



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**HIGH COURT CIVIL APPEAL NO. 9 OF 2018**

**ALFAYO SAENYI KASISI.....APPELLANT**

**VERSUS**

**BENSON KANYANYA WANYAMA.....RESPONDENT**

*(An appeal from the ruling in original Webuye CMCC 25 of 2015*

*delivered on 14.12.2017 by Hon. C.N Oruo Resident Magistrate)*

**JUDGMENT**

The appellant Alfayo Saenyi Kasisi was the Plaintiff in Webuye CMCC 25/2015 where he had sued the Respondent Benson Kanyanya claiming Kshs 36,400 being the value of cane damaged by the Respondent, cost of the suit, interest and any other relief the court may deem fit to grant.

The Respondent was served with summons to enter appearance but neither entered appearance nor filed defence within prescribed time. On 15.9.2015 on an application by the appellant/plaintiff judgment was entered in favour of the applicant against the defendant for Kshs 36,400.

On 1.3.2016 the Respondent/defendant applied for stay of execution which was granted and stay order issued on 1.3.2016. The Respondent filed application to set aside the judgment in default of appearance and filing of defence. The same was canvassed and by ruling dated 25.6.2016 the trial magistrate stated.

***“ I will allow the Defendant/Applicant’s Notice of Motion dated 1<sup>st</sup> March 2016, however the defendant/applicant to pay the plaintiff/respondent throw away costs of Kshs 10,000/- before hearing of the main suit.***

***The attached properties to be released to the defendant/applicant”***

Apparently the property were not released. The Respondent filed another application dated 15.8.2016 seeking the following orders.

***a) That the court does make an order for restitution and the plaintiff/respondent be ordered to compensate the applicant/defendant to the fine of Kshs 550,000/-plus interest, being the value of property attached pursuant to the decree herein which has been reversed.***

***b) That the costs of the application be provided for.***

The application was canvassed by both parties. The trial court by ruling dated 3.2.2017 ruled:

***“In this case there was interlocutory judgment entered against the defendant and the defendant/applicant filed an application setting aside the said judgment and all consequential orders including a stay of execution of the sale of the Defendant’s attached properties.***

***The effect of the stay of execution as rightfully put by M/s Athunga is that the decree was also reversed and as that by the plaintiff/respondent proceeding with execution was against the courts order staying all/any form of execution on the defendant’s property.***

***The execution was irregular as the orders issued staying execution were never varied.***

***On the issue of the value of the cows/property sold I will agree with counsel of the Respondent that there was need to file a supplementary affidavit or have a proper valuation by an expert to ascertain the value of the cows. In the absence of such a document.***

***I will however be guided by the value of the cows in the Auctioneers proclamation notice.***

***On whether to enjoin the auctioneer to the suit, that is left to the plaintiff/Respondent as he was the instructing client and it is the Auctioneer is a mere agent who acted on the instructions of the plaintiff.***

It is this ruling that precipitated this appeal by the appellant on the following grounds.

- 1. That the Honourable magistrate misinterpreted the provisions of Section 91 of the Civil Procedure Act Chapter 21 Laws of Kenya when he allowed the Respondent's application for restitution hence occasioning a miscarriage of justice.***
- 2. That the ruling of 1.2.2017 by the trial magistrate contradicts the ruling by the trial magistrate issue don't he 27.6.2015 hence occasioning a miscarriage of justice.***
- 3. That the ruling by the trial magistrate is contradictory in itself when he found that a valuation by an expert was necessary to ascertain the value of the livestock/cows but went ahead and ruled that the said value could be determined by the Auctioneers proclamation hence occasioning a miscarriage of justice.***
- 4. That the trial magistrate erred in law and fact when he failed as a court of record to clearly analyze and give consideration to the submissions by the applicant hence occasioning a miscarriage of justice.***
- 5. The trial magistrate erred in law and fact when he relied on the proclamation by the Auctioneer as the basis for determining valuation of the cows but failed to find that the Auctioneer was a necessary party hence occasioning a miscarriage of justice.***

By consent the appeal was canvassed by way of written submissions. Mr. Bwonchiri for the appellant submitted that the trial magistrate having found in his ruling dated 27.6.015 that the execution was proper and ordered the defendant/respondent to pay shs 10,000 throw away costs to appellant, it was not available to him to state in ruling dated 14.2.2017 that the attachment as irregular. He submits that the trial magistrate having ordered for the attached animals to be returned, he was estopped from entertaining another application for restitution. Counsel finally submits that the order for restitution was for value of the animals as indicated in the schedule on the proclamation notice all totaling Kshs 77,000 and the notice to show cause issued to appellant indicated value of Kshs 550,450. He submits that the animals having been auctioned, only Kshs 64,000 was remitted to the appellant. Finally, he submits that the claim and judgment was for Kshs 35,800 and costs of Kshs 21,655 and that the sum of Kshs 550,450 demanded is exaggerated. Finally he submits that the trial magistrate misapprehended the provisions of Section 91(1) Civil Procedure Act leading to miscarriage of justice.

Mr. Athunga for the Respondent submitted that the order of restitution was sought under Section 91(2) Civil Procedure Act and prayed for orders for refund, payment of interest, damages, mesne profits. He submitted that the "animals were sold and award of return of Kshs 550,000 is reasonable.

From the appeal and submissions it is common grounds that judgment was entered against the respondent in favour of appellant. On the basis of the judgment, execution proceeded and the respondents animals were attached. That attachment was set aside and appellant and auctioneer ordered to return the animals. The animals were however auctioned by the auctioneer who gave the proceeds to the appellant. The judgment was set aside by ruling dated 27.6.2015.

The appellant having failed to return the attached animals (which by then had been sold) was directed on application to reconstitute the animals or value thereof under Section 91(1) of the Civil Procedure Code. Section 91 provides:

***(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.***

The judgment having been set aside, all consequences flowing from it collapse. This includes any execution of the judgment, if execution had proceeded. The appellant is entitled to reconstitute under the provision of Section 91(1) of the Civil Procedure Act. This is what the trial magistrate ruled in the ruling dated 3.2.2017 and delivered on 14.2.2017 which this court had alluded to earlier. There is neither contradiction of conflict between the two rulings of the trial magistrate. The trial magistrate stated in (b) of the ruling stating,

**(b) The value of the sold animals will be as per schedule on the proclamation notice that was served upon the defendant/applicant.**

The schedule in this proclamation dated 26.3.2016 shows the property proclaimed and estimated value as here under.

1. One Brown Female Cow Fair Indigenous 10,000/-
2. One Brown & white patched cow Indigenous 15,000/-

and its calf

3. One Brown & white patched female calf Indigenous 10,000/-
4. One Black & white patched male calf poor Indigenous 12,000/-
5. One Brown Male calf fair Indigenous 14,000/-
6. One brown male calf fair Indigenous 12,000/-
7. One black male calf fair Indigenous 13,000/-
8. One black and white patched male calf (poor ) Indigenous 15,000/-

**TOTAL 101,000**

This is the value of the restitution ordered by the trial magistrate. The same will attract interest at court rates. The claim of Kshs 550,000 does not flow from the trial magistrate's orders.

Upon considering all the submissions, I am satisfied that the respondent order for restitution is for the sum of Kshs 101,000 plus interest from date of ruling on 3<sup>rd</sup> February 2017 at court rates till payment in full.

Consequently I allow this appeal with costs to the appellant.

Dated and Delivered at Bungoma this 11<sup>th</sup> day of February, 2021.

**S.N RIECHI**

**JUDGE**