



**Cheruiyot v Family Bank (K) Limited (Civil Appeal
E017 of 2021) [2024] KEHC 6367 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E017 OF 2021**

JR KARANJA, J

MAY 30, 2024

BETWEEN

CHARLES KIPKORIRI CHERUIYOT APPELLANT

AND

FAMILY BANK (K) LIMITED RESPONDENT

RULING

1. The decision and judgement of the Resident Magistrate at Kericho in CMCC No. 118 of 2017 prompted this appeal anchored on the four (4) grounds set out in the Memorandum of appeal dated 8th June 2024 and filed herein on 10th June 2021 which appear to have been abandoned in favour of the other four (4) grounds contained in the supplementary petition (sic) of appeal dated 15th February, 2023.
2. The Appellant, Charles Kipkorir Cheruyoit was the Plaintiff in the suit aforementioned while the Respondent, family Bank Limited, was the Defendant. The Kenya Orient Insurance Company Limited was enjoined in the suit as an interested party but is not a party to the present appeal. The claim by the Appellant against the Respondent was for a declaratory order to the effect that the Respondent's actions relating to a motor vehicle registration No. KBQ 541B Toyota Succeed were illegal and that the vehicle should be released unconditionally to the Appellant by the Respondent and the interested party.
3. The Appellant also claimed general damages in the sum of Ksh 3,000 per day from the 14th April, 2014 until judgment day for unlawful attachment and detention of the vehicle. It was pleaded in the plaint or statement of claim that on the 8th December 2012 the vehicle a aforementioned was stolen and recovered two years later on the 16th April, 2014 after which it was driven to the Defendant/ Respondent car yard and remained there since then. A demand letter dated 1st March 2017 was issued to the Respondent but it did not respond.



4. It was also pleaded that despite several attempts by the Appellant using diplomatic approaches the Respondent was disinterested in settling the matter amicably. That the Respondent's refusal to release the motor vehicle to the Appellant/Plaintiff caused him mental anguish, suffering, loss and damages bearing in mind that the vehicle was his only source of income for his family. The Appellant therefore prayed for judgement against the Respondent as prayed in the plaint.
5. Judgement in default of appearance and/or filing defence was initially sought by the Appellant and granted in his favour against the respondent. However, the default judgement was later set aside by the court and the Respondent allowed to file its defence which it did on the 5th February, 2019 denying the Appellants claim in toto. This was followed with an amended defence and counter claim dated 5th February, 2020 in which the Respondent reiterated its denial of the Appellant/Plaintiff's claim and counter claim against him in the sum of Ksh 1,785,947 together with interest at 18% per annum from 6th December, 2012 being the outstanding loan amount owed by the Appellant to the Respondent.
6. After a full hearing of the suit the trial court rendered its impugned judgment on the 25th May, 2021 to the effect that the Appellant's claim against the Respondent was dismissed for want of merit and the Respondent's counter claim against the Appellant was allowed to the extent that the Appellant was found to be indebted to the Respondent in the sum of Ksh 1,785,947 plus interest at 18% per annum from 6th December, 2012 until payment in full.
7. Being aggrieved with the trial court's judgment, the Appellant preferred this appeal which was canvassed by way of written submissions.

The Appellant filed his submissions in person on 23rd January, 2024 and supplementary submissions on the 17th May, 2024. The Respondent's submissions were filed on 29th April, 2024 through Ashitiva Advocates LLP.

8. Having given due consideration to the appeal on the basis of its supporting grounds and the viral submissions, the court's role was to reconsider the evidence availed at the trial and draw its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witness (see, *Selle vs Associated Motor Boat Co.* (1968)EA 123). The appeal is "*prima-facie*" against the trial court's judgement on the main suit by the plaintiff/Appellant against the Defendant/Respondent rather than of the counter claim by the Defendant/Respondent against the Plaintiff/Appellant.
9. Basically, the Appellant's case was briefly that in the month of January, 2012 the Appellant approached the Respondent bank to open a savings account when a bank official persuaded him to obtain a loan to purchase a vehicle for transport business purposes. He was then required to deposit into his account a sum of Ksh 200,000 in order to qualify for the loan. Thereafter, he was referred to a motor vehicle dealer in Nairobi where he deposited a sum of Ksh 5000 and after a month the loan amount of Ksh 500,000 was deposited into the account of the dealer, Fleet Auto Ltd.
10. After the payment, the Appellant took possession of the vehicle for his usage and commenced the repayment of the loan after a few months. He continued with the repayment up to the month of December, 2012 when the vehicle was stolen. He made the necessary report to the police and was issued with a police abstract report form. Two years thereafter in the year 2014, the police recovered the vehicle at Keroka.
11. On instructions from the bank, the Appellant proceeded to Keroka to view and inspect the recovered vehicle. He noted that the vehicle's body work and engine were severely damaged but paid the bank a sum of Ksh 11,000 for the vehicle to be brought to Kericho and to remain with the bank.



12. The Appellant later made a request to the bank to release the vehicle to him but the request was turned down and the bank continued to detain the vehicle without proper reason and having not informed him of the detention. He made several attempts to have the vehicle released to him but all in vain. He then instituted the present suit against the bank in the year 2017.
13. The Respondents case through its credits officer, Bernard Kipkurui Murangai (DW1), was briefly that the Appellant applied for a loan facility of ksh. 552,000 which was secured by a Chattel mortgage instrument duly executed by the Appellant in favour of the Respondent. That the instrument contained a provision for the Respondent's statutory power of sale and the procedure to be adopted before such sale was undertaken.
14. The Respondent was in the process of exercising its statutory power and realizing its security when it attached or detained the material vehicle on account of nonperformance of the Appellant's loan account it for a period of more than one year. It was the Respondent's contention that it was within its rights to exercise its statutory power of sale with regard to the vehicle which was registered in both its name and that of the Appellant and because the Appellant's loan account is still in arrears the Respondent should be allowed to continue with realization of its security. The Respondent therefore prayed for the dismissal of the Appellants case.
15. After having considered the evidence in its totality the trial court found that the issue for determination was whether the Plaintiff/Appellant was entitled to the prayers sought in the plaint. In that regard, the trial court stated as follows.

“I have carefully studied the pleadings the parties evidence and the law. Though the Plaintiff is not clear in the relief sought in part (a), firstly, he is seeking a declaration that the action by the Defendant is illegal, null and void. This then begs the question whether the action by defendant in repossessing the motor vehicle herein is illegal, null and void.”
16. It answering the question the trial court, being guided by the authorities cited by the Defendant/ Respondent in its submissions, and further the provisions of the chattel Transfer Act (cap 28), found that the Defendant by repossessing the motor vehicle herein was well within its rights to repossess it, the Plaintiff having defaulted in repaying the loan advanced to him by the Defendant. The conclusion by the trial court was therefore that the Appellant was not entitled to the orders sought against the Respondent as it acted lawfully by taking the vehicle away from the possession of the Appellant and detaining it for reasons of non payment of the outstanding loan amount by the Appellant.
17. Having reconsidered the evidence , it was clear to this court that the fact that the Appellant obtained a loan of over Ksh 500,000 from the Respondent to purchase the subject vehicle was not at all or substantially disputed and so was the fact that the Appellant defaulted in the repayment of the loan for more than one year thereby giving the Respondent its right to realize its security by exercise of its statutory power of sale under the relevant Chattel Mortgage Instrument which was allegedly duly and voluntarily executed by the Appellant.
18. The subject vehicle registration No. KBQ 541B Toyota S/Wagon was the collateral for the repayment of the loan under the terms and conditions specified in the Respondents letter of offer dated 2nd March, 2012 (D. exhibit 1) and in the Chattel Mortgage Instrument (D.Exhibit2). This offered an explanation as to why the vehicle as per the logbook No. 54555731 (D. Exhibit 4) was registered in the joint names of the Appellant and the Respondent as joint owners thereof.
19. Basically, in this suit, the Appellant/Plaintiff major complaint was that the vehicle was unjustifiably and unlawfully detained or seized by the Respondent from his custody. He therefore sought a declaratory



order to that effect and further an order for general damages against the Respondent's as a result of its alleged unlawful action. The Respondent's defence was that its action of detaining or seizing or repossessing the vehicle was lawful in as much as it was in accordance with the terms and conditions of the operational chattel Mortgage Instrument.

20. There being no denial or substantial denial from the Appellant that he actually obtained the loan from the Respondent to purchase the vehicle and that he defaulted for along period of time to repay the loan thereby prompting the Respondent to act the way it did by dint of the operating instrument. The basic issue which emerged determination was whether the Respondent's aforementioned action against the appellant was lawful and if so, whether the Appellant was entitled to the prayers sought in the plaint.
21. In his testimony in court, the Appellant appeared to have been at pains to explain the reason behind his inability to continue with the repayment of the loan amount. In the process, he dragged in the police, a motor vehicle dealer and an insurance company the erstwhile interested party in this matter.
The police apparently came into the fore on account of the theft of the vehicle and its recovery by them.
22. The Appellant implied that the theft and the vehicle caused him to fall behind in the repayment of the loan amount and this was exacerbated by the fact that he could not generate any income from the vehicle which he utilized for his transport business. Much as it was easy to sympathize with the Appellant, his reasons for failure to continue with the repayment of the loan for such an inordinate period of time could not and did not stop his obligations under the Chattel Mortgage Instrument and indeed, his contractual obligation with the Respondent.
23. There was no evidence that the Respondent had anything to do with the Appellant's aforesated reasons and it was not obliged to stop the contract from running on account of the theft of the collateral or even to suspend it unless, of course, the Respondent found it fit to have mercy upon the Appellant and given him time to recover before he resumed repayment of the outstanding loan amount. Obviously, with this suit, the Respondent did not show any mercy to the Appellant perhaps due to his impatience and zeal to bring this suit against (the Respondent).
24. Be that as it may, on the question as to whether the Respondent's action against the Appellant was unlawful, the trial court found in favour of the Respondent by holding that its action was lawful. The Appellant could not therefore be granted the prayers that he sought. His claim against the Respondent was dismissed.
25. In this court's opinion, the question would have been best answered by a consideration of the validity or otherwise of the Chattel Mortgage Instrument (D.Exhibit 2) upon which the Respondents action against the Appellant was anchored. As it were the investment was the first port of call in determining whether or not the Respondent's action was lawful.
26. A Chattel Mortgage Instrument may be said to be a derivative of the *Chattels Transfer Act* (cap 28) laws of Kenya) which is an Act of Parliament to make provision relating to Chattel Securities and the Transfer of Chattels.

Under section 2 of the Act, the term "instrument" means any instrument given to secure the payment of money such as the document produced herein by the Respondent as D. Exhibit 2 and which ought to be registered in the manner provided by the Act.



27. Registrations is defined by the Act to mean the filing of an instrument with schedule or inventories or a true copy thereof with the necessary affidavit, Section 4 of the Act provides that:-

“ all persons shall be deemed to have notice of an instrument and of the contents thereof when that instrument has been registered as provided by this Act....”

The mode of registration is provided for under section 5 of the Act as follows;-

“Registration of an instrument shall be affected by filing all schedules endorsed thereof annexed thereto or referred to therein, or a true copy of the instrument and the schedules, and an affidavit or to the same effect in the office of the Registrar.”

28. Section 6 of the Act provides for limitation of time for registration to the effect that an instrument may be registered within a period of twenty one (21) days from the day in which it was executed. The time for registration may however be extend under Section 9 of the Act. A perusal of the instrument availed herein by the Respondent (D. Exhibit 2) reveal that the document does not accord with the foregoing provisions of the Chattels Transfer Act, in relation to the executorial and registration of such an instrument.

29. In the absence of the date when the instrument (D. exhibit 2) was made and the absence of the grantor’s address and signature in part 1 of the schedule annexed thereto it cannot be said that the instruments was properly executed for purposes of swerving the loans advanced to the Appellant by the Respondent. This is buttressed by the fact even the affidavit accompanying the instrument was not dated hence lack of proper attestation (see section 15 of the Act). The lapses mistakes or errors in the execution of the operating instrument (D. Exhibit 2) was according to this court of fatal defect which rendered the instrument invalid and incapable of activating the Respondents power or rights to detain, seize or repossess the Appellants motor vehicle. The instrument was in effect null and void in justifying The Respondents impugned actions.

30. If the instrument was properly executed but unregistered or improperly registered the Respondent would have been justified in relying on it to repossess or detain the vehicle in realization of it’s security as the appellant would find no solace or protection since his situation would not fall in the category of cases or persons specified in section 13 (1) of the Chattel Transfer Act.

31. Apparently, the Respondent indicated by production of the notice dated 25th November, 2017 (D.Exhibit 3) that the instrument may have been registered. However, the registration could not have any effect an the instrument which was defective and invalid. For all the reason foregoing. The court would disagree with the finding of the trial court that the Defendant/Respondent action against the Plaintiff/Appellant respecting the subject vehicle was lawful. On the contrary this court finds that the action was unlawful in as much as it was founded on an invalid and defective Chattel Mortgage Instrument.

32. The Appellant’s contractual obligations with the Respondent were however not discharged by the defect in the execution of the instrument only that the Respondent should now adopt a different lawful method to recover from the Appellant the outstanding loan amount. Otherwise, this appeal is allowed to the extent that the impugned judgment of the trial court is hereby set aside and substituted with a judgement allowing prayer (a) of the statement of claim (plaint) dated 30th April, 2017 together with prayer (c).

33. Prayer (b) is however disallowed for want of sufficient evidence and proof for on award of general damages in the manner claimed by the Appellant.



34. Ordered accordingly.

DATED AND DELIVERED ON 30TH DAY OF MAY, 2024.

JR. KARANJAH

JUDGE

In the presence of .

Appellant. Present in person

Mr. Mua Wambua holding brief for Mr. Mburu for Respondent.

Alex court assistant.

