



**Kyutu v Mogo Auto Limited (Commercial Miscellaneous Application E243 of 2025)
[2026] KEHC 2074 (KLR) (Commercial and Tax) (20 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E243 OF 2025**

MN MWANGI, J

FEBRUARY 20, 2026

BETWEEN

DICKSON KYUTU APPLICANT

AND

MOGO AUTO LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 7th March 2025 pursuant to the provisions of Order 40 Rules 1, 2 & 4 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all enabling provisions of the law. The applicant prays for orders to compel the respondent to render a full and accurate account of all excess payments made under Loan Agreement No. AG9854837 and to direct the respondent to take those excess payments into account when computing the outstanding loan balance, with a corresponding adjustment of the applicant's remaining loan obligations.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Dickson Kyutu Matulai, the applicant herein. Mr. Matulai averred that he entered into Asset Finance Loan Agreement No. AG9854837 with the respondent, which was issued in United States Dollars. He further averred that due to fluctuations in the dollar exchange rate, he has made excess payments toward the facility, as evidenced by M-Pesa statements and loan statements issued by the respondent reflecting those excess payments.
3. He deposed that the Competition Authority of Kenya (CAK), in a decision dated 4th October 2024, required the respondent to regularize its loan agreements and properly account for payments, but despite the said directive the respondent amended the Loan Agreement on 24th December 2024 to convert the outstanding balance and future instalments to Kenya Shillings without factoring in the excess payments already made. Mr. Matulai asserted that his efforts to have the respondent account for



the excess payments have been unsuccessful and unless the Court intervenes, he will suffer financial prejudice by continuing to service an unaccounted loan balance.

4. In opposition to the instant application, the respondent filed a replying affidavit sworn on 25th March 2025 by Mr. Erick Omondi Onditi, the respondent's Legal Officer. Mr. Onditi averred that the instant application is frivolous, vexatious, brought in bad faith, and intended to obstruct the respondent from lawfully recovering the outstanding loan. He further averred that the issues raised herein are substantive in nature and cannot be determined through a miscellaneous application without a substantive suit. Mr. Onditi stated that the Asset Financing Loan Agreement No. AG9854837 was entered into on 4th May 2022 for the purchase of motor vehicle registration number KBV 188X.
5. He explained that at the applicant's request, the respondent granted him multiple loan extensions due to financial difficulties, through amendment agreements executed in good faith, but the applicant subsequently defaulted, thereby breaching the contract and prompting the respondent to issue reminders and Statutory Notices in compliance with the Movable Properties Security Act. He denied the allegation of excess payments, asserting that all payments were made strictly in accordance with the agreed and amended payment schedules. He maintained that the applicant was fully aware that the loan was denominated in USD with repayments converted to Kenya Shillings at agreed exchange rates.
6. Mr. Onditi stated that the conversion of the loan balance from USD to KES was undertaken solely to comply with the Competition Authority of Kenya's decision of 4th October 2024 and does not extinguish the applicant's existing liabilities, defaults, and it does not require retrospective accounting of alleged excess payments. He further stated that the applicant was not a party to the CAK proceedings and is selectively relying on the decision to evade contractual obligations, despite being in arrears and owing an outstanding sum of Kshs.520,802.00 as at 25th March 2025. He asserted that the application herein improperly seeks to rewrite the contract, thus offending equitable principles.
7. The instant application herein was canvassed by way of written submissions. The applicant's submissions were filed on 20th July 2025 by the law firm of Kerika Leina & Company Advocates, whereas the respondent's submissions were filed by the law firm of Munyaga Githaiga Advocates LLP on 17th July 2025 & 24th October 2025.
8. Mr. Kerika, learned Counsel for the applicant submitted that the dispute herein arises from a financier - customer relationship in which the respondent advanced the applicant a loan of Kshs.340,000/= on 4th May 2022 at an interest rate of 2.4% for a term of 36 months. Counsel argued that although the loan was disbursed in Kenya Shillings, the respondent structured repayments in United States Dollars, thereby exposing the applicant to foreign exchange volatility and unpredictable repayment obligations. This, Counsel asserted amounted to unfair trade practice in violation of Article 46(1)(b) of *the Constitution* of Kenya, the *Competition Act* and Sections 12, 13, 16, & 21 of the *Consumer Protection Act*.
9. Mr. Kerika relied on the decision of the Competition Authority of Kenya dated 24th October 2024, in which the respondent was found culpable of false and misleading representation and unconscionable conduct, was penalized, and directed to resolve pending complaints and refrain from similar conduct.
10. Counsel submitted that the applicant was one of the affected consumers and has fully repaid the subject loan to the tune of Kshs.620,703.00, yet the respondent has failed to account for the excess payments or comply with the Authority's binding decision more than eight (8) months after its issuance. He argued that having not challenged the CAK decision, the respondent is bound by it, rendering the impugned Loan Agreement incapable of implementation and liable to rescission pursuant to the provisions of Section 16 of the *Consumer Protection Act*, which allows for rescission, cancellation of related agreements and securities, and the award of damages. Mr. Kerika therefore urged the Court to



compel the respondent to regularize and recalculate the loan in compliance with the CAK decision, grant any other appropriate relief to protect consumer rights, and award costs of the application.

11. Ms Muiru, learned Counsel for the respondent relied on the cases of *Mwabungudu v Rashid; Land Registrar - Mombasa (Interested Party)* [2024] KEELC 3367 (KLR) and *Nairobi West Hospital Limited v Joseph Kariha & another* [2018] KEHC 1677 (KLR), and submitted that the application herein ought to be struck out for seeking substantive and final orders through an interlocutory procedure under Order 40 of the Civil Procedure Rules, 2010, without a substantive suit. Counsel relied on the Supreme Court case of *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 1 (KLR), and further submitted that the affidavit in support of the application herein is fatally defective for being uncommissioned, unsigned, and undated, contrary to the *Oaths and Statutory Declarations Act*, Cap 15, and therefore incapable of being salvaged by the provisions of Article 159(2)(d) of *the Constitution* of Kenya.
12. The foregoing notwithstanding, Ms Muiru argued that the applicant failed to satisfy the principles for being granted of an injunction as set out by the Court in the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358. She contended that the applicant has not established a prima facie case, that he stands to suffer irreparable harm in the event that the orders being sought herein are not granted, or that the balance of convenience tilts in his favour, noting that the applicant is in admitted default and owes the respondent Kshs.520,802.00 as at 25th March 2025. Counsel maintained that the Loan Agreement was freely and knowingly executed, was denominated in USD with repayment terms clearly disclosed, and that currency fluctuation does not amount to overpayment or illegality. Citing the Court of Appeal case of *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited* [2017] KECA 379 (KLR), Counsel urged this Court not to rewrite the contract between the parties herein.
13. In justifying the respondent's right to repossess the collateral upon default by the applicant, Ms Muiru relied on Sections 67 & 71 of the Movable Property Security Act. She submitted that compliance with the decision of the Competition Authority of Kenya of 4th October 2024 through conversion of the loan to Kenya Shillings does not extinguish the applicant's existing contractual obligations nor operate retrospectively. Counsel further submitted that the respondent has on its own initiative, regularized the applicant's loan facility in compliance with the Competition Authority of Kenya's decision, a fact expressly admitted by the applicant in his supporting affidavit, thereby demonstrating good faith.
14. She stated that the CAK decision did not invalidate or nullify existing loan agreements, but rather affirmed their enforceability. She further stated that the applicant's reliance on Article 46 of *the Constitution* is misplaced, as there is no legal prohibition against denominating transactions in foreign currency. In addition, Ms Muiru asserted that clients were afforded the option of repaying their loans in United States Dollars or converting repayments to Kenya Shillings, a practice justified by the respondent's multinational operations and commercial convenience.

Analysis And Determination.

15. I have considered the application filed herein, the grounds on the face of it, and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the application herein is fatally defective for being supported by an uncommissioned affidavit; and
 - ii. Whether the instant application is merited.



Whether the application herein is fatally defective for being supported by an uncommissioned affidavit.

16. The respondent's case is that the applicant's affidavit in support of the instant application is incurably defective for being uncommissioned, unsigned, and undated, contrary to the mandatory provisions of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. The respondent argued that such a defect goes to the root of the application herein and renders it incompetent and incapable of being cured by the provisions of Article 159(2)(d) of *the Constitution*.
17. Section 5 of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya provides that -
- Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
18. In the case of *In re MWO (Minor)* [2021] KEHC 13571 (KLR) the Court held as follows-
- It is a legal requirement that an affidavit be commissioned by either a Magistrate, a Commissioner of Oaths or by a Notary Public. An affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore, an affidavit must be executed on oath by the deponent. An affidavit which has not been properly commissioned is at best a mere signed statement of facts.
- It is the commissioning of the affidavit by an authorized officer which elevates the signed statement to the status of an affidavit. Therefore, commissioning of the document is a crucial step without which the statement cannot be deemed to be an affidavit. Failure to commission an affidavit cannot be dismissed as a mere technicality and is an omission which cannot be ignored and/or overlooked by the court.
19. Affidavits form evidentiary material upon which applications are anchored. Upon perusal of the instant application, it is clear that the affidavit in support thereof has not been commissioned by a Commissioner for Oaths. Consequently, in view of the fact that the applicant's affidavit in support of the instant application has not been sworn before a Magistrate, Commissioner for Oaths, or Notary Public as required by law, and it does not bear the stamp, name and address of a Commissioner for Oaths, this Court is of the finding that it is defective. I hold that failure to commission an affidavit reduces it to a mere statement of fact, rendering an application such as the one before this Court defective for want of a valid evidentiary foundation.
20. In the premise, this Court finds that the instant application is fatally defective. It is hereby struck out with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF FEBRUARY 2026.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence:-

Mr. Kerika for the applicant



Ms Muiru for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

