary to the provisions of section 29(b) of the Hire Purchase Act. In view of the clear provisions of the said section, clause 5 of the Hire Purchase Agreement was null and void. The Appellant was as per the provisions of the law required to issue notice to the Respondent before repossessing the motor vehicle. That being the case, the question is whether there was notice before the motor vehicle was repossessed.

32. The Appellant says that they issued a notice to the Respondent before they repossessed the motor vehicle. The Respondent on the other hand says that no such notice was issued.

33. The trial court held that issuance of a notice was crucial and that no notice was issued to the Respondent before repossession took place. I have on my part considered this issue. Though the Appellant stated in their submissions that there was a notice issued vide a letter dated 10<sup>th</sup> August 2019, I have not found such a letter in the documents produced before the trial court. No such letter was referred to in the Appellant`s list and bundle of documents dated 1<sup>st</sup> August 2023. Nor did the Appellant`s witness, Peter Kago, (DW1) who was the

business banker for the Appellant at their Mpeketoni branch refer to such a document when he testified in court. For these reasons, I find that the Appellant was entitled to be issued with a notice before repossession of the motor vehicle took place and no such notice was issued by the Appellant. Consequently, I find that the repossession of the motor vehicle was unlawful, null and void.

### ***Whether the sale was unlawful***

34. The Respondent argued that he was not informed of the intention to sell the motor vehicle. That the sale was not advertised. That two-thirds of the purchase price had been paid. That the illegal repossession and sale of the motor vehicle extinguished the debt.

35. The Appellant on the other hand argued that the evidence showed the sale was publicized on their website, multiple bids were received, and a winner was declared. That the respondent was not entitled to special notification after defaulting. That private sales are also legal. That the magistrate's calculation regarding the two-thirds payment rule was factually incorrect.

36. There was no dispute that the Appellant advanced the Respondent a loan of Ksh.3,528,900/= of which the appellant paid a sum of Ksh.1,227,500,009.26. The Respondent had thus not paid more than two-thirds of the loan. Section 15 (1) of the Hire Purchase Act provides that where the hirer has paid an amount equal to or exceeding two-thirds of the hire purchase price, the creditor cannot repossess the asset without first obtaining a court order. The

provisions of the said section could not be construed in favour of the Respondent as he had not paid two-thirds of the loan advanced to him. The trial court's finding that the two-thirds rule was violated was a factual error.

37. The Appellant in its counterclaim dated 1<sup>st</sup> August 2013 pleaded that it had sold the subject motor vehicle for Ksh.1,450,000/=to one Charles Mwaura. That after deducting recovery expenses, the Respondent`s account was left with an outstanding debt of Ksh.1,567,160.73 that continued to attract interest at commercial rates of 16.53% per annum till payment in full.

38. It was the evidence of the Respondent that he was not notified of the sale and that he came to know of it after he sued. The witness for the Appellant, Peter Kago, (DW1) in his evidence stated that the Appellant repossessed and sold the motor vehicle in issue. He admitted in cross-examination that their list of documents did not have any letters addressed to the Respondent. He admitted that their documents did not show that a valuation was done on the vehicle. He said that he could not know whether the sale was by private treaty. Neither did he know whether the Respondent was involved during the sale.

39. The trial magistrate found that the Respondent was not notified of the intention to sell the motor vehicle. The court held that the Appellant was obligated to inform the Respondent of the intention to sell the motor vehicle as he was a co-registered owner of the motor vehicle. More so that the vehicle was sold by private treaty.

40. It is clear from the evidence that was adduced before the trial court that the Appellant did not inform the Respondent of their intention to

sell the motor vehicle. Their witness admitted that there was no correspondence to the Respondent to this effect. In my considered view, the Appellant was obligated to inform the Respondent of the intention to sell the motor vehicle so as to exercise his right of redemption, if he wished to do so. The Appellant was in breach of the Hire Purchase agreement in failing to do so.

41. Additionally, it is clear that the Appellant sold the motor vehicle without even procuring a valuation report so as to have an estimate of its market value. Neither did the Appellant file receipts to show that the vehicle was sold to the purported purchaser and for how much. Nor did they file documents to detail out how the money was expended after the sale. In my view, It was the duty of the Appellant to exercise due diligence and ensure that the sale price was a fair reflection of the asset's market value. In failing to notify the Respondent of the intended sale, selling the motor vehicle without a valuation report, failing to adequately publicize the sale to attract multiple offers and not showing how the money was expended after the sale portrayed bad faith on the part of the Appellant. The Appellant ought to have provided sufficient proof that the sale was conducted in a transparent and commercially reasonable manner. Simply stating that there was a sale that was conducted procedurally was not enough. The Appellant did not show that it acted professionally. I accordingly hold that the sale was unlawful.

### ***Whether the unlawful sale extinguished the debt***

42. The Appellant contends that the loan was secured by the subject motor vehicle but that that did not extinguish its rights to pursue any shortfall after realizing the security. That in fact there was a shortfall

after the realization of the security and the appellant rightfully and lawfully issued the notices dated 13<sup>th</sup> March, 2023 and 3<sup>rd</sup> April, 2023.

43. In my considered view, a creditor is not barred from claiming the shortfall where a sale is properly conducted and the full amount owing is not recovered. A mere sale therefore does not extinguish the debt. The Appellant herein was entitled to the counter claim if the sale did not raise the full amount owing. However, in view of the finding that the sale was not properly conducted and the Appellant did not account to the Respondent on how the sale amount was expended, it is my finding that the Appellant did not prove the exact amount owed by the Respondent. The amount would have been lower than the amount claimed in the counterclaim or it would have covered the whole debt if the sale was properly conducted. I therefore find that the counter claim was not proved.

44. In view of the forgoing and for the reasons given, I do not find merit in the appeal and the same is dismissed with costs to the Respondent.

**Delivered, dated and signed at GARSEN this 19<sup>th</sup> day of February, 2026**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

**Mr. Odero HB for Mr. Kondele for Appellant**

**Mr. Ngonze for Respondent**

Court Assistant- Rahma

Original