



REPUBLIC OF KENYA



Letshego Kenya Limited & another v Kanyi & another (Civil Appeal 173 of 2023) [2025] KEHC 10741 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 173 OF 2023**

**FN MUCHEMI, J
JULY 17, 2025**

BETWEEN

LETSHEGO KENYA LIMITED 1ST APPELLANT

TROPHY AUCTIONEERS 2ND APPELLANT

AND

DAVID MUREITHI KANYI 1ST RESPONDENT

AFFORDABLE BUDGET CONTROL HOMES LIMITED 2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. J. A. Agonda (PM) delivered on 11th May 2023 in Ruiru MCCC No. 194 of 2023)

JUDGMENT

Brief Facts

1. This appeal arises from the ruling of Ruiru Principal Magistrate in MCCC No. 194 of 2023 whereby the trial court issued a permanent injunction restraining the appellants from selling LR. No. Ruiru Kiu Block 2 (Githunguri)/14976 and directed the 1st appellant to discharge the charge registered in its favour and release the security to the respondents.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 12 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in failing to appreciate that the issue at hand was not just interest accrued but also that the appellants right of sale had accrued hence making the entire loan due and owing.
 - b. The learned trial magistrate erred in law and in fact by ordering release of security of a loan that was due and owing over an interest dispute.



- c. The learned trial magistrate erred in law and in fact in ordering the release of the security while admitting that the loan was still due and owing.
 - d. The learned trial magistrate failed to consider the letter of offer together with the loan statement even though the same were produced through affidavits before court.
3. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

4. The appellants submit that their application was dated 20th March 2023 but in the ruling delivered on 11th May 2023, the trial magistrate stated that the ruling was in relation to an application dated 27th March 2023. Further, in the ruling the magistrate stated that the application sought an order to the effect that the respondents pay the outstanding interest arrears of Kshs. 2.2. million but the appellants submit that their application sought an order directing the respondents to pay the outstanding loan balance of Kshs. 13,456,441.67/-.
5. The appellants argue that the trial magistrate delved on the issue of interest which was not the issue at hand which led to the final orders directing them to discharge the property. The respondents in filing the suit in the trial court sought for orders of permanent injunction restraining the appellants from disposing of the suit property, an order for reconciliation of accounts and an order for an independent valuation of the suit property. The respondents did not deny that the loan was in arrears. The appellants submit that during the proceedings before the lower court, the respondents paid the sum of Kshs. 1,200,000/- to clear the arrears that were outstanding.
6. The appellants argue that the interest charged on the loan was calculated as per the letter of offer which the respondents executed knowingly and voluntarily thereby affirming that they understood the terms and agreed to be bound by the terms. Under the letter of offer, interest on the loan was to be charged at the rate of 15% per annum and the loan was to be repayable in 60 monthly instalments of Kshs. 440,269.85/-. Additionally, one of the prayers sought in the respondents' application dated 21st November 2023 was for them to disclose the percentage they used to arrive at monthly interest rates. The appellants argue that the trial magistrate ought to have directed the parties to conduct a reconciliation of accounts to ascertain the interest rates charged and how the same were arrived at. However, the trial magistrate in her ruling made a final determination of the matter yet the same was at the preliminary stage as pretrial directions were yet to be taken and the matter was yet to be heard.
7. The appellants argue that the learned trial magistrate erred in her ruling by issuing a permanent injunction at an interlocutory stage and when the same had not been prayed for. The permanent injunction issued by the court fully determined the suit and should not have been granted on the basis of affidavit evidence and before hearing the witnesses. To support their contentions, the appellants refer to the case of Superior Homes (Kenya) Limited vs East Africa Portland Cement Company Limited (2024) eKLR.
8. The appellants further argue that the trial magistrate erred when she directed that they discharge the suit property at the preliminary stages of the trial and while the respondents had admitted that the loan had been defaulted on. The order by the trial magistrate further amounted to rewriting of the contract as the parties had agreed in the letter of offer that security would only be released upon full repayment of the loan. To support their contentions, the appellants rely on the case of Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR.



The Respondent's Submissions.

9. The respondents argue that they filed a suit seeking to stop a scheduled sale by auction under certificate of urgency dated 21st November 2022 which was opposed by the appellants. The trial court rendered its ruling on 10th January 2023 in their favour making the appellants file an application dated 23rd March 2023 seeking that they be ordered to pay an outstanding loan balance of Kshs. 13,456,441.67/- which amount they opposed. The respondents thus submit that it is wrong for the appellants to condemn the trial court for concluding a case through applications yet they are the ones who invited the court to conclusively hear and determine their suit through their application.
10. The respondents submit that the 2nd respondent took a loan facility from the 1st appellant which was secured by the 2nd respondent's properties namely maisonette D45, D62 and D67 erected on LR. Mainland North Section 1/343, maisonette D14, D27 and D28 erected on LR. Mainland North Section 1/22067 and a fixed floating debenture over its assets. Additionally as a guarantor, the 1st respondent offered his personal property known as LR. No. Ruiru Kiu Block 2 (githunguri)/14976 as security. The 2nd respondent continued to service the loan until November 2022 when the 1st appellant through the 2nd appellant maliciously and irregularly advertised the 1st respondent's suit property. The respondents submit that the property was advertised before they were issued with all the necessary notices and before the 1st appellant exhausted all the available remedies against the 2nd respondent. To support their contentions, the respondents rely on the case of Kenya Commercial Bank Ltd vs Sun City Properties Ltd & 5 Others [2005] eKLR.
11. The respondents urge the court to uphold the lower court's decision to have the certificate of title over property LR. No. Ruiru/kiu Block 2 (githunguri) 14976 released as no prejudice will be occasioned to the 1st appellant.

Issue for determination

12. The main issue for determination is whether the appeal has merit.

The Law

13. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.



15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

16. The record shows that the 1st appellant advanced a loan facility of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) to the 2nd respondent vide letter of offer dated 12th April 2022. The said loan was secured by the following securities:- a legal charge dated 20th April 2021 over the property Title Number Ruiru Kiu Block 2 (Githunguri) 14976; a legal charge in favour of the 1st appellant over property masionette D45, D62 and D67 erected on LR mainland North/section 1/343 registered in the name of the 2nd respondent; a legal charge in favour of the 1st appellant over the property masionette D14, D27 and D28 erected on LR mainland North/Section 1/22067 registered in the name of the 2nd respondent; a legal charge between the 1st and 2nd respondent over Title Number Ruiru Kiu Block 2 (Githunguri)/14976; a deed of guarantee and indemnity by the 1st respondent being the registered owner of the property being secured; a deed of guarantee and indemnity by all directors of the 2nd respondent and fixed and floating debentures for the sum of Kshs. 15 million over assets of the 2nd respondent. It was a term in the letter of offer that the loan would be repaid in a period of sixty months with each monthly installment of Kshs. 440,269.85/- with a chargeable interest of 15% flat rate per annum.
17. Upon the 1st respondent filing an application dated 21st November 2022 to stop the sale of his personal property, LR. No. Ruiru Kiu Block 2 (Githunguri)/14976 the court rendered its ruling on 10th January 2023 stopping the said sale and ordered the appellants to regularize the accounts.
18. The matter came up for directions on 20th February 2023 and the trial court directed the 2nd respondent to deposit only the outstanding arrears which was due and payable to the 1st appellant of Kshs. 1,200,000/-. The 2nd respondent deposited the said amount vide two cheques of Kshs. 800,000/- and Kshs. 400,000/- dated 26th February 2023 and was acknowledged by the 1st appellant. On 14th March 2023, the matter came up for mention to confirm if the 1st appellant had received the said sum of Kshs. 1,200,000/- which they did confirm receipt but informed the lower court that the 1st respondent was still owing an interest cost of more than Kshs. 1million the court then directed the 1st appellant to file a formal application on the same.
19. The appellants then filed the application dated 20th March 2023 seeking for repayment of the outstanding loan of Kshs. 13,456,441.67/-. The court delivered its ruling on 11th May 2023 whereby the magistrate issued a permanent injunction restraining the appellants from selling the suit property and directed the 1st appellant to discharge the charge registered in its favour. On further perusal of the trial record, the ruling delivered on 11th May 2023 was in respect of the application dated 27th March 2023 seeking for orders for the plaintiff to pay the outstanding interest arrears of Kshs. 2.2 million from the default loan facility issued by the defendant. I have perused the lower court record and noted



- that there is no application dated 27th March 2023. The appeal lodged arises from the application dated 20th March 2023.
20. Upon further perusal of the record including the submissions of the parties, it is confirmed that the ruling delivered on 11th May 2023 by the magistrate was in respect of the application dated the 20th March 2023. These ruling forms the subject of the appeal.
 21. The appellants challenge this appeal on several grounds. Firstly, that the court in its ruling ordered release of the security L.R. No. Ruiru Kiu Block 2 (Githunguri)/14976 arguing that the subject loan is still due and owing whereas the respondents in the plaint had raised the issue of accounts on the loan. The applicant argues that the magistrate erred in releasing the security prematurely.
 22. The case before the magistrate was filed through a plaint. For the court to determine the suit, it was under an obligation to hear the parties and consider the evidence before it. The record shows that the court dealt with interlocutory applications only in order to give the orders it gave in the impugned ruling. In the ruling delivered on 11th May 2023, the magistrate made final orders declaring that the respondents had fully paid the loan and proceeded to order release of the security.
 23. In my considered view, the magistrate ought to have heard the parties in their case before making final orders. Looking at the weighty issues that were determined between the parties, this case was determined through the interlocutory applications. Article 50 (2) of *the Constitution* provides that every party in civil or criminal proceedings has a right to be heard. The ruling of the magistrate denied the parties their right to be heard which is their constitutional right.
 24. I have looked at the other grounds of appeal and noted that they revolve around the premature orders of release of the security in the ruling of the magistrate which also declared that the respondents had fully paid the loan without hearing the parties in evidence.
 25. For the above reasons, I find this appeal successful and I make the following orders:-
 - a. That the ruling of the magistrate delivered on 11th May 2023 is hereby set aside.
 - b. That the original file is hereby returned to Chief Magistrate Court, Ruiru for hearing and determination.
 - c. That the parties do maintain status quo pending further orders by the Chief Magistrate Court.
 26. Due to the nature of this case, and the issues involved, I hereby order that each party do meet their own costs of this appeal.
 27. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 17TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE

