



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NUMBER 90 OF 2011

JOHN MUITA T/S JOMUKI AUCTIONEERS ENTERPRISES.....APPELLANT

VERSUS

BENJAMIN FUNDI NANGOJE.....RESPONDENT

(Being an appeal from the judgment and decree in original Webuye PMCC 45 of 2007 delivered on 3rd August, 2011 by E.C Cheronu (Principal Magistrate).

J U D G M E N T

By plaint dated 27th January, 2006 the Respondent (Plaintiff in magistrate's court) mother and next fired Zipporah Karewe) and the appellant John Muita T/s Jomuki Auctioneers seeking a refund of Ksh.245,000/- being the actual cost of animals sold by the appellant, costs and interest. The Plaintiff's claim was that on 1st February, 2006, the appellant who is a licensed auctioneers unlawfully attached his livestock and sold them in the premise of a court order, to attach and auction the property in respect Webuye, SRMCC 90 of 2003. The parties to the suit were **Henry Oduor suing through Zipporah Karewe** as plaintiff Versus **Henry Wekesa Wanjala, Wilson Nakoya and Kennedy Kinywa** as the defendants. The Respondent averred that he was not party to the suit and that the attachment and sale of his property was unlawful.

The appellant John Muita T/a Jomuki Auctioneers filed a statement of defence. He admitted attaching the said livestock but avers that the attachment was legal and that the same belonged to judgment debtor and not the respondent Benjamin Fundi Nangoye.

The parties gave evidence in support of their respective pleadings. The plaintiff testified that the livestock belonged to him, he was not party to the civil suit, that the Respondent proclaimed and attached his property and sold them immediately at throw away prices, and finally that not being a judgment debtor, the attachment and sale of his property was irregular. He testified that Wilson Nangoya the defendant in Webuye SRMCC 90 of 2003 was his father and Henry Wekesa was a driver to Alex's vehicle.

The Appellant gave evidence. He testified that he obtained Warrants of attachment and sale in respect of Webuye SRMCC 90 of 2003. He then proceeded to proclaim the property of Wilson Nankoye who was the judgment debtor. He attached and issued a notification of sale. He took the animals to Kitale where the same were sold by public auction. The property fetched a total of Ksh.60,000/-. He admitted that the plaintiff complained to the Auctioneers Licensing Board and he was fined Ksh.50,000/- for breaking the Auctioneers rules.

By judgment dated 3rd August, 2011 the trial magistrate found that the Appellant's attachment of respondent's livestock was unlawful and entered judgment for Respondent against the Appellant.

Aggrieved by the judgment, the appellant filed this appeal on the following grounds: -

- i) The learned trial magistrate erred law and in fact in failing to consider the appellants evidence and submissions.*
- ii) The learned trial magistrate erred in law and in fact in finding that the respondent had obtained a stay order on 1st December, 2006 contrary to the evidence.*
- iii) The learned trial magistrate erred in law and fact in finding that the respondent had proved his claim and value of the animals.*
- iv) The learned trial magistrate erred in law and fact in basis his judgment on the fact that the appellant had not appealed in Auctioneer's Disciplinary Cause No. 27 of 2007.*

By consent this appeal was canvassed by way of written submission. M/s Kariuki Mwaniki Advocates for the Appellant submitted that the trial magistrate failed to consider the appellant's defence, in particular to find that the Respondent did not file objection proceedings. Counsel

further submitted that the trial court overly relied on the finding of the Disciplinary Committee of the Auctioneer Licencing Board.

Mr. Oyando for the Respondents submitted that the claim was properly particularised and the value of the attached animals given. He submitted that the appellant admitted attaching and selling the animals. The appellant this act was found to have wrongly attached the Respondent's Livestock and consequently disciplined by the Auctioneers Licensing Board.

From the submissions, the main issue for determination in this appeal is whether the respondent proved his claim against the appellant in the trial court. From the pleadings and evidence, it is evident that the following are not disputed. It is not disputed that Respondent Benjamin Fundi Nangoye was not a party in Webuye SRMCC 90 of 2003. The parties were Henry Oduor (Minor suing through the next friend and mother Zipporah Karende) Versus Henry Wekesa Wanjala as defendant. Judgment in the suit was entered for plaintiff against the defendant for Ksh.100,000/- general damages, Ksh.1,500/- special damages and costs.

3) the 2nd issue which is not disputed and in fact admitted by the Appellant is that he made an attachment and sale of livestock pursuant to warrant issued in Webuye SRMCC 90 of 2003."

With these two issues not in dispute the only issue was whether the attached livestock belonged to him. He called PW 2 Humphrey Sumba Namodi who testified that the animals were taken from respondent home in presence of his son. He also called PW 3 Kennedy Wanyonyi Matumbai a veterinary practitioner who estimated the value of the livestock. The Appellant gave his evidence stating that he was executing a warrants of attachment.

He did not in his evidence state how he identified the property he attached to be belonging to the judgment debtor. He did not call as a witness the decree holder or any person who pointed out the property. It, therefore, turned out that the property did not belong to the judgment debtor but the Respondent. Indeed that is when the complaint by the Respondent to the Auctioneers Licensing Board was lodged and he was fined Ksh.50,000/- for contravening the auctioneers rules.

While it is true auctioneers execute court warrants, it is their duty to ensure the warrants are executed against the property of the judgment debtor. That duty involves ascertaining ownership of property to be attracted before attachment and sale. Where the attached property does not belong to a specified party in the judgment, he cannot claim immunity on the basis that he is executing a warrant from court and, therefore, protected by Section 6 of the Judicature Act Section 6 of the Judicature Act provides: -

"No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

This provision does provide for protection to an officer who is performing his duties properly. It does not in my view protect an auctioneer who attaches property of a wrong party in **Kuronya Auctioneers Vs Maurice Adhoch & another (2003) eKLR** the Court of Appeal on this issue stated: -

"The question that falls for our consideration in this aspect of the appeal is this: "If an auctioneer attaches the goods of a wrong party when he is armed with a warrant to attach the goods of a specified party can he claim the immunity given to him by section 6 of the Judicature Act?"

That issue was decided in the case of Simiyu vs. Sinino [1982-88] IKAR 630. That case decided that a party who sets in motions the process of execution against a wrong person, even though not maliciously, becomes liable at common law for damages for trespass and wrongful execution.

Hancox, J A (as he then was) stated at page 636:

"I would therefore hold that the respondent, as the only party before us on this appeal, is liable to the appellant in damages for trespass for the wrongful attachment of his goods."

Chesoni Ag. J.A (as he then was) and Nyarangi, Ag. J.A (as he then was) concurred with the holding of Hancox J A.

The ratio decidendi of the Simiyu case is that if the execution is levied against a wrong party that party has a right of recourse against the auctioneer as well as the decree-holder despite the protection given to the auctioneer by Section 6 of the Judicature Act and that such recourse is at common law. It stands to reason to say that Section 6, cannot provide protection to an auctioneer who attaches the goods of a wrong party. He may have some other valid defence but he cannot succeed in having the suit against him thrown out in limine on the basis of Section 6 if he executes the warrants against a wrong person."

Upon considering the evidence before the trial court, re-evaluating it, I am satisfied that the judgment entered against the appellant was proper and premises on evidence adduced. I, therefore, find no merit in this appeal and dismiss it with costs.

Dated, signed and delivered at Bungoma this 29th day May, 2020.

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S N RIECHI

JUDGE