REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 11 OF 2019

EQUITY BANK KENYA LTD.....APPELLANT

VERSUS

ROMANUS OKELLO.....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon P. Mbulikah (SRM)

delivered at Kisumu in Chief Magistrate's Court Case No 230 of 2008 on 18th December 2018)

JUDGMENT

INTRODUCTION

1. In her decision of 18th December 2018, the Learned Trial Magistrate, Hon P. Mbulikah, Senior Resident Magistrate, entered judgement in favour of the Respondent herein against the Appellant as follows:-

> **a. Loss of income 1,290,000** (sic)
>
> **b. Costs of the suit to be borne by the Appellant herein.**

She specifically stated that she would not award any interest on the said sum.

2. Being aggrieved with the said decision, on 1st February 2019, the Appellant filed a Memorandum of Appeal dated 28th January 2019. It relied on three (3) grounds of appeal.

3. The Appellant's Written Submissions were dated 19th August 2021 and filed on 1st September 2021 while those of the Respondent were dated and filed on 12th October 2021. The Judgment herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

> **"...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..."**

6. The principle behind this conclusion is that as an appellate court will not have had the advantage of having seen and heard the evidence of witnesses, it should exercise its jurisdiction to review the evidence with caution and it is not enough that the appellate court might have come to a different conclusion.

7. Having looked at the Memorandum of Appeal, the Appellant's and Respondent's Submissions, it was the considered view of this court

that the issues that had been placed before it for determination were as follows:-

a. Whether the attachment of the Respondent's Motor Vehicle Registration Number KYY 781 (hereinafter referred to as "the subject Motor Vehicle) was lawful;

b. If not, whether the Respondent was entitled to the claim for loss of income; and

c. If so, who was liable to pay the Respondent the claim for loss of income.

8. Although all the grounds of appeal were more or less related, this court therefore deemed it prudent to address the said issues under the following distinct heads.

I. ATTACHMENT OF THE RESPONDENT'S SUBJECT MOTOR VEHICLE

9. The Appellant pointed out that it was an undisputed fact that it advanced the Respondent a loan of Kshs 400,000/= which was secured by the logbook of the subject Motor Vehicle but the Respondent defaulted in payment of the said loan. It was emphatic that the Respondent was served with two (2) Proclamations which clearly gave him seven (7) days' notice as provided in Rule 12(1)(c) of the Auctioneers Rules. It was therefore its submission that the Trial Court erred when it held that the attachment was illegal.

10. On his part, the Respondent averred that it did not dispute that the Proclamations were issued. However, he questioned their legality for the reason that there was no decree as no determination had been made of the existence of the debt, if at all.

11. He placed reliance on the case of **National Industrial Credit Bank Ltd vs S.K. Ndegwa Auctioneer [2005] eKLR** where the court therein held that the purpose of an attachment is to execute a decree.

12. He further argued that the attachment was unlawful as the same was done on his subject Motor Vehicle which was his tool of trade despite the said loan also having been secured by Title Deed of parcel of land known as L.R. No. Kisumu/Konya/2891. He submitted that this was contrary to the provisions of Section 44(1)(iii) of the Civil Procedure Act Cap 21 (Laws of Kenya) that provides that the **"tools and implements of a person necessary for the performance by him of his trade and professions"** shall not be liable for attachment which position was also emphasised in the case of **Invesco Assurance Co Ltd vs Kinyanjui Njuguna & Co Advocates [2020] eKLR**.

13. Notably, the Appellant did not rebut the Respondent's case. It did not call any witnesses to testify on its behalf. It did not also tender in evidence any document to demonstrate that it was entitled to repossess the subject Motor Vehicle in case of default by the Respondent herein. It did not also produce any Notice to the Respondent notifying him that it would repossess the subject Motor Vehicle in the event he did not rectify the default.

14. In this regard, this court was satisfied that the Learned Trial Magistrate did not apply the wrong principles in having come to the conclusion that the Appellant repossessed the subject Motor Vehicle without giving the Respondent notice of the same. In the absence of any evidence to the contrary, this court thus came to the firm conclusion that the attachment of the subject Motor Vehicle was irregular and unlawful.

15. Having said so, this court did not agree with the Respondent's submissions that the subject Motor Vehicle was a tool of trade that could not have been attached within the meaning of goods that could not be attached as stipulated in Section 44(1)(iii) of the Civil Procedure Act. As this court had already found that the attachment of the subject Motor Vehicle was unlawful, it was not necessary to belabour the point. It sufficed for this court to state that a good that had been pledged as a collateral for a loan could not by any means be deemed to be a tool of trade. It remained a chattel that could be repossessed and sold to recover any outstanding monies owed to a creditor.

II. LOSS OF INCOME

16. The Appellant submitted that the firm of Okeno & Sons Building Contractors which leased the subject Motor Vehicle to Lake Quarry Limited vide an Agreement dated 1st March 2008 was a limited liability company and a separate entity from the Respondent herein.

17. It added that the Respondent who testified as PW 2 told the Trial Court that the subject Motor Vehicle was hired out at a cost of Kshs 12,500/= per day. He had claimed a sum of Kshs 794,000/= being loss of income for sixty two (62) days that the said subject Motor Vehicle had been repossessed.

18. It was its contention that this was a complete departure from the evidence of Paul Otieno Okeno (hereinafter referred to as "PW 1") who testified that the subject Motor Vehicle used to earn Kshs 30,000/= per day.

19. It further argued that no evidence was produced to prove that the alleged Agreement was in place at the time of the attachment and that no audited accounts were tendered in evidence to prove the income earned from the use of the subject Motor Vehicle and that tax was paid as per the law.

20. In this respect, it relied on the cases of **Ryce Motors Ltd & Another vs Muroki (1995-1998) 2 EA 363** and **Joseph Kimani & Another vs James Kangara Kahanya [2017] eKLR** where the common thread was that proof had to be adduced in a claim for loss of earnings.

21. On his part, the Respondent submitted that the minimum the subject Motor Vehicle earned per day was Kshs 12,500/= while the maximum income per day was Kshs 30,000/=. He was emphatic that the Appellant did not adduce any evidence to rebut this fact and that it

was improper for it to challenge this evidence at the submissions stage. He contended that the same could only be challenged at the cross-examination stage.

22. The court carefully perused the evidence and noted that the Agreement dated 1st March 2008 was between Okeno & Sons Building Contractors (hereinafter referred to as **"the Lessor"** and Lake Quarry Ltd(hereinafter referred to as **"the Lesee")**. The said Agreement was duly executed and attested by Moses A Orengo Advocate and Commissioner for Oaths. However, the persons who attested the Agreement on behalf of the Lessor and the Lessee were not indicated therein. When he was cross-examined, the Respondent admitted that he was not one of the persons who signed the same and that the names of the persons who signed the said Agreement were not indicated therein.

23. Having not been a signatory to the said Agreement, the Respondent could not therefore adduce evidence on the veracity of the contents therein. Further, as the Appellant correctly pointed out, the Lessor was a separate entity from the Respondent herein. This court did not see any documents that created a nexus between him as a director and/or shareholder of the Lessor and further any connection with the Lessee. Indeed, the Respondent could not make a claim on behalf of the Lessor without any authority to sue on its behalf. In any event, the party that seemed to have suffered loss of income was the Lessor who had no relationship with the Appellant herein.

24. For all purposes and intents, the Respondent could not therefore have relied on the said Agreement to justify a claim for loss of income and was irrelevant in the circumstances of the case herein.

25. The said Agreement was also inadmissible by virtue of the fact that the same was not adduced in evidence by its maker. Indeed, Section 72 of the Evidence Act Cap 80 (Laws of Kenya) provides that:-

> **"Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."**

26. The Respondent did not adduce evidence that he was familiar with the handwriting of the persons who attested the said Agreement. Further, he did not lay basis as to why the person who attested the Agreement could not be called to tender it as evidence in court. The said Agreement was therefore both inadmissible and irrelevant as has been shown hereinabove.

27. Going further, the said Agreement was inadmissible in evidence as stamp duty had not been paid by the time the Respondent and PW 1 testified and closed their case. If the same had been paid, no evidence, to the contrary, was adduced.

28. Notably, Section 19(1)(b) of the Stamp Duty Act Cap 480 (Laws of Kenya) stipulates that:-

> **"Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.**

29. Further, Section 19(2) of the Stamp Duty Act states that:-

> **"No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped."**

30. It was therefore the considered view of this court that purely on the basis that the said Agreement was not adduced in evidence in conformity with the provisions of Section 72 of the Evidence Act and Sections 19(1)(b) and 19(2) of the Stamp Duty Act, the Learned Trial Magistrate erred in having placed weight on the said Agreement as the primary document to determine the income the subject Motor Vehicle brought in per day. Proof of income would best have been demonstrated by way of audited accounts or deposits of monies in the bank from the Lessee, for example.

31. In any event, this court was not persuaded that the income per day ought to have been a sum of Kshs 30,000/= merely on the assertion the Respondent without adducing any documentary proof when PW 1's evidence was that the subject Motor Vehicle used to bring in Kshs 12,500/= as per the aforesaid Agreement.

32. This court thus came to the firm conclusion that whereas the Respondent had demonstrated that the Appellant attached his subject Motor Vehicle without having given him notice, he did not prove his claim for loss of income to the required standard, which in civil cases, is on a balance of probability.

33. In the premises foregoing, this court found and held that Grounds of Appeal Nos (1), (2) and (3) were merited and the same be and are hereby upheld.

III. PARTY LIABLE TO PAY CLAIM FOR LOSS OF INCOME

34. The question of who between the Appellant and the Auctioneer ought to have borne the claim for loss of income had been rendered moot following this court's determination that the Respondent had not proved its claim for loss of income.

35. However, if it had found that the Respondent had proved its claim for loss of income, this court would have concluded that it was the Appellant which ought to have met the said claim for the reason that the Auctioneer acted on the instructions of the disclosed principal, the

Appellant herein as was correctly submitted by the Respondent herein.

36. Notably, Section 26(1) of the Auctioneers Act states that:-

> **"Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action"**

37. Indeed, Rule 26(1) of the Auctioneers Act, No 5 of 1996 envisages the consequences of an auctioneer who on his own motion, exercises his powers irregularly resulting in loss by the person against whom those powers were exercised. Section 26(1) of the Auctioneers Act which the Appellant had relied upon to shift blame to the Auctioneer was not applicable in the circumstances of the case herein.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 1st February 2019 was merited and the same be and is hereby allowed. The effect of this decision is that the judgment of Hon P. Mbulikah (SRM) that was delivered in **CMCC No 230 of 2008 Romanus Okeno t/a Okeno & Sons Building Contractors vs Equity Bank Limited** be and is hereby vacated and/or set aside and replaced with the order that the Respondent's suit be and is hereby dismissed.

39. As the court found that the Appellant had unlawfully instructed the Auctioneers to repossess the subject Motor Vehicle and the Respondent had admitted in his evidence that he had defaulted in the loan that was advanced to him by the Appellant herein, it is hereby directed that each party will bear its own costs of the matter in the lower court and of the Appeal herein.

40. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JANUARY 2022

J. KAMAU

JUDGE