



**Barasa v Momentum Credit Limited (Civil Appeal E654 of 2022)  
[2025] KEHC 5233 (KLR) (Civ) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E654 OF 2022**

**JN NJAGI, J**

**APRIL 25, 2025**

**BETWEEN**

**DICKSON SILOMELOH BARASA ..... APPELLANT**

**AND**

**MOMENTUM CREDIT LIMITED ..... RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. J.P. Omollo, Senior Resident Magistrate & Adjudicator in Nairobi SCCCOMM No.1437 Of 2022 delivered on 29/7/2022)*

**JUDGMENT**

1. The appellant herein obtained a loan facility from the respondent in May 2019 at the rate of 5% per month and used his motor vehicle registration No. KCE 134G as collateral. The same was to be paid in 12 monthly instalments of Ksh.60,769/= per month. The respondent later advanced the appellant a top up loan also to be paid in 12 monthly instalments. In April 2020 the respondent structured the loan whereby the appellant was required to pay the loan by monthly instalments of Ksh.34,796/= per month until payment in full. In October 2020 the respondent alleged that the appellant was in arrears and repossessed the appellant's motor vehicle. They subsequently sold the motor vehicle for Ksh.400,000/=. They then alleged that the appellant still owed Ksh.202,207/= and filed suit to recover the money. The appellant denied the claim and contended that they had paid all the money owing. They further contended that the respondent had undervalued the motor vehicle during the sale. They counterclaimed the value of the motor vehicle at Ksh.950,000/=.
2. The trial court heard the claim and dismissed both the respondent's claim and the appellant's counterclaim. Both parties were aggrieved by the outcome. The appellant filed the instant appeal while the respondent filed a counter appeal.
3. The grounds of the Appellant's appeal are that:



- i. The learned magistrate misapprehended the totality of the pleadings, evidence and submissions and the law in finding that the Appellant was in loan arrears and had not paid interest and on which basis, dismissed the Appellant's counterclaim.
  - ii. The learned magistrate erred in law and in fact in failing to consider the evidence presented by the Appellant, in the form of Mpesa statements and cheques, in finding that the total amount repaid by the Appellant was KES 452,048/= only and not KES 823,215/=.
  - iii. That the learned magistrate erred in not finding that the Appellant had, in fact, repaid the loan advanced to him in excess of the principal and interests.
  - iv. That the Learned magistrate erred in law and fact in finding that the Respondent was entitled to re-possess the Appellant's Motor Vehicle Registration Number KCE 134G, whose pre-accident value was KES 950,000/= and not KES 400,000/= presented by the Respondent, in satisfaction of non-existing loan arrears.
4. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

5. The appellant submitted that the loan advanced to him by the respondent was Ksh.422,680/= which the respondent later topped up with another loan of Ksh.43,942.58/=. That he religiously serviced the loan.
6. The appellant submitted that he demonstrated through tabulated evidence that he settled the loan in full but that the trial court gave a blind eye to his evidence. He submitted that he had established that he was not in arrears and therefore that the repossession of his motor vehicle was unwarranted and was illegal.
7. The appellant further submitted that the loan facility agreement did not expressly provide for repossession of the appellant's motor vehicle in the event of a purported default. In this respect the appellant relied on the case of Peter Waikwa Njagi v Omar Ali Shabhai (2011) eKLR where the court held that a right of possession cannot be inferred from an agreement that did not provide expressly for it. Therefore, that the trial court erred in holding that the respondent was entitled to repossession of the motor vehicle. That in holding so the court sought to re-write the agreement between the parties which has been frowned upon by many decisions such as in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd (2001) eKLR.
8. The appellant further referred to sections 65-67 of the *Movable Property Security Rights Act*, No13 of 2017 that provides for an enforcement of security rights and that the secure creditor is required by law to issue notice in writing to the grantor notifying them of the default and requiring them to make good the default within a particular period of time and in default may either sue the guarantor or take possession of the movable property.
9. The appellant referred to section 12 of the Auctioneers Practice Rules, *LN 120/1977* Corr. No. 84/1997, LN. 144/2009 where a proclamation Notice is required under Rule 12 (1) (b) thereof over and above one issued by the secured creditor, since the same is issued after the right to repossess is issued. The appellant submitted that he was not issued with the mandatory notices and or demand letters prior to repossession.
10. The appellant submitted that the respondent contended that at the time of auction and sale of the motor vehicle, the appellant's loan stood at Ksh.602,207/=:, yet the respondent's auctioneer in his notification of sale indicated the same as Ksh. 100,112/=:.



11. He submitted that there was no evidence that the respondent sold the motor vehicle on the 18<sup>th</sup> December 2021 as alleged. That the repossession did not follow the right process of sale by auction as there was no advertisement indicating venue, value and date of sale. More so that the respondent did not value the motor vehicle before sale as the same was valued at Ksh.950,000/= as of 18<sup>th</sup> May 2019 and they sold it at Ksh.400,000/=. Therefore, that the sale was unprocedural, illegal and null and void.
12. The appellant submitted that the respondent refused to render a statement of accounts in respect of the loan facility which raises doubt as to the genuineness of the claim against the appellant at the trial court.
13. It was submitted that the appellant is entitled to the prayers sought by virtue of the equity of redemption as postulated in *Rajnikantkhetshi Shah v Habib Bank A. G. Zurich* (2016) eKLR. That as the appellant has demonstrated that he was not in arrears at the time of repossession he is by virtue of the equity of redemption entitled to return of the motor vehicle or in the alternative the remittance of the value of the said vehicle by the respondent.

### **Respondent`s Submissions**

14. The respondent submitted that the appellant was extended a loan facility of Ksh.456,678/= on 22<sup>nd</sup> May 2019. Further that he was granted a USSD top up loan facility of Ksh.378,762/= that was to be paid in 12 monthly instalments starting 28<sup>th</sup> October 2019 to 28<sup>th</sup> September 2020. That in April 2020, the appellant sought for a restructure of the loan. That at the time of the re-structure the appellant owed Ksh.450,561/=. Upon structuring he was to pay instalments in the sum of Ksh.38,796 per month. That after the re-structure and before proclamation, the appellant paid four instalments totaling to Ksh.175,864/=:, paid in the months of June, July, August and September 2020. However, that he was required to have paid 5 instalments at Ksh.38,796/= to make a total of Ksh.193,980/=. That the appellant was thereby in arrears hence the repossession of the motor vehicle.
15. It was submitted that the repossession of the motor vehicle was lawful as the appellant was in arrears. That clause 1 of the terms of the loan agreement provided that in the event of default, the claimant would realize the collateral and recover all sums due including but not limited to loan charges, legal fees and other charges.
16. It was submitted that the appellant was issued with a demand letter before repossession on 5/10/2020, annexure SI.4 and further issued with a disposition notice on 13/11/2020, annexure SI.7. That he was issued with notification notice from Antique Auctioneers on 31/10/2020. That the motor vehicle was advertised in the Daily Nation newspaper of 7/11/2020 where it was indicated that it would be sold by private treaty. That the motor vehicle was valued on 18/11/2020 and the forced value was returned at Ksh.480,000/=. That the respondent followed all the process including proclamation and disposition that the appellant admits to receiving in his witness statement. That the respondent complied with section 21 of the *Auctioneers Act* as to advertisement and sale of the motor vehicle.
17. The respondent submitted that the appellant signed the loan facility agreement voluntarily and as such was bound by the terms therein. In that respect the respondent cited the cases of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (supra) and *Richard Akwesera Onditi v Kenya Commercial Bank Finance Company Limited* (2010) eKLR.

### **Analysis and Determination**

18. This being a first appeal, I am mindful that it is my duty to re-evaluate the evidence adduced before the lower court and, on the basis thereof, come to my own conclusion, bearing in mind however, that



I did not have the advantage of seeing or hearing the witnesses. In *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

19. I have considered the record of the lower court and the submissions tendered by the respective advocates for the parties. The issues for determination in the appeal are:
- i. Whether the appellant was in loan arrears.
  - ii. Whether the repossession and sale of the motor vehicle was lawful.
  - iii. Whether the appellant is entitled to the prayers sought in the appeal.
  - iv. Whether the respondent is entitled to the prayers sought in the cross-appeal.

#### **Whether the appellant was in loan arrears**

20. The case for the appellant was that he was advanced an initial loan of Ksh.422,680/= and a top up of Ksh.43,942.58, to make a total of Ksh.466,622.58. The respondent on the other hand contended that the initial loan was Ksh. 456,678/= and the top up was Ksh. 378,762/=. The trial magistrate found that the loan advanced was as stated by the appellant.
21. The appellant produced his bank statement from Family Bank showing that he received an advancement of Ksh.422,680/= from the respondent on the 22/5/2019. The bank statement further showed that he received a top up of Ksh. 43,942.58 from the respondent on the 27/9/2019. The respondent on the other hand never produced any documents to counter the evidence of the appellant on the amount of money advanced to him. Their claim that the initial loan was Ksh.456,678/= and that the top up was Ksh.378,672/= was thereby not proved. I agree with the trial court that the appellant was advanced a total loan of Ksh.466,622.58.
22. The trial court found in its judgment that though the appellant in his witness statement tabulated the total sum paid as Ksh.823,215/=:, his cheque and Mpesa statements showed that he re-paid a total of Ksh.452,048/= against a loan of Ksh.466,622.58. That the appellant did not repay the loan in full and did not pay interest and loan fees. Therefore, that the appellant was in arrears.
23. The appellant tabulated in his witness statement the various amounts he paid through cheques and Mpesa, all totaling to Ksh823,215. The tabulation shows that by the time that the car was repossessed in October 2020, he had repaid a total of Ksh.817,215/= (a sum of Ksh.6,000/= was paid after repossession). The payments were backed by his bank statement and Mpesa statement. The respondent did not produce the appellant's account statement to show that the various amounts the appellant claimed to have made were never made. The appellant had therefore proved that he had made a total payment of Ksh.823,215/= (Ksh.817,215/= before repossession). I find that the trial court wrongly rejected the evidence of the appellant that he paid a total of Ksh.823,215/=:.
24. The respondent alleged that at the time that the loan was re-structured in April 2020, the outstanding loan was Ksh.450,561/=: . The respondent produced a statement dated 6<sup>th</sup> May 2022 showing that the appellant was owing Ksh.450,561/=: as at 23/4/2020. However, the statement ran from that date to



- 30/12/2020. The respondent did not produce the appellant's statement from the date the loan was advanced to the time the loan was structured in April 2020. Why would the respondent fail to produce a statement of accounts running from the date the loan was given, yet that was the centre of the dispute in that the appellant was contending that he was not in arrears? There was therefore no evidence placed before the court to show how the figure of Ksh.450,561/= was arrived at. In my calculation from the appellant's tabulation, the amount paid before April 2020 was Ksh.643,951/=. How then did the amount owing at the time of structuring come to Ksh.450,561/= when already Ksh.643,951/= had been paid out of the loan advanced of Ksh.466,622.58?
25. It is to be noted that the advocates for the appellant wrote to the respondent requesting to be supplied with the statement of accounts in respect of the loan advanced to the appellant but this was not complied with. The inevitable conclusion that can be deduced from the refusal is that had the documents been availed they would have been adverse to the respondent. The respondent did not respond to the evidence of the appellant that he had paid a total of Ksh.817,215/= as at the time repossession took place. The statement that the respondent produced showing the balance of Ksh.450,561/= did not show the true position of the loan as the said document ran from 23/4/2020 and not from the time the loan was given.
26. It is clear that the respondent was working his figures from the disputed sum of Ksh.378,762/= for which there was no evidence that the same was advanced to the appellant. That, in my view, seems to be the root of the dispute between the parties. The respondent did not support their contention by documentation that the loan stood at Ksh.450,561/= as at April 2020. In the absence of a complete statement of accounts from the respondent, I find no evidence that the loan arrears stood at Ksh.450,561/= in April 2020.
27. The trial court held that the appellant had paid a total of Ksh.452,048/= and rejected the evidence that he had paid Ksh.823,215/=. The payment of the latter sum was supported by Mpesa statements. The respondent did not specifically deny that the payments were made. There was therefore no reason for the trial court rejecting the payment. The trial court did not consider the payments made in the entire period of the loan when it held that the appellant was in arrears. It is my finding that the respondent did not demonstrate that the appellant was in arrears as at the time of repossession of the appellant's motor vehicle and if he was in such arrears, the amount of arrears was not proved.

#### **Whether the repossession and sale of the motor vehicle was lawful**

28. According to a demand letter dated 5/10/2020, the amount claimed by the respondent as being due as of that date was Ksh.39,525/=. A week later vide a letter of instruction to the auctioneer dated 12<sup>th</sup> October 2020 as well as the Proclamation of Attachment of the motor vehicle by the auctioneer both of which were dated 12/10/2020 indicated that the amount owing was Ksh.483,885/=. That notwithstanding, the Notification of Sale of the motor vehicle from the auctioneer dated 31/10/2020 indicated the decretal amount as at that date was Ksh.100,300/=. The question that arises then is as to the exact amount owing at the time of repossession of the motor vehicle. Was it Ksh.39,525/=, Ksh.100,300/= or Ksh.483,885/= ? How did the figure manage to jump from Ksh.39,525 to Ksh.483,885? In face of all these discrepancies, it can only mean that the figures were not accurate.
29. The respondent through the witness statement of its legal officer claimed that the amount outstanding at the time the motor vehicle was auctioned in December 2021 was Ksh.602,207/=. The amount claimed at the time of filing suit was Ksh.202,207/=. Considering that the appellant had paid a sum of Ksh.823,215/= by the time of the repossession, it means that the total amount owing by the appellant at the time of filing suit was Ks.1,025,422/=. The respondent did not demonstrate by way of laying down evidence how a loan of Ksh.466,622.58/= rose to that figure in a period of about one-and-a-half



years. If there was any money owing, it was not proved how much it was. I find that the respondent repossessed the appellant's motor vehicle with no concrete evidence that the appellant owed them money. Consequently, there was no justification in the repossession of the motor vehicle.

### **The appellant's Counterclaim**

30. The appellant counter claimed return of the motor vehicle and in the alternative payment of the market value of the vehicle as per the valuation report done at the time of the loan facility, the same being Ksh.950,000/=. He contended that he was not served with any of the mandatory notices prior to repossession of the motor vehicle as required by the law. That the vehicle was not sold as alleged by the respondent as it was not advertised for sale. That the newspaper advertisement produced by the respondent did not relate to his motor vehicle nor to the respondent's auctioneers, Antique Auction Agencies. That there was collusion between the respondent and their auctioneers to sell the motor vehicle at a throw away price of Ksh.400,000/=. The appellant produced the valuation report dated 18/5/2019 indicating that the motor vehicle had at the time a market value of Ksh.950,000/= and a forced value of Ksh.810,000/=.
31. The respondent on their part stated that upon repossession of the motor vehicle, the appellant was issued with a disposition notice dated 13/11/2020. That the motor vehicle was advertised before auction on 17/11/2020. That according to a valuation report dated 18/11/2020 the motor vehicle had a forced value of Ksh.480,000 and it was auctioned and sold on 18/12/20 for Ksh.400,000/=. The respondent produced the disposition notice, the advertisement and notification of sale as evidence in his case.
32. Having found that the Respondent repossessed the appellant's motor vehicle without justification, the remedy is to order the respondent to return the appellant's motor vehicle or pay its market price at the time of repossession. The respondent says that the motor vehicle was sold so the only option is to order payment of its market price.
33. The respondent says that the motor vehicle was valued before sale. They called one witness, Duncan Abuga, CW2, who produced the valuation report in court. The witness however stated that though he participated in the preparation of the report his name was not contained in the report. He did not tell the court his qualifications and whether he is qualified to assess motor vehicles. The report indicates that the motor vehicle was examined by a person called Tominent Ondari whose qualifications are not stated in the report. Nor does the report indicate the particular person who signed it.
34. Though the report indicates at the top that a road test was carried out on the vehicle during examination, the report at the same time indicates that the motor vehicle was not started nor tested for mechanical and electrical serviceability because the ignition key was missing. The report indicated a market value of Ksh.570,0000/= and the forced value of Ksh.480,000/=. In the absence the qualification of the person who prepared the report, the court cannot rely on the report to determine the market value of the vehicle at the time that it was sold.
35. The respondent claimed that the vehicle was advertised for sale on 17/11/2020. They produced a newspaper advertisement to prove so. However, the name of Antique Auctioneers does not appear in the newspaper cutting. Nor does the registration number of the vehicle appear therein. The witness for the respondent CW 1 eventually told the court that the vehicle was sold by private treaty. She declined to reveal the name of the person the vehicle was sold to. From all this it would appear that there was a conspiracy to undervalue the vehicle and sell it at a throw away price. I am in agreement with the appellant that the vehicle was undervalued in being sold at Ksh.400,000/=. Even if the respondent had



justification to sell the vehicle, they were under duty to act in the best interests of the appellant to sell the vehicle at a reasonable price which they do not appear to have done in this case.

36. The appellant produced a valuation report that indicates that at the time he was granted the loan by the respondent in the month of May 2019 the vehicle had a market value of Ksh.950,000/= and forced value of Ksh.810,000/=. It is the respondent who had called for the report as a precondition for granting the loan. They must have thus agreed with the report. Having unlawfully sold the appellant's motor vehicle, the respondent's must pay the appellant at least the forced value of the vehicle of Ksh.810,000/=. I so order.

### **Respondent's Cross appeal**

37. The respondents were claiming a sum of Ksh.202,207/= being the amount of money owing from the appellant as a result of a loan facility advanced to him. As observed above, the respondent did not prove that there was any such amount owing. Consequently, their counter appeal is dismissed.

### **Disposition**

38. The upshot is that the judgment of the trial court is set aside and substituted with an order allowing the appellant's counterclaim in the sum of Ksh.810,000/= which is the forced value of his motor vehicle at the time of repossession that was unlawfully sold by the Respondent. The Respondent's cross appeal is dismissed.

39. The appellant to have the costs of the appeal, the cross appeal and the costs at the subordinate court.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL 2025**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Onyango for Appellant

Miss Wanene for Respondent

Court Assistant - Dennis

