IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 10 OF 2013

BETWEEN

K-REP BANK LIMITED….....APPELLANT

AND

GEORGE NDEGE OKELLO ….....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii

(Sitati, J.)dated 22nd November, 2012

in

H.C.C.A. NO. 70 OF 2010)

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JUDGMENT OF THE COURT

1. This is a second appeal, the first one having been dismissed by the High Court (Sitati, J.) on 22nd November 2012.

2. The brief facts of the case are as follows: The appellant is a commercial bank registered and carrying on business in the Republic of Kenya. Between August and December 2007, it advanced to the respondent two loans totalling to Kes.1, 450,000/= repayable in thirty six equal monthly installments of Kes. 36,797. That amount was to be secured by a chattels mortgage over the respondent's motor vehicle registration number KAG 131F (the motor vehicle) and the respondent's cash deposits held by the appellant.

3. It is not in dispute that upon the respondent's default in the repayment of those loans, one Henry Owuor trading as Boma Property Management Services repossessed the motor vehicle on the appellant's instructions. Aggrieved by that repossession, the respondent filed a suit in the subordinate court at Kisii against both the appellant and Henry alleging that the repossession of the motor vehicle was illegal on account of the purported chattels mortgage over the motor vehicle having been fraudulent and void and

Henry having not been licensed by the Auctioneers Board to carry on the business of an auctioneer. The appellant filed a defence in which it denied those allegations and counter-claimed a sum of Kes. 904, 478.90 being the balance of the two loans due and outstanding from the respondent.

4. After hearing the case, the subordinate court found that the chattels mortgage over the motor vehicle was indeed void and that Henry was not a licensed auctioneer. It nevertheless entered judgment for the appellant in the sum of Kes.662, 618.09 in the counter-claim being the balance then due from the respondent after giving him credit for his said deposits which the appellant had off-set against the outstanding amount. On appeal to the High Court by the respondent, Sitati, J. allowed the same holding that although the respondent admittedly owed a sum of Kes. 662, 618.09 to the appellant, the latter could not recover it by way of sale of the motor vehicle as the purported chattels mortgage over it was fraudulent and void on account of improper registration of the same and directing the appellant to go back to the drawing board. It is that decision that provoked this appeal.

5. At the hearing before us, Ms. Asati, learned counsel for the appellant, argued that even though the appellant's repossession of the vehicle was illegal, the appellant was nevertheless entitled to recover the outstanding balance of the loans on the basis of breach of the loan contract.

6. Countering that argument, Mr. Ochwangi, learned counsel for the respondent, submitted that the loan facility was on the basis of the chattels mortgage over the motor vehicle and the same having been found to be void, the appellant could not recover any money from the respondent. He said if we were to overrule him on that submission, then we should find that the appellant should have filed a separate suit to recover the outstanding balance if any.

7. Having considered the matter, we find no legal basis for the respondent's contention that the loan facility was based on the chattels mortgage over the motor vehicle. The facility was based on the loan contract between the appellant and the respondent as set out in the letters of offer dated 12th September 2007, and 24th December, 2007 produced as exhibits in the trial court. The chattels mortgage was mere collateral securing the repayment of the advanced sums. The invalidity of any collateral does not defeat or obliterate the outstanding amount of the loan. It simply renders recovery through the realization of the collateral impossible and leaves the creditor to recover by other available means including court action.

8. In this case the appellant claimed the amount due to it from the respondent through a counter-claim. It did not need to file a separate suit as counsel for the respondent contended.

9. Counter-claim is a hallowed and well-established procedure in our legal system intended to obviate a multiplicity of suits between the same parties on any given transaction. Having been sued, the appellant did not need to file another case. It was therefore perfectly entitled to claim, as it did, the amount outstanding and due from the respondent by way of counter-claim. And having found that the respondent actually owed the sum of Kes. 662, 618.09 to the appellant, the learned Judge erred in setting aside the trial court's judgment on the counter-claim. Consequently, we allow this appeal and restore the trial court's judgment. The appellant shall have the costs of this appeal and those of the two courts below.

DATED and Delivered at Kisumu this 23rd day of April, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR