



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO 53 OF 2019

THE CHAIRLADY, HELLEN CHERUBET

SECRETARY, GLADYS CHERONO

TREASURER CAROLYN MARU, TABOYAT WOMEN GROUP

UNIT MANAGER KENYA WOMEN FINANCE

TRUST LIMITED NANDI HILLS.....APPELLANTS

VERSUS

SIMON KIPTOO KIMOSO.....RESPONDENT

(Being an appeal against the entire judgment of Hon M.C. Kesse Esq. Senior Resident Magistrate,

in Kapsabet SPMCC No 90 of 2011 delivered on 5th July 2017)

RULING

1. **SIMON KIPTOO KIMOSO (the respondent)** had sued **THE CHAIRLADY HELLEN CHERUBET, SECRETARY, GLADYS CHERONO, TREASURER CAROLYN MARU, TABOYAT WOMEN GROUP and UNIT MANAGER KENYA WOMEN FINANCE TRUST LIMITED (KWFT)** (the 1st, 2nd, 3rd, 4th and 5th appellants) seeking that judgment be entered in his favour in the sum of Kshs 173,000/= plus interest at commercial rates. He also prayed for damages for loss of user. The background to the dispute was that on 13th May 2011, the appellants jointly and severally moved into his home, and heads of cows which they sold so as to defray an alleged loan facility/or overdraft made to **LEDISHA JEPKORIR** (his daughter-in-law) by **KENYA WOMEN FINANCE TRUST LIMITED** through the 1st, 2nd and 3rd appellants who were officials of **TABOYAT WOMEN GROUP**. In the process of the purported attachment, a Nokia mobile phone belonging to **ATNUS KIMARU TOO** (who was herding the animals) was taken away by **GEOFFREY KIPTOO** (the Unit Manager of KWFT Nandi Hills Branch). The respondent's complaint was that he had never guaranteed any loan or pledged his herd of cattle as security for any loan or overdraft, and the appellants' actions resulted in him suffering loss in the sum of Kshs 173,000/=.

2. The respondents denied the actions complained of arguing that the respondent was not entitled to the prayers sought. They pleaded in the alternative, and on a without prejudice basis that at her own request **LEDISHA JEPKORIR** (hereinafter referred to as the "Borrower") was advanced a loan facility of Kshs 100,000/= through **TABOYAT WOMEN GROUP**, which was guaranteed by the said group, a personal guarantee by **MAURICE KIPROP TOO**, and secured by a chattels mortgage 2 Ayrshire brown and white cows plus 1 calf were named as security for the loan. These animals were identified to be grazing at **TAITO** village. The loan was to be repaid to KWFT in monthly instalments of Kshs 7100/=, but the borrower defaulted and as at May 2011, she was in arrears in the sum of Kshs 106,000/=. KWFT through its agents thus moved to recover the security offered on 13th May by taking possession of the two cows and calf, which were then sold

3. At the hearing the respondent narrated how his son informed him that officials from KWFT went to his farm and took away the items on account of Ledisha's failure to repay the loan, and that he was the guarantor, yet as far as he knew, his son was the guarantor. A month earlier, he had been told about the debt, and his son had asked him for a tree which he wanted to sell so as to repay the debt. He also lamented that as a result he suffered a loss as he used to get 40-50 litres of milk which he would sell at Kshs 90,000/ so he sought special damages.

4. On cross examination he explained that although his son had offered household goods and one cow as security, his animals died. That the animals were taken from his home, yet his son had his own home which the creditors ought to have visited, Further, that in any event, the officials of the Women's group knew him, and were his neighbours who ought to have known the difference between his property and that of

his son.

5. **MAURICE KIPROP TOO (PW2)** (hereinafter referred to as the “Guarantor”) confirmed that he was the guarantor for his wife’s loan, and had offered his cow as security, but the animal died. He explained that he had shown the officials of KWFT 35 trees which had been cut down, and which he intended to sell to repay the loan, and told the trial court that the animals which were driven away belonged to his father. He too stated that the officials of the women’s group were his neighbours who knew what belonged to him

6. **DW1 HELLEN TOO** maintained that the borrower offered two cows and a calf for the loan she took, and she had shown them those animals. It was her contention that those were the animals which were driven away, having been collected from the debtor’s compound. However, on cross examination she conceded that: “The cows were not part of the securities. The cows are not indicated in the Chattels Mortgage” though she corrected this on re-examination to say they were indicated in the document.

7. **VINCENT RONO, (DW2)** the **KWFT Nandi Hills** branch manager referred to the chattels mortgage which listed the securities, including the 3 animals. He explained that the money had been loaned to the borrower through the Women’s group, so when she defaulted, members of the group and the institution’s officers impounded her property and sold the same, and the proceeds were used to pay the loan. On cross examination he stated “...The cows that members collected belonged to **SYMON KIMOSO**. However, he was not present when the animals were collected.

8. **DANIELE TALLAM (DW3)** an official at **KWFT** who accompanied members of the Women’s Group to collect the animals, told the trial court that the borrower was present when they went to recover the animals which were within the compound where her homestead stood. That she acknowledged the animals as being the same ones earlier secured. On cross examination, he explained that there were other homesteads within the same compound, and there were also other animals, but they picked the ones whose appearance matched what was in the chattels mortgage

9. In her judgment, the trial magistrate held that the respondent was the bona fide owner of the attached animals, and noted that the animals described in the chattels mortgage were one white and brown cow which had been ear-marked in the event of default of repayment of the loan. However, there were no detailed descriptions of the animals as required under section 24 of the Chattels Transfer Act, and the instrument relied on by KWFT was found to be void. That in any case the appellants conducted themselves as auctioneers without fulfilling the requirements of section 2 of the Auctioneer’s Act, thus nullifying their action. Judgement was entered in favour of the respondent in the sum of Kshs 173,000/= as restitution for the sold animals, plus costs of the suit.

10. Being aggrieved with the judgment, the appellants preferred this premised on 7 grounds as set out there under. Directions were taken and the appeal was to be canvassed by way of written submissions. The appeal is the basis of these submissions which were only filed by the respondent.

The following issues are proposed for determination:

- a) Ownership of the cows;
- b) Whether or not the chattel instrument was void;
- c) Legality of repossession;
- d) Whether or not the respondent was entitled to the prayers as sought.

Ownership of the cows

11. There was no dispute that the borrower who was the respondent’s daughter-in-law secured a loan from **KWFT**, and had among other assets, listed three cows as security. There was also no dispute that her guarantor was **MAURICE TOO**, and not the respondent. The appellants faulted the trial magistrate for making a finding that the respondent was the *bona fide* owner of the sold cows, insisting that the cows belonged to the said Maurice Too the grantor in the chattel instrument allegedly executed on 13/5/2011. The appellants contend that the trial magistrate erred in finding that the subject animals were not adequately described to the standards required by the **Chattels Transfer Act** thus rendering the execution of the loan void. The trial court was also faulted in its finding that only a licenced auctioneer could carry out any form of attachment

12. The respondent relies on section **107 of the Evidence Act** which stipulates that whoever alleges must prove. Further that section 116 of the Evidence Act stipulates that:

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

The respondent submits that he demonstrated he was the owner of the 3 sold cows as he produced receipts (PEx1, 2 and 3) demonstrating that he purchased the cows as well as a receipt for artificial insemination which bore his name. Further, that he also produced a valuation report to demonstrate how much milk the animals produced for his commercial farming.

13. It is contended that the appellants failed to disprove ownership of the sold cows as they did not avail any documents to demonstrate that **the guarantor or borrower** was the *bona fide* owner of the sold cows. The appellants are faulted for relying on the declarations made by the Borrower on the loan security declaration form signed by the applicant on 12/8/2009 to demonstrate that the said borrower was the owner of an Ayrshire cow valued at Kshs 15,000/-. That the guarantor confirmed in his evidence he only owned the one cow which he had died and

which cow the borrower had declared to be hers. The respondent argues that on cross-examination, DW2 confirmed that when they went to recover the respondent's cows, they did not ascertain ownership as there was no document to identify the 3 cows as those owned by the grantor or the borrower. Further, that he even confirmed that the cows belonged to the respondent. That DW3 also confirmed during cross-examination that when they went to recover the cows, they relied on the oral statements as to ownership of the cows. They did not ascertain ownership through documents. The respondent urges this court to affirm the finding of the trial court that the respondent had demonstrated that he was the owner of the sold cows.

Whether or not the chattel instrument was void

14. The Borrower made a loan application to Kenya Women Finance Trust Limited sometime in August 2010 for the sum of Kshs. 100,000/=. The Bank approved her application and funds were disbursed into her account on 12/9/2010. See page 32 of the Record. According to the bank statement and the loan application, the amount was to be repaid within 18 months at a monthly installment of Kshs. 7,100/- and according to the loan application form, the Borrower was to commence repayment on 7/10/2009. This loan was guaranteed by the members of the self-help group as can be seen from the signatures on the loan application, which signatures were endorsed on 5/8/2010. See pages 30 – 31 of the Record.

15. The appellants contend that the loan was secured by a chattel instrument apparently executed on 13/5/2011 and registered on 31/5/2011. The guarantor in the chattel instrument was **Maurice Kiprop Too**. The appellants also contend that the loan was guaranteed by the self-help group which the Borrower belonged. It is also pointed out that during trial, the appellants used the chattel instrument executed on 13/5/2011 and registered on 31/5/2011 alongside the loan security declaration form to lay justification for the attachment and sale of the cows to recover the debt owed by the borrower. In the trial court's judgment, the court invalidated the chattel instrument pursuant to section 24 of the Chattel Transfer Act (hereinafter referred to as the "CTA") for lack of proper description of the cows.

Was the respondent privy to the chattel instrument?

16. A perusal of the chattel instrument and the loan security declaration form, leaves no doubt that the respondent was not privy to the agreement that led to the advancement of funds to the borrower. The parties to the entire transaction involved Maurice Too as the "Guarantor", Ledisha Jepkorir as the "Borrower" and Kenya Women Finance Trust Limited as the "Financier". There was also a deed of guarantee signed by the members of the **Taboiyat Women Self Help Group** as the "Guarantors".

The chattel instrument and loan security form

17. Clause 5 of the chattel instrument gave the bank the right to attach and advertise for sale the listed items in the schedule by way of public auction should the grantor and/or the borrower fail to repay the amount as agreed. The items listed therein are:

- *A Cupboard – softwood (2009) valued at Kshs 10,000;*
- *Hens (2007) valued at Kshs 20,000;*
- *Television – black and white (great wall) valued at Kshs 4,000;*
- *Sofa sets valued at Kshs 6,000;*
- *Utensils china made valued at Kshs 10,000.*

The respondent produced the loan security declaration form as *PEXh5* where the borrower had made a declaration that various items were to be attached and sold in case of default as follows:

- *Utensils (2005) valued at Kshs 3,000;*
- *Furniture – hardwood (2006) valued at Kshs 4,000;*
- *Bicycle – radah model (2003) valued at Kshs 6,000;*
- *Cow Ayrshire – brown and white (2008) valued at Kshs 15,000;*
- *Radio T.V (2004) valued at Kshs 3,000.*

Were the 3 sold cows chattels available for attachment and sale

18. In their amended statement of defence, the appellants admitted attaching the 3 cows but denied that they belonged to the respondent. All the prosecution witnesses who testified on behalf of the appellants and the respondent confirmed that the cows that were sold belonged to the respondent and that the same were not listed in the chattel mortgage... I cannot fault that. However, the appellants rely on the loan security declaration to argue that the cows listed did not belong to the respondent.

19. It is reiterated that clause 5 gave the Grantee the right to attach and sell the listed items in case of default by the grantor or the borrower. It is not in dispute that both the borrower was in default hence the demand letters from the bank. In case of default, what was to be attached and sold to recover the advanced amount as per the list the following items were to:

- *A Cupboard – softwood (2009) valued at Kshs 10,000;*
- *Hens (2007) valued at Kshs 20,000;*
- *Television – black and white (great wall) valued at Kshs 4,000;*
- *Sofa sets valued at Kshs 6,000; and*
- *Utensils china made valued at Kshs 10,000/.*

20. The 3 cows were not part of the list of items to be mortgaged in case of default on the part of the guarantor and/or the borrower. Indeed, even the loan security form mentions a cow **NOT 3 cows**, and it is difficult to justify the decision to then attach 3 cows. It would have been different if the animals had been listed in the Chattels Mortgage and a detailed description given in the loan security document. It would be a travesty of justice to assume that the one brown and white Ayrshire cow listed in the loan security document somehow transformed into two adult cows and a calf! I concur with the respondent that if this court were to find that the 3 cows are part of the list of items, then it would amount to rewriting the contract to which it is not privy to. In support of this line of argument, the respondent cites the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** which held that:

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

Basis of voiding instrument under section 24 of the CTA

21. Whereas the respondent did not plead the issue of voiding the chattel instrument the same arose during the hearing of the case. He submits that the failure to comply with the mandatory provisions of section 24 of the CTA demonstrated an illegality on the face of the transaction that led to the illegal attachment of the respondent's cows. In various cases, courts have held that an illegality whether or not pleaded once brought to the court's attention surpasses all questions of pleadings. Further, that the law is never pleaded and urge this court to be guided by the decision in **Birket vs Arcon Business Machines Ltd [1999] 2 All ER 429**, it was held:

“if a transaction was on its face manifestly illegal, the court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the Court might refuse to enforce it even if illegality had not been pleaded or alleged. The principle behind the court's intervention of its own notion in such a case was to ensure that its process was not being abused by an invitation to enforce sub silentio a contract whose enforcement was contrary to public policy”

Also cited is a decision by the Court of Appeal in Uganda in **Makula International Ltd Vs His Eminence Cardinal Nsubuga and Another [1982] HCB II**, which held that -

“...a court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon.”

22. That even if this court were to find that the 3 cows belonged to the guarantor or borrower and/or that they were listed as items to be mortgaged in case of default, then it should affirm the decision of the trial court to void the chattel instrument and loan security declaration form for lack of proper description as required under section 24 of the CTA which provides:

Where stock are comprised in an instrument, they shall be described or referred to therein or in the schedule thereto by some brand or brands, earmark or earmarks, or other mark or marks upon them or shall be so described or referred to by sex, age, name, colour or other mode of description as to be reasonably capable of identification, otherwise the instrument shall be void as against the persons mentioned in sections 13 and 14, so far as regards such or so much of such stock as are not so described or referred to or are not reasonably capable of identification; and the land or premises on which the stock are or are intended to be depastured or kept shall be described or mentioned in the instrument or schedule.

23. The respondent points out that item 4 has been indicated as one cow of Ayrshire breed identified by colour brown and white, nor has the place where the cow was to be kept been described, and it is contended that this is not the proper description? Section 24 dictates that the cow should be described by some brand(s), earmark(s) or other mark(s), referred to by sex, age, name, colour or other mode of description as to be reasonably capable of identification. It also dictates that premises where the stock is kept should be specified.

24. It is drawn to this court's attention that DW3 testified that all Ayrshire breed are brown and white and when they went to the village, they saw many cows of similar breed and he decided to pick cows that he had secured. With such description **“Cow ayrshire – brown and white (2008) valued at Kshs 15,000”**, the respondent wonders how DW3 could he know that was the cow or rather cows that were described in the list of items? He is not an expert (considering he works in the bank) to tell whether the cows he found in the compound were the same ones secured as improperly described in the security form. I am persuaded that the trial magistrate duly took into consideration the critical aspect about failure to properly describe the cows as required in law prejudiced the respondent and subjected him to being deprived the right to own property and DW3 even admitted as much:

“...if the cows were in a pool of other cows it would be impossible to pick them out”

25. I am in agreement that section 24 of the CTA has made the description a substantive issue that touches on the root of the instrument and not a procedural one and the failure to comply gives the court jurisdiction to void the same. I am guided by the case of **H.S. Jutley Insurance Brokers Ltd v Enterprise Machine Tools Ltd and Jagmohan Singh Ghataura & Another** where Lesiitt (J) set aside the proclamation by the auctioneer where the auctioneer had failed to comply with the mandatory provisions of **Rule 12 of the Auctioneer Rules** regarding description of goods. In that case, the auctioneer had generalized the goods that were attached in execution and the court found that there was an error on the description of the parties and the court issuing the order was proof of carelessness on the auctioneer's part. In my view, the same principle applies

26. In **Hughes Limited =VS= Mohammed S Kassam**, the court found the proclamation defective on the failure to comply with rule 12 of the Auctioneer Rules. The court in that matter held that Rule 12(b) of the Auctioneer Rules existed for a reason that is, to ensure that the specific goods attached and their conditions and values are clearly known. Further, the specific description of the movable properties is so as it is made sure that there was transparency in the subsequent sale of the attached goods and proceeds that would be realized. The court found that there was no attachment in law and in fact as the attachment in execution was not in accordance with the law and that failure on the part

of the Auctioneer in preparing an itemized inventory of the goods attached as per the provisions of the law rendered the purported attachment fatally flawed.

Legality of the repossession

27. The appellants have faulted the trial court's finding that only licensed auctioneers are supposed to carry out any form of attachment and sale. Indeed, clause 5 gave the Financier the right to attach and sell the listed items by way of public auction in case of default by the grantor or the borrower. Both the borrower and the grantor were in default hence the demand letters from the bank. Once the guarantors defaulted in their obligations as dictated in the deed of guarantee then the Financier was within its right to take possession and have the items listed in the instrument for sale by way of public auction. or purposes of enforcement of Clause 5 of the chattel instrument, the grantee bank would be within its rights to issue a letter of instruction under Rule 5 of the Auctioneer Rules to attach the items listed items to be mortgage as part of recovery of the debt. However, I think the trial court overdid it and took into consideration irrelevant factors because it was not so much a question of the manner in which the attachment and sale were conducted which was in issue...rather it was the attached goods which was contested. I will therefore not delve too much on the question regarding who was the proper person to proceed with recovery

28. I detect no error in law or fact by the trial court which would materially warrant interference of the decision. The only irrelevant consideration I have pointed out, does not tilt the outcome. Consequently, I hold and find that the appeal lacks merit and is dismissed with costs to the respondent

E-Delivered and dated this 22ND day of MAY 2020 at Eldoret

H.A. OMONDI

JUDGE