REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

COMMERCIAL APPEAL NO. E211 OF 2025

PROF. ABDALLAH MUHAMMAD SWAZURI.....1ST APPELLANT

JACKLINE SILANTOI LONGISA TEEKA.....2ND APPELLANT

VERSUS

MY CREDIT LIMITED.....RESPONDENT

(Being an appeal against the Judgment of the Chief Magistrates Court at Nairobi delivered on 4th July 2025 – Hon. Becky Cheloti)

JUDGMENT

1. This appeal arises from the judgment of the Chief Magistrate's Court at Nairobi (Hon. Becky Cheloti) delivered on 4th July 2025 in Milimani CMCCOMM No. E186 of 2021, wherein the Appellants' suit was dismissed for lack of merit.
2. The Appellants' claim before the trial court was founded on the alleged unlawful repossession and sale of motor vehicle registration number KCA 444N, which had been offered as security for a loan facility advanced by the Respondent.
3. Aggrieved by that decision, the Appellants lodged this appeal raising thirteen grounds, as follows:
    i. *That the Learned Trial Magistrate erred in law and in fact in retrospectively applying the law.*

ii. *That the Learned Trial Magistrate erred in law and in fact in failing to find that the Defendant's repossession and sale of the Plaintiffs' motor vehicle, Registration No. KCA 444N, was unlawful, arbitrary, and conducted without proper notice or due process as required by the law.*

iii. *That the Learned Trial Magistrate erred in law by failing to find that the Defendant had an obligation to provide proper, accurate, and timely statements of account to the Plaintiffs, and that the failure to do so materially prejudiced the Plaintiffs' ability to service and monitor the loan.*

iv. *That the Learned Trial Magistrate erred in law and in fact in ignoring or downplaying the Plaintiffs' evidence demonstrating that the 1st Plaintiff had repaid a total of Kshs. 5,637,915 and that the Defendant had further realized Kshs. 6,500,000 from the sale of the vehicle - an amount grossly exceeding the principal loan of Kshs. 3,600,000.*

v. *That the Learned Trial Magistrate erred in law in failing to appreciate that the Defendant's actions amounted to unjust enrichment and that the Defendant had unlawfully profited at the expense of the Plaintiffs.*

vi. *That the Learned Trial Magistrate misdirected herself in law by failing to hold that the Defendant had breached the contractual terms and*

restructuring agreement dated 28th February 2020, which was still in force at the time of repossession.

vii. *That the Learned Trial Magistrate erred in law by not finding that the repossession and sale of the security vehicle without statutory notice or demand violated the provisions of the Movable Property Security Rights Act and/or other applicable consumer protection statutes.*

viii. *That the Learned Trial Magistrate failed to consider or properly evaluate material evidence provided by the Plaintiffs, including partial statements, bank records, and correspondence which proved ongoing payments and non-default status at the time of repossession.*

ix. *That the Learned Trial Magistrate erred in law and in fact by failing to award the Plaintiffs any or adequate relief, damages, or refund despite the clear overpayment and unlawful sale of the secured asset – a fact which the Defendant acknowledged during trial.*

x. *That the Learned Trial Magistrate erred in law and in fact by failing to take into consideration the points in law and facts given by the Appellants.*

xi. *That the Learned Trial Magistrate erred in law and in fact by narrowly framing the issues before her thereby resulting in the wrong decision.*

xii. That the Learned Trial Magistrate erred in Law and in fact in entering the impugned Judgment without any viable and/or sufficient reasons.

xiii. That in any event, the Learned Trial Magistrate erred in law and fact by arriving at the impugned decision contrary to the facts, circumstances and the principles applicable to the case when analyzed in their entirety.

4. The appeal was canvassed by way of written submissions.

Parties arguments

5. The Appellants' case is that the trial court erred in dismissing their claim notwithstanding evidence that the 1st Appellant had obtained a loan facility of Kshs. 3,600,000 from the Respondent, secured by the subject motor vehicle, which facility was subsequently restructured in February 2020. They contend that they substantially serviced the loan and had by February 2023 paid approximately Kshs. 5,637,915. Despite this, the Respondent repossessed the motor vehicle before expiry of the repayment period and proceeded to sell it.
6. It is further their case that the repossession and sale were unlawful and unprocedural for want of compliance with the Movable Property Security Rights Act, 2017 and the Auctioneers Rules, 1997. They submit that no statutory notices of default or intention to sell were issued, nor were they served with any proclamation or redemption notice. They rely on **Pius Kimaiyo Langat v Co-operative Bank**

of Kenya Ltd [2017] eKLR and **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd [2014] eKLR** for the proposition that a lender's discretion must be exercised reasonably and with due notice.

7. The Appellants also fault the Respondent for failing to render proper and reconciled accounts, thereby prejudicing their ability to ascertain the outstanding loan balance and to redeem the security. They invoke Article 46 of the Constitution, contending that they were entitled to information necessary to protect their economic interests.
8. Their principal grievance is that the Respondent unjustly enriched itself. They submit that the Respondent recovered approximately Kshs. 12 million from a loan of Kshs. 3.6 million, comprising payments made by the Appellants and proceeds from the sale of the motor vehicle. They rely on **Madhupaper International Ltd v Kenya Commercial Bank Ltd & 2 Others [2003] eKLR** and **Stephen Karanja Kibuku v Safaricom Ltd [2018] eKLR** on the doctrine of unjust enrichment, and on **Section 44A of the Banking Act** as well as the case **Mugure & 2 Others v HELB [2022] KEHC 11951 (KLR)** on the *in duplum* rule.
9. On its part, the Respondent submits that there existed a valid and binding contractual relationship between the parties arising from the loan facility advanced in August 2019 and restructured in February 2020. It is contended that the Appellant freely executed both agreements and is bound by their terms.

10. The Respondent maintains that the 1st Appellant was in persistent breach of the repayment terms, having made sporadic and insufficient payments. It asserts that upon default, it lawfully exercised its contractual right to repossess and sell the motor vehicle.

11. The Respondent further denies any illegality, contending that the vehicle was sold through a public auction and the proceeds applied towards settlement of the outstanding loan. It argues that the Appellants failed to prove any overpayment, unjust enrichment, or breach on its part, and relies on **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another** and **Fina Bank Ltd v Spares & Industries Ltd** for the principle that courts do not rewrite contracts.

Analysis and determination

12. This being a first appeal, the Court is obligated to re-evaluate the evidence and arrive at its own independent conclusions. (See **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123)**.

13. Having considered the Memorandum of Appeal, record of appeal and submissions by the parties, the issues that fall for determination are:

    i. *Whether there existed a valid and binding contract between the parties;*

    ii. *Whether the 1st Appellant was in breach of the contract;*

iii. Whether the repossession and sale of the motor vehicle were lawful;

iv. Whether the Respondent was unjustly enriched; and

v. Whether the Appellants are entitled to the reliefs sought.

Existence of a valid and binding contract between the parties

14. It is not in dispute that the relationship between the parties was founded on a loan facility advanced by the Respondent to the 1st Appellant pursuant to a Letter of Offer dated 2nd August 2019 for the sum of Kshs. 3,600,000, which was secured by the subject motor vehicle. The evidence on record further shows that the facility was subsequently restructured by a Letter of Offer dated 28th February 2020, revising the outstanding amount to Kshs. 3,240,000 and setting out new repayment terms.

15. The Appellants admitted execution of both agreements. The essential elements of a valid contract, offer, acceptance and consideration, were present.

16. I therefore find that there existed a valid and binding contract between the parties, governed by the restructuring agreement of 28th February 2020. The parties were therefore bound by those terms, subject only to compliance with applicable statutory provisions governing enforcement.

Whether the 1st Appellant was in breach of the contract

17. The Respondent's case is that the 1st Appellant failed to adhere to the agreed repayment terms as set out in the

restructuring Letter of Offer dated 28th February 2020, which required monthly instalments of Kshs. 280,800 over a period of twenty-four (24) months. It was submitted that the Appellant made sporadic and irregular payments, some of which were insufficient to meet the contractual instalments, and that several post-dated cheques issued as part of the repayment arrangement were dishonoured. On that basis, the Respondent contends that the Appellant fell into arrears and thereby triggered the contractual consequences, including repossession of the security.

18. On their part, the Appellants do not deny making payments. Indeed, their primary contention is that they substantially serviced the loan and paid a total sum of approximately Kshs. 5,637,915, which they argue exceeded the principal amount advanced. Their position is that, viewed holistically, the payments made demonstrate good faith performance of the contract and negate any allegation of default sufficient to justify the drastic step of repossession and sale of the motor vehicle.

19. Sections 107, 108 and 109 of the Evidence Act place the legal burden upon the party who asserts a fact to prove it. In the present case, while the Respondent alleged default, the Appellants bore the evidential burden of demonstrating that they had complied with the agreed repayment structure or that no default had occurred. The material placed before the Court shows that the payments made by the 1st Appellant were irregular in both timing and amount, and did

not correspond with the agreed monthly instalments. In contractual terms, such deviation from the agreed repayment schedule constitutes default unless otherwise excused or waived by the lender.

20. That said, the Appellants' argument that they made substantial payments is not without significance. The fact that a borrower has paid a considerable portion of the loan does not, in itself, extinguish the obligation to comply with the agreed repayment structure.

21. In the premises, I am satisfied that although the Appellants made payments towards the loan, those payments were not made in strict compliance with the contractual repayment terms. Consequently, I find that the 1st Appellant was in breach of the repayment obligations under the restructuring agreement.

Whether repossession and sale of the motor vehicle were lawful

22. The central question for determination under this head is whether the Respondent, in enforcing its security, complied with the applicable statutory and constitutional requirements. While it is not disputed that the Respondent had a contractual right to realize the security upon default, the exercise of that right is not unfettered and must be undertaken strictly within the confines of the law.

23. The Movable Property Security Rights Act, 2017. Section 67 of the Act obligates a secured creditor, upon default, to issue a notification to the debtor specifying the

nature and extent of the default, the amount required to remedy it, and the time within which such default is to be cured. Section 73 further mandates the secured creditor to issue a notice of intention to dispose of the collateral, which must contain, *inter alia*, a description of the collateral, the amount required to satisfy the secured obligation, and the date after which the collateral may be disposed of.

24. The Appellants' case is that no such statutory notices were issued and that they were not furnished with any proper or reconciled statements of account to enable them to ascertain the outstanding indebtedness or exercise their right of redemption. They contend that the repossession and subsequent sale were therefore arbitrary, unprocedural, and in violation of the law.

25. On the other hand, the Respondent relies on the terms of the Letter of Offer, which, it argues, permitted repossession of the security without further reference or notice in the event of default. It is thus the Respondent's position that the repossession and sale were contractually sanctioned and therefore lawful.

26. This Court is unable to agree with the Respondent's position. It is now settled that statutory requirements governing the realization of security interests override any contractual provisions to the contrary. A lender cannot, by contract, oust or circumvent mandatory statutory safeguards designed to protect a borrower. In **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR**, the Court

of Appeal held that even where a contract grants a lender discretion, such discretion must be exercised reasonably and in accordance with the law, and not to the detriment of the borrower without proper notice.

27. Moreover, Article 46 of the Constitution guarantees consumers the right to information necessary to gain full benefit from goods and services and to the protection of their economic interests. In the context of credit transactions, this necessarily includes the right to be informed of the outstanding debt and the steps being taken to enforce the security. A failure to provide such information not only offends statutory provisions but also implicates constitutional safeguards.

28. In the present case, the Respondent did not place before the Court cogent evidence demonstrating strict compliance with Sections 67 and 73 of the Act. There is no satisfactory proof that the Appellants were served with a proper notice of default specifying the amount required to cure the default, nor is there evidence of a compliant notice of intention to dispose of the motor vehicle. Equally, there is insufficient evidence that the Appellants were furnished with a reconciled statement of account prior to the sale.

29. In the absence of such proof, this Court is unable to find that the Respondent adhered to the procedural safeguards prescribed by law. The mere existence of a contractual clause permitting repossession without notice cannot validate a process that is otherwise statutorily deficient.

30. Accordingly, I find that the repossession and subsequent sale of motor vehicle registration number KCA 444N were carried out in contravention of the mandatory provisions of the law and were therefore procedurally unfair and unlawful.

Whether the Respondent was unjustly enriched

31. The Appellants contend that the Respondent recovered sums grossly in excess of the loan advanced. Their case is that they paid approximately Kshs. 5.6 million towards the loan facility, and that the Respondent further realized Kshs. 6.5 million from the sale of the motor vehicle, thereby recovering in excess of Kshs. 12 million against a principal facility of Kshs. 3.6 million. It is their submission that the Respondent retained both the payments made and the sale proceeds without rendering proper accounts or refunding any surplus, thereby unjustly enriching itself.

32. The Respondent, on the other hand, maintains that all payments were duly accounted for and that the proceeds of sale were applied towards liquidation of the outstanding loan balance together with contractual interest and recovery costs. It further asserts that any balance due to the Appellants was available but was declined, and that no evidence was tendered to demonstrate overpayment or unjust enrichment.

33. The doctrine of unjust enrichment is well settled in our jurisprudence. In **Madhupaper International Ltd v Kenya Commercial Bank Ltd & 2 Others [2003] eKLR**, the

Court stated that a party should not be permitted to retain a benefit derived from another where it would be against conscience to do so. Similarly, in **Stephen Karanja Kibuku v Safaricom Ltd [2018] eKLR**, the Court set out the elements of unjust enrichment as: *that the defendant has been enriched; that the enrichment is at the expense of the plaintiff; and that it would be unjust to allow the defendant to retain that benefit*.

34. Further, Section 44A of the Banking Act codifies the *in duplum* rule, which limits the amount recoverable by a lender in respect of a non-performing loan to the principal sum owing, interest not exceeding that principal, and recovery expenses. The rationale of the rule was underscored in **Mugure & 2 Others v Higher Education Loans Board [2022] KEHC 11951 (KLR)**, where the Court emphasized that it is grounded in public policy and is intended to protect borrowers from oppressive and unconscionable accumulation of interest.

35. Applying these principles to the present case, it is evident that the Respondent derived a benefit both from the payments made by the Appellants and from the proceeds of sale of the charged asset. The critical question, however, is whether such benefit was unjust. That determination can only be made upon a clear and transparent account showing the outstanding principal at the time of default, the interest lawfully accrued within the confines of Section 44A of the

Banking Act, and the manner in which the sale proceeds were applied.

36. In the present case, the Respondent did not place before the Court a comprehensive and reconciled statement of account demonstrating how the total sums received were appropriated. The absence of such accounts leaves unresolved the Appellants' contention that the total recovery exceeded what was lawfully due. In circumstances where a lender exercises its power of sale and realizes security, there is a corresponding duty to render a full account and to refund any surplus to the borrower.

37. Given the magnitude of the sums alleged to have been recovered and the lack of clear accounting, this Court is unable to conclusively determine that the Respondent's retention of the benefit was justified. To the contrary, the failure to render accounts, coupled with the apparent disproportion between the principal sum and the total recovery, raises a legitimate and *prima facie* case that the Respondent may have recovered amounts in excess of what was lawfully due.

38. In the premises, I am persuaded that the Respondent's conduct give rise to a finding of unjust enrichment, or at the very least necessitates a full accounting to determine whether any surplus is due to the Appellants.

39. The trial court dismissed the suit on the basis that parties are bound by contract and that the court cannot rewrite contracts.

40. While that principle is correct, it is not absolute. Courts will intervene where statutory provisions are violated or where the conduct complained of is unconscionable. In the present case, the learned magistrate failed to sufficiently interrogate compliance with statutory notice requirements, the duty to render accounts, and the applicability of the doctrine of unjust enrichment.

41. That omission, in my view, constituted a misdirection in law. An appellate court is entitled to interfere with the findings of a trial court where it is shown that the court misapprehended the law or the evidence. (See Mbogo & Another v Shah [1968] EA 93).

42. In the result, and for the reasons set out above, I find that this appeal is merited and is hereby allowed on the following terms:

i. The Judgment of the Chief Magistrate's Court delivered on 4th July 2025 is hereby set aside.

ii. A declaration is hereby issued that the repossession and sale of motor vehicle registration number KCA 444N was unlawful.

iii. The Respondent shall render a full and reconciled statement of account within 30 days.

iv. The Appellants shall be entitled to refund of any surplus arising after reconciliation.

v. In the alternative, the Appellants are awarded damages for wrongful sale, to be assessed.

vi. The Appellants shall have the costs of the appeal and the suit in the lower court.

It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Ms. Katana h/b for Mr. Kithi for Appellant

Mr. Chege for Respondent

Court Assistant*: Lispa*