

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E077 OF 2024

SAMUEL KIMUNYA GACHUHI, T/A SAKIGA SUPER MILLERS.....
APPELLANT

VERSUS

NCBA BANK KENYA.....
RESPONDENT

(An appeal from the order of the honourable V. Asiyu PM in Thika Chief Magistrates court civil case no. 218 of 2021 delivered on 4th April 2024)

JUDGEMENT

1. The Appellant instituted his claim at the trial court vide a plaint dated 4th May 2021. He averred that in early 2019 he applied for an asset finance facility from the Respondent in the sum of Kshs. 4,621,657.00 to finance the purchase of motor vehicle KCU 182U Isuzu FRR 33L Truck repayable within five years at the instalment rate of Ksh. 105,160 per month.
2. The Appellant dutifully paid the loan until April 2020-2021 when the Respondent repossessed the subject motor vehicle on 7th April 2021 without any prior notice to the Appellant. During the repossession period, the appellant continued to remit the monthly instalments as per the agreement and as at 27th April 2021, the outstanding aggregate amount was Ksh. 3,931,934.00. The appellant thus sought relief for relinquishment or repossession and reinstatement of the terms of repayment. He further sought a declaration that the repossession was irregular and amounted to breach of contract.

3. The Respondent denied the claim and referred to clause 7 of the Hire purchase agreement which empowered the Respondent to terminate the hiring of goods without notice. If any instalment remains unpayable after fourteen days of the instalment becoming due.
4. As at 26th April 2021, the Appellant was in arrears in the sum of Ksh. 3,931,933.68.00. The amount had reduced to Ksh. 701,872,62 as at 17th June 2021 following the auction of the repossessed vehicle. The Respondent thus made a counterclaim for the outstanding Ksh. 701,872.62 from the appellant together with interests.
5. The appellant denied the counterclaim and sought that it be dismissed.
6. The matter proceeded to trial where both the appellant and the Respondent called one witness to support their cases. The witnesses adopted the witness statements and the bundle of documents in file. The Appellant admitted that although he had defaulted in loan repayment, the repossession was irregular as he was not informed or given any notice.
7. At the end of the trial, the court found that parties are bound by their agreement and while it was possible for the Respondent to extend the time required by the Appellant to repay the loan, the same was binding however unconscionable it was. The Appellant had therefore failed to prove his case against the Respondent on a balance of probabilities. On the other hand, the court found that the counterclaim had been [proven to the required standard and the court proceeded to enter judgment for Ksh. 724,508.00 in favour of the Respondent. The court found that the auction of the subject motor vehicle was regular.
8. Aggrieved and dissatisfied with the decision of the trial court, the appellant lodged the instant appeal on grounds that:

- i. The learned magistrate erred in law and in fact in not considering the evidence of the appellant.
 - ii. The learned magistrate erred in law and in fact in concluding that the Respondent had proved their counterclaim.
 - iii. The learned magistrate erred in law and in fact in dismissing the prayers sought by the appellant without any justifiable reason.
 - iv. The learned magistrate erred in law and in fact in finding that the appellant had failed to prove his case to the required standard.
 - v. The learned magistrate erred in law and in fact in declaring that the attachment and auction were proper.
9. Reasons wherefore the appellant prayed that the judgment of the lower court dated 4th April 2024 be set aside and vacated in its entirety.
10. The court directed that the appeal be canvassed through written submissions. The appellant submitted that the repossession by the Respondent was unlawful as it was marred with procedural irregularities for failing to notify the appellant and in breach of Section 32 of the Hire Purchase Act.
11. It was further submitted that the appellant was deserving of reinstatement as an equitable relief as he was willing to abide by the loan repayment upon restructuring of the loan. He therefore demonstrated transparency, good faith and a genuine willingness to meet his financial obligations. The appellant thus prayed that the appeal be allowed.
12. The Respondent's submissions are not in file. However, the file indicates that he filed them in the CTS

ANALYSIS AND DETERMINATION:

13. This being a first appeal, I am guided by the decision of the Court of Appeal in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, wherein the court stated as that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. The parties herein entered into a Hire Purchase Agreement. The said Agreement provides for the terms and conditions that govern inter alia; the Hirer’s obligations in relation to: payments, use of goods, loss, damage and repair, insurance, bank and other legal charges. The Agreement also provides for issue relating to: interest payable, late payment, termination by the Hirer and liability on termination.
15. In **Eunice Kanugu Kingori v NIC Bank Limited [2018] KEHC 10147 (KLR)**, the court observed that:

“Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying installments. The hirer has an option to buy the goods at the end of the Agreement if all installments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement,

the ownership of the goods remain with the owner.”

16. Both the appellant and the respondent admitted the existence of the Hire Purchase Agreement that secured the loan obtained to finance motor vehicle registration number KCU 182U Isuzu FRR 33L Truck. Also, both parties agree that the Appellant defaulted in payment of the loan hence resulting repossession of the subject motor vehicle. The main point of contention is that while the appellant contends that the Respondent ought to have informed him before repossessing the vehicle, the Respondent contends that Clause 7 of the Hire Purchase Agreement authorised him to repossess the vehicle without notice to the appellant at the lapse of 14 days following the default by the appellant.
17. The trial court, guided by this clause remarked that it was not the business of the court to save parties from unconscionable terms of a contract due to party autonomy and privity of contracts.
18. Although the Appellant contends that repossession of the motor vehicle without notice offended Section 32 of the Higher Purchase Act, the provisions of the Act do not apply to the agreement between the partes since the hire purchase price exceeded Kshs. 4,000,000.
19. **Section 3 of the Higher Purchase Act** provides that:

This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire-purchase price does not exceed the sum of four million shillings or such other higher or lower sum as the Cabinet Secretary may, after taking into account market forces from time to time prevailing, prescribe other than a hire-purchase

***agreement in which the hirer is a body corporate,
wherever incorporated:***

20. It however suffices to note that the document signed by the parties is clearly stated to be a Hire Purchase Agreement and is a contractual Agreement.
21. The main issue however that remains is whether the repossession was lawful. Prior to repossessing of the motor vehicle, the appellant was in arrears of Kshs. 3,931,933.68.00. Accordingly, he was in default of the Higher Purchase Agreement and the Respondent's legal right to repossess without notice as per the terms of Clause 7 had accrued. The repossession was therefore lawful.
22. Although the Appellant stated that he reached out to the Respondent with a possibility of restructuring the loan when he defaulted, he never provided evidence on the nature of the conversation or outcome of the intention to restructure the loan. The upshot is that the Appellant has not adduced evidence to demonstrate that the repossession was unlawful.
23. Based on the foregoing, I find no reason to disturb the finding of the trial court. ***The appeal is hereby dismissed with cost to the respondent.***

Dated, Signed and Delivered Virtually on this 14th day of May 2026.

**HON. T. W. OUYA, OGW
JUDGE**

In the presence of:

Gachari for Waweru Nyambura for Appellant

Kyumu for Muchemi for Respondent

Hamza/Kevin - Court Assistants