



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R MWONGO, J)

MILIMANI LAW COURTS

CIVIL SUIT NO.150 OF 2008

HENRY MUTUA NJOROGE.....PLAINTIFF

VERSUS

DUNCAN MUGAMBI MUTUNGI

T/A WRIGHT AUCTIONEERS.....DEFENDANT

JUDGMENT

Background

1. The brief background to this suit is that the defendant carried out a proclamation against the plaintiff. The defendant's actions arose from a court decree in the lower court in Nairobi in **CMCC No EJ 642 of 2000**. In that suit a company known as Treadsetters Tyres Limited obtained judgment against the plaintiff. Consequent upon the judgment debt, the judgment creditor sought the defendant's services to recover the decretal sum in that suit from the plaintiff. The actions taken in effecting that recovery are the subject of the plaintiff's complaint in the present suit.
2. The plaintiff herein seeks compensation for loss and damage he claims resulted from the defendant's allegedly unlawful acts of proclaiming and attaching his assets. The assets attached were: a vehicle registration number KAM 275N Toyota Corolla station wagon, and livestock, namely, three grade cows and four grade calves. According to the plaint, the vehicle was proclaimed on 24th May, 2006 and the livestock on 2nd June 2006 in Gachie within Kiambu Division. The livestock were sold the following day on 3rd June 2006.
3. In October, 2006, the plaintiff lodged a complaint against the defendant with the Auctioneers Licensing Board in Disciplinary Case No 100 of 2006. The Board found the defendant guilty of carrying out an attachment outside his authorised geographical jurisdiction and failing to give the plaintiff forty eight (48) hours to redeem his property.
4. In the plaint, the plaintiff alleges that the actions of the defendant were fraudulent because he: attached the plaintiff's goods outside his area of jurisdiction; knowingly attached without first having proclaimed; raised a backdated proclamation; and made an application for breaking orders and police assistance knowing the same to be based on false or fictitious facts.
5. The plaintiff claims special damages of Kshs 2,478,300/=, unspecified general damages, punitive and exemplary damages, and costs of the suit, including interest, for all the troubles he has allegedly been put through by the defendant.
6. The defendant denies all the claims by the plaintiff and also denies that any loss or damage was suffered by the plaintiff as a result of his actions. He asserts that if any loss or damage was suffered by the plaintiff, it was as a result of his own ineptitude, inaction, negligence in that: the plaintiff failed to redeem his properties in time following the lawful proclamation; he ignored notices given by the defendant; he failed to obey a court decree; and he failed to collect his goods within the time allowed by law. He asserts that he was carrying out his job as an auctioneer in respect of a judgment debt owed by the defendant.
7. At the hearing, the parties agreed that their witness statements be adopted as their evidence in chief, and their evidential bundles be produced without objection as exhibits, subject to cross examination. The plaintiff, PW1, testified that he indeed had a debt with Treadsetters Limited in Case EJ 642/2000, and that following the lower court's determination the defendant was issued with a warrant for attachment in respect of it. What the defendant served him with, however, was a notification of sale dated 24th May 2006, and a proclamation which was backdated 1st December, 2005, which he first saw on 24th May 2006. This was one of the reasons the plaintiff reported the defendant to the Auctioneers Board.

8. In cross-examination, the plaintiff admitted that he later appealed against the lower court's determination in EJ 642/2000, and that in the appeal it was eventually held that he should pay the debt, and that there was no evidence of backdating of the proclamation. He also admitted that he had not fully paid for the car, and that its log book was still in the name of the person with whom he had contracted to buy it; hence it was not sold by auction. Instead, it was released through a consent to the registered owner, and after paying for storage charges following an agreement in court.

9. PW2, Lucy Wakonyo Mutua, the plaintiff's wife, gave evidence similar to the plaintiff's. The distinction, however, was that with regard to the alleged losses on milk sales due from the cows that had been attached and sold, she said that the milk was taken to Kiambaa Dairy who collected it from Gachie. On his part, PW1 had testified that he used to take the alleged 450 litres of milk daily to a small hotel in a place called Kajuli. He did not know where the hotel or kiosk took the milk.

10. In his evidence, the defendant: denied that he backdated the proclamation and that there was nothing he sold which he did not account for. He also confirmed that he paid the fine for the breaches he committed as found by the Auctioneers Board.

The issues for determination

11. On the basis of the pleadings, the parties agreed on the following issues for determination by the court:

- a) Did the defendant fraudulently and unlawfully attach the plaintiff's motor vehicle registration number KAM 275N as pleaded in the plaint?
- b) Did the defendant unlawfully attach, take away and sell the plaintiff's assorted livestock as pleaded in the plaint?
- c) Did the plaintiff suffer loss and damage as pleaded in the plaint and is the loss and damage attributable to the defendant or to the ineptitude, inaction, negligence, ignorance and or indolence of the plaintiff?
- d) Did the plaintiff serve the defendant with notice before action?

12. In my view, however, the above issues may be reconstituted and clustered into one issue with two sub-issues as follows:

Whether the attachment effected by the defendant and found to be beyond his jurisdiction:

- i. constituted fraudulent actions for which damages may arise?
- ii. Whether, which and how much of the losses and damages alleged by the plaintiff are liable for compensation?

Accordingly, it is essential to evaluate each aspect of the items alleged by the plaintiff as amenable to damages and assess the compensation payable if any.

Whether the actions of the defendant disclose fraud in terms of the particulars pleaded

13. It is not disputed that the defendant attached the plaintiff's property outside of the geographical jurisdiction in respect of which he was registered to conduct attachments under the Auctioneers Act, 1996. The proceedings of the Auctioneers Board show that the plaintiff's complaints before it were that:

- “1. The Auctioneer operated in an area he has no jurisdiction i.e. Kiambu – Gachie is in Kiambu;***
- 2. The Auctioneer carried livestock on 2.8.2006 at about 4.00pm and sold them on 3.8.2006 at about 11.20 am***
- 3. The proclamation was done on 24.5.2006 whereby motor vehicle KAM 275 N Toyota Corolla was allegedly proclaimed but the same was backdated to 1.12.2005”***

14. The Board findings were:

- “1. There was no evidence of backdating.***
- 2. He (auctioneer) attached outside his jurisdiction***
- 3. He failed to give 48 hours to allow the judgment debtor to redeem his property***

Consequently, the Board's decision was as follows:

“Auctioneer fined Ksh 20,000/= and costs of Ksh 5,000/= to be paid within the next thirty days.”

15. It must be noted that none of the parties appealed the Board's determination despite the right under that Act to do so. Further, the Board's

decision is not under review herein, and stands as originally documented, without more. It must further be noted that in the complaint before the Board, fraud was never alleged nor was there any finding as to fraud.

16. The plaintiff's case is premised entirely on what the plaintiff terms as the "fraudulent and unlawful" attachment carried out by the defendant. The particulars of fraud are pleaded as follows:

"a). Knowingly attaching in an area without jurisdiction

b). Knowingly attaching without having first proclaimed

c). Knowingly raising a fraudulent backdated proclamation

d) Making an application for breaking orders and police assistance knowing the same to be based on false and fictitious facts

e). Knowingly making an application for breaking orders and police assistance to execute/ attach in an area outside his jurisdiction"

17. In general, whenever fraud is pleaded, there is inherent in it the element of criminality and deceptive intention. The intention or mens rea – not just the actus reus – to defraud must be proved. The general evidential rules as to proof of fraud thus kick in. The rule is trite that they require fraud – the criminal intent or mens rea – to be proved on a standard below proof beyond reasonable doubt but above proof on balance of probabilities. It is that in-between standard of proof that must be applied to the plaintiff's claims based on allegations of fraud.

18. Item a) of the particulars of fraud was proved before the Board as a breach of a statutory provision only, there having been no allegation of fraud. Thus, the same was not proved as fraud before the Board. In the present case, the pleadings and the evidence availed showed that the defendant was licensed to attach within Nairobi and Thika Districts. Thus, to the extent that the defendant effected attachments in Gachie within Kiambu District, there was proof of unlicensed attachment outside the licensed districts. That act, without more, cannot in itself amount to fraud.

19. As to item b) of the particulars of fraud, none of the witness statements of the plaintiff (PW1) or PW2 made any mention about the attachment having been done without the defendant having first proclaimed. Accordingly that allegation of fraud is unproved.

20. With regard to particulars of fraud, item c) PW1 in his witness statement said that he came to realize that the defendant had raised a fraudulent proclamation at the time of attachment which was backdated to 1st December, 2005. He stated that he however signed it without noticing the backdating. Yet, in the Board's proceedings at page 10, the plaintiff's advocate, Mr Kimathi, stated:

"We can abandon the issue of backdating..."

Given the above evidence, taken together with the Auctioneer's Board's determination that there was no evidence of backdating, it is clearly demonstrated that the particulars of fraud in item c) remain unproved, and cannot stand.

21. Items d) and e) of the particulars of fraud concerning breaking orders given to the defendant, although pleaded, were not in any way alluded to in the plaintiff or his witness in their evidence. No application for or breaking orders were attached. With regard to police assistance alleged to have been given to the defendant in making the attachment, both PW1 and PW2 stated that :

"...the defendant in the company of his workmen and a squad of police officers invaded (our) home and attached"

They allegedly took away the car and the livestock. The element of fraud, which was pleaded, was however not demonstrated in the evidence. It is insufficient to plead particulars which are not subsequently proved, and in this case to the high standard required for proof of fraud..

22. The next question is whether the attachment and hurried sale – which was unlawful to the extent found by the Auctioneer's Board to have been outside the defendant's licensed jurisdiction and to have failed to give the plaintiff an opportunity for redemption – led to loss and damage to the plaintiff. Thus each of the heads of damages must be assessed.

Special Damages

Storage of motor vehicle

23. The vehicle KAM 275N was in the plaintiff's compound when it was attached. The vehicles mentioned in the disputed proclamation did not include the subject vehicle, but the said vehicle somehow appeared in the sale notification later on in 2006. The defendant did not bother to check the ownership of the vehicle before attaching it. Had he done so, he would have noted that it did not belong to the plaintiff and would have acted ignorantly or recklessly and would likely have avoided attaching it.

24. The plaintiff claims storage charges of Kshs 45,000/= and exhibited a Fee Note dated 26th July, 2006 from the defendant to the plaintiff

for Kshs 49,025.60 which appears to have been compromised at Kshs 45,000/=. However, the Fee note covers all items charged by the auctioneer in the attachment, of which storage for 63 days amounted to only Kshs 18,900/=.

25. I thus do not agree with the defendant's submission that the receipt indicated as having been "for part payment of EJ 642 of 2000, Milimani, Commercial Courts" is for storage, as it is dated twenty four days before the fee note was even raised.

26. The claim is thus proved for only Kshs 18,900/= since it is not disputed that the subject vehicle was attached from the plaintiff's compound, and that it was he who paid for its storage.

Loss of use of motor vehicle

27. In his witness statement on this head, the plaintiff merely stated that as a consequence of unlawful attachment, he incurred loss of user of the said vehicle. He attached three receipts for hire of a vehicle namely Toyota KAV 871 T. They are for a total amount of Kshs 261,700/= for the period from 31st May 2006 to 27th July, 2006, although he claimed kshs 262.400/=.

28. The defendant correctly argued that the attached vehicle, although picked from the plaintiff's compound, did not belong to the plaintiff. He exhibited a notice of objection in the lower court by an Objector, James Waireri, who objected to the attachment as being the owner of the said vehicle. He also attached a search certificate for the vehicle showing that the owner was James Waireri Nganga, the objector, as at 8th June, 2008. Further he exhibited a consent agreement dated 27th July, 2008 between counsel for the parties in the lower court suit in which it was agreed, inter alia, that:

"Motor vehicle registration number KAM 275N be and is hereby released to the objector James Waireri Nganga subject to payment of auctioneers charges."

29. No evidence was given concerning any arrangement between the owner of the vehicle and the plaintiff. The plaintiff did argue, however, that he was in the process of purchasing the vehicle at the time of the attachment, and thus was in possession of it. Nevertheless, no sale agreement was availed to show such possession so as to found a claim for loss of user. The claim is therefore unproved, and is dismissed.

Cost of servicing motor vehicle

30. The claim for Kshs 45,000/= for repair of the aforesaid motor vehicle must suffer the same fate as the claim for loss of user. No evidence was availed to found a basis for the incurrence by the plaintiff of repair costs on a vehicle that did not belong to him. No evidence was availed to show that the plaintiff did in fact even buy the said vehicle. Of the five receipts exhibited, one is for a battery purchased on 9th December 2008, and it cannot be said to be in any way related to the attachment in any event. The other four receipts are all dated 27th July, 2006, but there is no evidence that they relate to repairs to vehicle registration KAM 275N, and even if they did, there is no evidence as to ownership of the vehicle on that date.

31. Accordingly, this claim was unproved and is dismissed.

Loss of three grade cows, four grade calves and one goat

32. This claim for the loss of livestock arises from the fact that the defendant did not give the required forty eight hours to allow the plaintiff to redeem the same. The plaintiff claims an amount of Kshs 125,000/= per cow; Kshs 85,000/= per calf and Kshs 7,500/= for the goat. The total claim amounts to Kshs 722,500/=.

33. The evidence shows that the Auctioneer carried livestock on 2.8.2006 at about 4.00pm and sold them on 3.8.2006 at about 11.20am. The sale was done within less than eighteen hours after the attachment, contrary to the Auctioneers Rules. Although I consider that this is a valid claim for compensation in light of the statutory breach, I find that the plaintiff merely gave figures for the value of the livestock. There is no formal estimate – even from the veterinarian who serviced them, a livestock officer, or a dairy, or any other authority who could assess and verify the value.

34. The defendant asserts that after selling the livestock, he raised Kshs 56,400/= which he accounted for in that the amount went into servicing the plaintiff's debt. He attached a letter dated 6th June, 2006 to this effect. The defendant also argued that the sale was a forced one and there was no reserve price.

35. In my view, the plaintiff was statutorily entitled to redeem the livestock under **Rule 13 (c)& (d)** of the **Auctioneers Rules, 1997**. And to a notice under **Rule 8(3) of the Auctioneers Rules**. These were not complied with. The Plaintiff cited the case of **Gerishon Christopher Ondari v James Omari & 2 Others [2014]eKLR**. There, Karanja, J stated as follows:

"Even after seizure, there was no compliance with R. 8 (3) of the Auctioneers Rules which provides for notification to the creditor and the debtor and the court (if any) of the arrangements considered desirable or necessary for the safe custody, health, feeding, watering or transport of the livestock seized, the costs thereof and their payment in advance or as the court may think just, such fees and costs being in addition to those provided for in the rules."

The forty eight (48) hours notice and now seventy-two (72) hours notice by dint of Legal Notice No. 144/09 was not adhered to in the present circumstances.....

.....It may be noted that the 48 hrs notice (P. Exh. 7) referred to thirty (30) dairy animals, ten (10) calves and four (4) small bulls all valued at Ksh. 390,000/=. It is without doubt that the first defendant was in a hurry to dispose of the animals and this explains why he sold them at an undervalue which was a further reflection of his negligence in the entire process”

36. In the **Gerishon Ondari case**, the court relied on valuations from the area livestock officer, which was not done in the present case.

37. To the extent of the non-compliance with the law, I consider that the sale was unlawful. Further, the defendant after deduction his expenses of Kshs 45,634.40, forwarded only Kshs 10,765/= to the plaintiff's account. I do not think he was entitled to that amount in the circumstances. In the absence of a valuation of the livestock, I would award the plaintiff the full amount of expenses deducted from the livestock sale being Kshs 45,634.40.

Loss in milk sales

38. The claim for loss of milk sales is grounded on no evidence whatsoever and appears to me to be an attempt at unjust enrichment. The receipts provided by the plaintiff on this head are not credible. They are cash sales allegedly issued by MK Quality Café for alleged milk deliveries between 31st March, 2006 and 31st May, 2006. PW1 said the milk was delivered to a kiosk or hotel at Kajuli; PW2 said it was delivered to Kiambaa Diary.

39. I agree with the defendant that even if there were lost sales, the same would be within the context of the cost of expenses and inputs. What the plaintiff claimed were mere figures supported by no records of milk output. Further, the contradictory evidence concerning where the milk was allegedly sold does not help the plaintiff in his case.

40. In light of the evidence availed. This head of claim is therefore hereby dismissed.

Loss in sale of animal farm manure

41. The plaintiff claims loss of sale of farm manure in the amount of Kshs 21,900/=. This figure is wholly unsupported by any evidence and is hereby dismissed.

Legal costs for Disciplinary case before Auctioneers Board

42. Costs in the disciplinary case were awarded at Kshs 5,000/= against the defendant by the Auctioneers Board. The claimant claims 65,000/= and produced receipts for legal fees paid to his lawyer. The costs awarded in that case were in the purview of the Board which was seized of the case. The Board made an award on costs based on their discretion and within the circumstances of that case. They were best placed to do so.

43. In my view, no more costs can be claimed for that case in this suit than were awarded in the disciplinary case itself. Accordingly, this claim is dismissed.

General Damages, Punitive and exemplary damages

44. This suit is one in which the plaintiff is suing to recover for damages for the exercise by the defendant of a statutory and legal power of attachment, in exercise of a court's order for attachment. There is no dispute that the plaintiff herein was the judgment debtor; there was no dispute that the plaintiff was bound to pay the amounts for which the attachment was instituted, had it been done correctly. The only thing that went wrong was that the attachment was wrongly effected outside of the auctioneer's jurisdiction, and that the auctioneer failed to give 48 hours to the plaintiff to redeem his livestock.

45. Further, the evidence is that upon appeal against the lower court judgment, the appellate court found that the plaintiff was bound to pay the judgment debt. In a sense, the defendant helped the judgment debtor to pay the debt, although through a wrong procedure.

46. Exemplary damages are punitive in that they are awarded as a punishment to the defendant (see **Dumbell v Roberts [1944] 1 All ER**). From the foregoing evidence, it is clear that as a consequence of employing the wrong procedures in breach of the **Auctioneers Act**, the defendant was subsequently found guilty of failing to comply with some statutory provisions, and was thus punished through a fine by the Auctioneers Board.

47. I do not think this case demands further punitive award. Nor do I think it qualifies for anything more than an award of nominal general damages. I award general damages in the amount of Kshs 40,000/=.

Disposition

48. Given all the foregoing, I enter judgment as against the defendant in the following amount:

a) Special damages:

1) Storage charges	Kshs.	18,900.00
2) Loss of livestock	Kshs	45,634.40

