



**Gachare v Platinum Credit Limited & 2 others (Commercial Appeal E040 of 2021)
[2025] KEHC 769 (KLR) (Commercial and Tax) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E040 OF 2021
RC RUTTO, J
JANUARY 31, 2025**

BETWEEN

DEREK KIMANTHI GACHARE APPELLANT

AND

PLATINUM CREDIT LIMITED 1ST RESPONDENT

AUCKLAND AUCTIONEERS 2ND RESPONDENT

SWALEH A. BAJABER 3RD RESPONDENT

*(An appeal from the ruling and order of the Chief Magistrate's Court at Nairobi
(D.W. Mburu, SPM) delivered on 21st May 2021 in CMCC No. 4770 of 2017)*

JUDGMENT

1. This appeal seeks to set aside the orders of 21st May 2021 granted in Nairobi CMCC No. 4770 of 2017 and substitute it with an order allowing the plaintiff's application dated 26th October 2020. The appellant also seeks costs of this appeal.
2. In the application dated 26th October 2020 the appellant invoked sections 1A, 1B and 3A of the [Civil Procedure Act](#) in seeking the following reliefs:
 1. Spent;
 2. Spent;
 3. That pending the hearing and determination of this suit, this Honorable Court be pleased to set aside the orders of this court issued to the interested party on 8th May 2018 on account of fraud and illegality of the sale of motor vehicle KBJ 571W;



4. That costs for the application be in the cause.
3. This application was premised on the grounds on the face of the application and the supporting affidavit sworn by Derrick Kimathi Gachere, the appellant herein. The grounds are summarised follows: the orders of 8th May 2018 were craftily procured to support a fraudulent and illegal sale; at the time of sale, there was a lawful order prohibiting the disposition of the suit vehicle; the sale occurred when the appellant was not in any loan arrears; the vehicle was sold below the forced sale value in a bid to defeat the court's lawful orders; the sale was done against the appellant's right to redemption; the sale was conducted contrary to the Auctioneer's. Furthermore, no public auction was conducted; the documents presented to support the sale are contradictory and put together to create the impression that the vehicle was sold regularly; the sale has given rise to the issuance of two conflicting log books; the 1st respondent frustrated ongoing investigations to unearth the fraud regarding the sale of the subject motor vehicle; the 1st respondent concealed documents and has not surrendered them to the relevant authorities conducting the investigations; and the 1st respondent has committed perjury for failing to comply with the orders of Kitui Misc. Criminal Case no. 124 of 2018.
4. The application was opposed by the 1st respondent. Through the replying affidavit sworn on 4th February 2021 by Richard Simba, the 1st respondent's assistant legal officer, the 1st respondent set out the facts giving rise to the suit and prayed that the application be dismissed for the following reasons: that while the orders of 20th July 2017 were indeed issued, the same had already been overtaken by events; the application the subject of those orders was not served upon the respondents; it is for this reason that by order of 8th May 2018, those orders were vacated by the trial court after it was discovered that they were obtained by way of misrepresentation of material facts; the appellant was ordered to surrender the vehicle to the 3rd respondent but failed to do so; the suit vehicle was sold to the 3rd respondent on account of the appellant's loan arrears in exercise of the 1st respondent's rights that had matured in the contract; the repossession process complied with the law and in particular the Auctioneer's Act; the appellant's rights to the suit vehicle had since extinguished; the appellant had not completed paying for the loan contrary to his assertions; the suit was only instituted after the suit vehicle had been repossessed; and the 1st respondent complied with the orders set out in Kitui Misc. Criminal Case no. 124 of 2018.
5. The 3rd respondent also opposed the application. In its replying affidavit sworn on 2nd February 2021, the interested party prayed that the application be dismissed for the following reasons: the orders of 20th July 2017 were set aside on 8th May 2018; the appellant was ordered to release the suit vehicle to the interested party but was yet to comply with those orders; the appellant was subsequently arrested using the said motor vehicle; the appellant lacks dignity, regard and authority for the court; and the suit vehicle has been sold to Dola Feeds Limited, the rightful owner.
6. Upon hearing the parties' documents, the trial court delivered its ruling dated 21st May 2021. It is this ruling that aggrieved the appellant and led to the filing of this appeal. In the memorandum of appeal dated 24th May 2021 the appellant raised four grounds impugning those findings as follows: the trial court failed to appreciate that the interested party had no locus standi to apply for and be issued with orders on 8th May 2018; the trial court failed to appreciate that the interested party was in breach of the orders issued on 8th May 2018 since he proceeded to transfer the subject motor vehicle to a third party; the repossession and sale of the subject motor vehicle was undertaken by the respondents at a time when the appellant was not in arrears; and the trial court disregarded the appellant's submissions demonstrating fraud and illegality on the sale of the suit vehicle. In view of the premised circumstances, the appellant urged this court to allow the appeal and set aside the orders of 21st May 2021.



7. The appeal was canvassed by way of written submissions. The appellant filed and relied upon its undated written submissions. It was his submission that the 3rd respondent lacked the locus standi to approach court. This is because as the motor vehicle KBJ 571 W did not belong to him as it was sold to Dola Feeds Kenya Limited. He urged that a company is a separate legal personality and hence the 3rd respondent could not benefit from the said orders of the court.
8. He also submitted that the 3rd respondent (interested party) was in breach of the orders issued to him by the court on 8th May 2018 and was not deserving of orders in his favour. He stated that the trial court explicitly ordered the 3rd respondent to preserve the motor vehicle until the suit was heard and determined but he caused it to be registered in the name Dola Feeds Kenya Limited in the intervening period being 8th May 2018 to May 2021. He urged the court to find that the 3rd respondent had put the motor vehicle at risk of alienation and rendering the proceedings moot.
9. Finally, he submitted that he did not owe the 1st respondent any arrears as at the date of the alleged repossession. He urged this court to find that the motor vehicle KBJ 571W was sold by the 1st and 2nd respondent at the time the appellant was not in arrears. He urged this court to allow the appeal as prayed.
10. The 1st and 2nd respondents relied on their joint written submissions dated 4th October 2024. They set out three issues for determination namely; whether the appeal ought to be allowed; whether the appellant's loan was in arrears prior to the repossession of the motor vehicle; whether there was fraud and illegality in the sale of motor vehicle KBJ 571W and lastly, who should bear the costs of the suit?
11. As to whether the appeal should be allowed, the 1st and 2nd respondent submitted that the appeal did not comply with the requirement of section 79G of the *Civil Procedure Act* which requires an appeal to be filed within 30 days. As such, the appeal is incompetent since he was aggrieved by the orders of 8th May 2018 when he had an opportunity to have them reviewed or set aside within the timelines set out by law. Further, that the issue of locus standi of the 3rd respondent is being raised after a period of 3 years.
12. They submitted that the appellant was bound by law to comply with the orders of 8th May 2018 and in the event the court finds that the sale of the motor vehicle was unlawful the appellant could be compensated by way of costs. They submitted that the appellant was in arrears therefore, it lawfully exercised its right to recover the loan advanced to the appellant. Reliance was placed on the case of *Rinya Hospital Limited vs Co-operative Bank of Kenya Limited & Another* [2011]eKLR. It was also submitted that the appellant has not placed any evidence before court to show that it exceeded the terms of the loan agreement to warrant protection by the court. That the appellant had committed that in an event of default the 1st respondent would exercise its right to repossess the collateral. To buttress this argument reference was made to the case of *Nyaga vs Housing Finance Co of Kenya (1987) LLR 2187 CAK* as cited in *Henry Wanyama Khaemba v Standard Chartered Bank & 3 others* [2005] eKLR. They prayed that the appeal be dismissed with costs.
13. The 3rd respondent filed his written submissions dated 30th September 2024. They set out two issues for determination namely whether the appeal is regular before court and whether the sale of the suit motor vehicle to the 3rd respondent was legal and regular. He argued that the appeal was defective and ought to be dismissed for omitting parties to the application dated 26th October 2020 in this appeal. They contended that this is appeal seeks to set aside the ruling delivered on the 8th May 2018 and yet the timelines had already passed. That the orders were issued in 2018 and the appeal was filed in 2021 without leave of the court. On the issue of locus standi, it submits that they were properly joined in the proceedings vide an application presented to court on 17th October 2017. Concerning the sale of the



motor vehicle, the 3rd respondent submitted that it was done in compliance with the law and the process could not be faulted. This is because the sale took place 26th April 2017 and orders were issued on 20th July 2017 hence the orders had been overtaken by events. Further, the appellant right of redemption had extinguished upon successful execution of the contract of sale. To support this argument reference was made to the case of *Ze Yun Yang vs Nova Industrial Product Ltd (2003)1 EA 362(CCK)*. They urged that the appellant had the option to pursue a claim for damages and hence this court should dismiss the appeal with costs.

14. Before delving to set out the issues for determination it is important to outline the facts of this case, which have created a complex labyrinth leading to this appeal. The summary of the facts are as follows; the appellant obtained a loan from the 1st respondent and offered its motor vehicle KBJ 571W as security. The loan was advanced upon terms and conditions agreed by the parties. Some of the agreed terms included that the loan would be repaid in monthly instalments; it would be secured by a chattels mortgage and joint registration of the motor vehicle; upon fully settling the loan the 1st respondent would discharge their interest on the log book.
15. It is alleged that the appellant defaulted in paying the loan as agreed a result of which the 1st respondent instructed the 2nd respondent to repossess and sell the motor vehicle to recover the outstanding balances. According to the 1st and 2nd respondents, they advertised for the sale of the motor vehicle on 26th April 2017 and subsequently sold and released the motor vehicle to Dola Feeds Kenya Limited which had registered the highest bid.
16. Following this, the appellant on the 5th July 2017 instituted a suit together with an application seeking to restrain the 1st respondent from selling the motor vehicle which he claimed was repossessed unlawfully. From the proceedings on record, the trial court granted interim measures and on 20th July 2017 the application was allowed on grounds that the application was unopposed. After a series of other proceedings, the trial court on the 8th May 2018 delivered a ruling on an application dated 17th October 2017. In that application, the 3rd respondent had moved the court to be joined as an interested party and for the orders granted on the 20th July 2017 to be set aside. In this ruling, the trial court held that the application was merited and allowed it as prayed.
17. This ruling aggrieved the appellant who approximately two and half years later, proceeded to file the application dated on the 26th October 2020 seeking to set aside the orders granted in the ruling delivered on 8th May 2018 on account of fraud and illegality of the sale of motor vehicle KBJ 571W. A ruling was then delivered on 21st May 2021, where the trial court held as follows:

“The Plaintiff’s reliance on the fact that there are two log books one in the name of Elizabeth Muturi and the other in the name of the interested party to insinuate an illegal sale is ironical. The Plaintiff took a loan and the said loan was secured using the subject motor vehicle. The 1st defendant stated that the said motor vehicle was jointly registered in the names of the plaintiff and the 1st defendant. The alleged holder of the other logbook, Elizabeth Muturi is the same person whom the plaintiff purchased the subject motor vehicle from, and approached the 1st defendant with her details and documents to effect the transfer of the same.

That having been said, the 1st defendant has clearly shown that the plaintiff was in default. The terms and conditions of the loan clearly stipulated that the security could be repossessed and sold when and if the plaintiff fell into arrears. Though the plaintiff has produced MPESA record claiming to have been servicing the loan he did not rebut the 1st defendant’s assertion that the said payments were not the full monthly instalments and they were less



the other charges that accrued from the back dated cheques bouncing. The 1st defendant stated that it conducted the sale legally within its right and that all the requisite notices were served upon the plaintiff. All these facts as alleged by the 1st defendant were not responded to by the plaintiff and therefore remain unrebutted.

From the above it is clear that the plaintiff was in arrears and that the repossession and subsequent sale of the subject motor vehicle was justifiable. The court set aside the orders issued on 20th July 2017 after discovering that the said orders had been issued due to misrepresentation of facts made by the plaintiff in his initial application. It is clear that the said application was not served to the defendants and the affidavits of service filed were false and the court had been misled to believe that service had been effected upon the defendant.

Further, the said sale, as admitted in the plaintiff's supporting affidavit, took place before the application was filed on 5th July 2017. Therefore, the orders issued on 8th May 2018 to set aside the prior orders issued on 20th July 2017, in my view, were rightly issued by the court. All the court did was restore the parties to the status quo before the grant of the impugned orders of 20th July 2017.

... the main ground which the plaintiff appears to be relying on his bid to have the orders issued on 8th May 2018 set aside is that the court was not provided with all the material facts regarding the loan agreement and the subsequent repossession and sale of the subject motor vehicle. The plaintiff has alleged various facts which he has failed to prove. These facts were rebutted by the 1st defendant and there was no response from the plaintiff to the alternate facts as pleaded by the 1st defendant. As was stated by Mabeya J. in *Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & another* [2015] eKLR that "... failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as represented are true..."

Therefore, no evidence has been shown to prove that the court was misled or not made privy to certain pertinent facts while issuing the orders of 8th May 2018. In the absence of such evidence the plaintiff's application, puts forth no reason for the setting aside of the orders made on 8th May 2018. The application dated 26th October 2020 is hereby dismissed..."

18. Following the above extensive reproduction of the trial court's reasoning, I have considered the memorandum of appeal, examined the record of appeal and the parties' written submissions and analyzed the law. Two issues call for determination namely; whether the appeal before this court is competent and whether the ruling dated 21st May 2021 should be set aside.
19. On the competence of the appeal, the respondents argued that the appeal was incompetent as it was filed way outside the 30 days statutory period set out under section 79G of the *Civil Procedure Act*. This section provides;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
20. From the above provision, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against but in computing the 30 days,



the time the lower court certified as having been requisite for preparation of the decree or impugned order and delivery to the appellant should be excluded. In this instance, the appeal is against the orders of 21st May 2021 which the appellant seeks to have them set aside.

21. It is evident that the appellant filed a memorandum of appeal dated 24th May 2021 against those orders. The matter was thereafter mentioned numerously to confirm whether the proceedings and record of appeal were ready. On 23rd September 2024 the appeal was admitted for hearing. Filing of an appeal is a factual issue proven by computation of days. In this instance, the respondents have just alleged that the appeal was filed out of time, it is not enough to allege, they ought to have computed the days so as to conclusively state that the appeal was out of time. On the face of the record, the impugned orders were issued on 21st May 2021 and the appellant filed his memorandum of appeal dated 24th May 2021, barely three days from the date the impugned order was issued. This was in my view within the permissible timelines as an appeal to this court is instituted by way of filing the memorandum. In the event that the respondents challenge the time within which the record of appeal was filed, they have fallen short of discharging the said burden. At any rate, the purpose of the mentions before the admission of the appeal was to cater for such instances under which the appeal would be challenged. In addition, the respondents were at liberty to formally move the court to challenge the propriety of the appeal instead of raising such weighty arguments by way of submissions. I am not persuaded by the respondents in this instance and therefore do find that the respondents challenge that the appeal was filed out of time devoid of merit. On this account, I do find that the appeal is competent.
22. Turning to the substance of the appeal, this is an appeal against the orders issued in exercise of discretion of the trial magistrate court. As a first appellate court, I must therefore bear in mind that this court will not interfere with the exercise of the trial court's discretion unless it is clear and evident that the trial court, in exercising its discretion, misdirected itself on the application of the law and as a result arrived at a decision that was so erroneous, or resulted in a miscarriage of justice. [See *Mbogo vs. Shah* [1968] EA 93] *Deynes Muriithi & 4 others v Law Society of Kenya & Another* [2015]eKLR].
23. The main argument preferred by the appellant in its application dated 26th October 2020 is that the trial court erred in granting orders issued on 8th May 2018 for the following reasons: the appellant was not in any loan arrears; the orders were obtained through crafty machinations; at the time of sale, there was a lawful order prohibiting the sale; the sale violated the Auctioneer's Act; the sale was done against the principle of redemption; and the sale yielded the production of two conflicting log books.
24. This court notes that the basis of the trial court's decision was that the appellant was in arrears; the repossession and subsequent sale of the subject motor vehicle was justifiable; the court had been misled to issue the orders based on misrepresentation of facts by the appellant as the application had not been served upon the respondent and the affidavit of service contained falsehoods. The trial court also noted that the orders granted on the 20th July 2018 had been overtaken by events as such the parties were being restored to the position they were in before the orders were granted. In arriving at its decision, the trial court was guided by the holding in the case of *Kenya Electricity Transmission Company Limited v Kibotu Limited* [2019]eKLR that clearly sets out the fundamental principles of non-disclosure of material facts.
25. I do note that the appellant has failed to substantiate his grievances against the findings of the trial court by showing that the trial court indeed erred or misapplied the set out principles in its decision. The appellant has not demonstrated any error in the decision but instead reiterates the very same grounds raised before the trial court. The trial court aptly based its decision on its reasoning on various aspects as already set out, the appellant doing very little to rebut the said issues, as a basis of faulting the trial



court's reasoning. Instead he merely reiterated his earlier position that led to the issuance of the orders in his favour at the first instance, as opposed to challenging the setting aside.

26. Besides, this court notes that the appellant took more than two years to institute that application. The appellant has not demonstrated that it had discovered new and important evidence or justified any sufficient cause as to demonstrate the delay of two years in seeking to overturn or review the orders of 2018. All the reasons advanced by the appellant were well within his reach and it was incumbent upon him to move with speed. The equity maxim that equity aids the vigilant and not the indolent is very relevant here. If indeed the appellant was aggrieved by those orders, what prevented him from filing that application at the earliest opportune time? I find that litigation must come to an end. The two years delay in filing the application, the subject of this appeal, rendered the appellant guilty of laches. If this court is to grant the orders great injustice will be occasioned to the parties.
27. I find that the orders of the court issued on 8th May 2018 were sound, just and expedient. No iota of evidence tilted in favor of the appellant. In any event, even if those orders would have been considered on their merits, they were rendered moot since there is sufficient evidence that the suit vehicle had already changed hands and the 1st respondent ably recovered the loan amount from that sale. None of the parties informed the court of the current status of the suit vehicle including its ownership or possession. Further, this court has not been informed of the status of the suit pending determination, the orders subject to this appeal having been made at an interlocutory stage. The appellant still has an opportunity to move the court for redress against any of the respondents.
28. Regarding the issue of locus standi, I find that the same was only introduced at this stage of the proceedings. That ought to have been introduced in the proceedings at trial. Be that as it may, leave was sought and the 3rd respondent permitted to come on record as an interested party before his application was found to have merit.
29. In the end, I find that the learned magistrate correctly analysed and exercised his discretion in failing to set aside the ruling and orders delivered on 8th May 2018. The orders were issued judiciously. Consequently, I find that the appeal herein lacks merit. It is hereby dismissed it with costs to the respondents.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant:

