



**Gateri t/a Dartony Investment v Nguyo (Civil Appeal E010 of 2022)
[2022] KEHC 11531 (KLR) (Commercial and Tax) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E010 OF 2022**

DAS MAJANJA, J

JULY 28, 2022

BETWEEN

DAVID GATERI T/A DARTONY INVESTMENT APPELLANT

AND

ABRAHAM MWANGI NGUYO RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. G. Gitonga, RM/Adjudicator dated 31st January 2022 at the Magistrates Court at Nairobi, Milimani in SCCOM No. 1290 of 2021)

JUDGMENT

1. This is an appeal from the judgment and decree of the Small Claims Court dated 31st January 2022 wherein the Appellant was ordered to pay the Respondent KES. 780,000.00 together with costs and interest thereon for conversion of motor vehicle body and cabin.
2. The facts of the case are not in dispute. The Appellant owns a storage yard in Kasarani where the Respondent stored a motor vehicle body and cabin. The Appellant states that he purchased the body and cabin for KES. 700,000.00, incurred a cost of KES. 50,000.00 to join the two parts and used KES. 30,000.00 to transport it from Kayole to the Appellant's yard Kasarani hence the claim for KES. 780,000.00. When the Respondent took the body and cabin to the Appellant's yard in December 2019, they agreed that he would be paying storage charges of KES. 200.00 daily. He later learnt the Appellant had sold the body and cabin as scrap metal in February 2021.
3. The Respondent admits that he agreed with the Appellant to store the body and cabin but the Appellant defaulted in paying the agreed storage charges and despite several notices issued to the Respondent, he failed to pay the outstanding charges. The Respondent therefore instructed Famous George Auctioneers ("the Auctioneer") to commence recovery of his charges. The Auctioneer proceeded to issue a notice to the Respondent on 23rd November 2021, advertised the body and cabin



for sale in the Standard Newspaper on 4th January 2021 and sold it at an auction on 13th January 2021. The Appellant states that he was given KES. 40,000.00 by the Auctioneer. The Respondent denied liability and stated the Appellant had stored the cabin and body at his premises for over one and half years and that he was entitled to recover his charges. He also sought indemnity from the Auctioneer who had carried out the sale.

4. The Adjudicator considered the evidence and held that he the Respondent was liable for failure to follow due process in recovering its charges. It therefore awarded the Respondent KES. 780,000.00 being the value of the body and cabin that was sold.
5. The Appellant appeals against the judgment based on the memorandum of appeal dated 13th February 2022. The thrust of the appeal is that the Respondent failed to prove its case on the balance of probabilities and that the Adjudicator failed to evaluate the evidence and therefore came to a wrong conclusion on liability. The Appellant complains that the court failed to consider that the third party failed to enter appearance in this matter. The Appellant suggested that he was entitled to instruct the Auctioneer who was required to work within the confines of the law hence he was not liable for any wrong committed by the Auctioneer and was in fact entitled to indemnify from him.
6. As this is a first appeal, the duty of the first appellate court is to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
7. As I stated elsewhere the facts giving rise to this case are not in dispute. The issue is whether based on the facts of the case, the Appellant was liable for the conversion of the Respondent's body and cabin. At the hearing of the appeal, I drew the Appellant's attention to the Disposal of Uncollected Goods Act (Chapter 38 of the Laws of Kenya) ("the Act") which, under section 3, applies to, "goods in possession or under control of a custodian under a contract – (c) custody or warehousing of good for reward; or under any other contract of bailment express or implied: Provided that the application of the Act may be expressly modified or excluded by the terms of the contract." The Appellant conceded that the Appellant was bound by the provisions of the Act which require that specific notices be issue before the uncollected property in its possession is sold. The purpose of the Act was to regulate self-help remedies by, inter alia, custodians of goods for reward. A custodian who seeks to recover his charges without following the procedure under the Act, can only suit for his charges in court.
8. Under the Act, the custodian of goods is required to give the owner a notice to collect the goods which should not be less than 30 days in accordance with the First Schedule. Thereafter, the notice of intention to sell must be issued in the form provided by the Second Schedule. It is a mandatory requirement that both the notice to take delivery and notice of intention to sell must either be delivered by hand to the depositor or by leaving it at his residence or place of business or by sending to the depositor's last known address by registered post and failing any of the above, the custodian is required to place a notice in both the Kenya Gazette and a national daily newspaper. It is clear that the Appellant did not comply with these provisions hence it could not lawfully sell the body and cabin as it purported to do. The Appellant's only option was to sue for recovery of his charges. The Adjudicator came to the correct conclusion that the Appellant did not follow due process as there was no basis to sell the body and cabin.
9. The next question is whether the Respondent is entitled to KES. 780,000.00 being the value of the cabin and body. As I outlined elsewhere this amount represents what the Respondent spent to purchase the body and cabin, put it together and deliver it for storage. The Appellant argued that the Respondent did not produce a valuation report or a photograph of the cabin and body to show the



condition of its status a year after storage. It argued that assets depreciate over time which ought to be taken into account.

10. There is no dispute that the Respondent delivered a body and cabin to the Appellant for storage. He produced sale agreements dated 24th January 2020 showing he purchased the cabin for KES. 200,000.00 and a sale agreement dated 7th December 2020 showing that he purchased the body for KES. 500,000.00 making a total of KES. 700,000.00. This reflects that value of the asset at the time of purchase. The Appellant need only prove the value on a balance of probabilities. There is no requirement to produce a valuation or photographs. On the other hand, it is the Appellant who ought to have produced counter evidence to rebut the Respondent's case. Since the cabin and body had been in the Appellant's possession for a long time, he was in a position to lead evidence to support its case. I therefore find and hold that the value of the body and cabin is KES. 700,000.00. This is in consonance with the following principle in Halsbury's Laws of England (4th Ed), Pg. 389 regarding the measure of damages for conversion:

Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation and the goods are not later returned.

11. On the final issue of the third party, I hold that at all times the Auctioneer was an agent of the Appellant. It is the Appellant who instructed the Auctioneer hence the third party, as the Appellant's agent, cannot be liable to the Respondent. In the absence of directions by the court ordering that the issue of liability between the principal parties and between the Respondent and third party be heard together, the Appellant is at liberty to pursue its issue with the Auctioneer separately.
12. For the reasons I have set out, I allow the appeal only to the extent of the value of the cabin and body which is ascertained at KES. 700,000.00. The appeal is otherwise dismissed with costs assessed to KES. 40,000.00. The amount deposited in court by the Appellant shall be released to the Respondent or his advocate on record.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

D. CHEPKWONY

JUDGE

Ms Chepkemboi instructed by Chepkemboi Milka and Company Advocates for the Appellant.

Mr Wambugu instructed by Komu and Kamenju Advocates for the Respondent.

