



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CIVIL APPEAL NO. 150 OF 2017

KENYA WOMEN FINANCE TRUST LIMITED.....APPELLANT

VERSUS

ELIZABETH KIPSANG.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N.C. Adalo, Resident Magistrate, delivered on 13 November 2017 in Iten SPMCC No. 2 of 2014)

JUDGMENT

1. This appeal arises from the Judgment and Decree of the **Resident Magistrate in Iten SPMCC No. 2 of 2014: Elizabeth Kipsang vs. Kenya Women Finance Trust Ltd.**, wherein the Plaintiff, (the Respondent herein) had sued the Appellant on account of wrongful seizure of her cattle on the **24 May 2014**. The Respondent denied that she had had any dealings with the Appellant and therefore that the Appellant had no colour of right to take her 5 dairy cows and 3 sheep worth **Kshs. 230,000/=**. She accordingly asked the lower court for an order directing the Appellant by itself, its agents and/or servants to release the said animals unconditionally and pay for the loss and damage suffered till date of their release. She also prayed for costs of the suit and interest.

2. The Appellant, being dissatisfied with that decision, lodged this appeal on **5 December 2017** on the grounds that:

- a. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent **Kshs. 230,000/=** as general damages which, despite being pleaded as special damages by the Respondent, was not specifically prayed for nor strictly proved to the required standard.
- b. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the claim before it being one of special damages had not been strictly proved to the required standard and the same ought to have failed hence the award of Kshs. 230,000/= which despite being pleaded, had not been proved strictly to the requires standard.
- c. The Learned Trial Magistrate erred in law and in fact in finding that the Respondent had proved her case on a balance of probabilities leading to an erroneous judgment not supported by law or facts.
- d. The Learned Trial Magistrate erred in law and in fact in failing to consider the submissions and authorities of the Appellant leading to an erroneous judgment not supported by law or facts.
- e. The Learned Trial Magistrate erred in law and in fact in arriving at a conclusion allowing the Respondent's case without actually considering the real and true facts before the court.
- f. The judgment of the Learned Trial Magistrate was against and not supported by the evidence before the court.

3. In the premises, the Appellant prayed that her appeal be allowed with costs on the following terms:

- a. That the judgment and orders of the Resident Magistrate, **Hon. N.C. Adalo**, be set aside and the Respondent's case in the court below be dismissed with costs to the Appellant.
- b. That the costs of the appeal be awarded to the Appellant.

4. The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **13 November 2018**. Thus, Counsel for the Appellant filed written submissions herein on **27 November 2018**, while the Respondent's written submissions were filed on **29 November 2019**. Counsel for the Appellant highlighted their contention that, since the Respondent did not specifically pray for the value of the cows and sheep in her prayers, the lower court erred in awarding the sum of **Kshs. 230,000/=**, which is in the nature of special damages without the same sum being pleaded specifically or proved. It was further submitted that the Respondent did not adduce evidence in proof of either her ownership of the animals or their value. He relied on **William Kiplagat & Another vs. Benson Omwenga Civil Appeal No. 180 of 1993** in which it was held that special damages must be pleaded with as much particularity as the circumstances permit and must be strictly proved; which, in his view, was not done before the lower court. Counsel accordingly urged, for the reasons aforementioned, that the appeal be allowed.

5. **Mrs. Rono**, Learned Counsel for the Respondent, on the other hand, urged the Court to interrogate the question whether or not there was a contract between the Appellant and the Respondent; and whether the Respondent's animals were used as security to warrant their seizure by the Appellant. Counsel urged the Court to note that the Appellant opted to adduce no evidence before the lower court and therefore lost out on an opportunity to demonstrate, either that the Respondent was one of its customers and that she had been given a loan which she defaulted in repaying, or that she was a guarantor to one of the Appellant's customers. She further submitted the amount of **Kshs. 230,000/=** was based on existing market prices and that that evidence was uncontroverted by the Appellant before the lower court.

6. Counsel relied on **Article 159(2)(a) and (b)** of the **Constitution of Kenya**; **Section 1A** of the **Civil Procedure Act** and **Sections 107 and 108** of the **Evidence Act**, **Chapter 80** of the **Laws of Kenya** as well as the authorities of **Kanyungu Njogu vs. Daniel Kimani Maingi; Pius Kimaiyo Langat vs. The Co-operative Bank of Kenya Limited [2017] eKLR**; **William Muthee Muthami vs. Bank of Baroda [2014] eKLR** and **RTS Flexible Systems Ltd vs. Molkerei Alois Muller GmbH [2010] 1 WLR 753**, in urging the Court to find that the Respondent fully discharged her burden of proof. **Mrs. Rono** accordingly urged for the dismissal of the appeal with costs.

7. This being a first appeal, the principle propounded in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, applies, namely:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

8. Accordingly, it is imperative to reconsider the evidence presented before the lower court to determine whether the findings and conclusions of the trial court are defensible. After two false starts entailing the setting aside of default judgments, the suit before the lower court was ultimately heard by **Hon. Adalo, RM**, and determined on **13 November 2017**. The evidence of the Respondent, as **PW1** before the lower court, was that some people went to her home on **24 May 2013** at about 8.00 a.m. and seized her 5 Friesian cows and 3 merino sheep; and that in utter shock, she asked them as to the reason for the attachment, and was told that her son **Dan Kipsang** had taken a loan that they were not going to entertain any discussion on the matter. She got to learn that the people were agents of the Appellant.

9. It was further the evidence of **PW1** that the cows would give her 20 litres of milk in the morning and 10 litres in the afternoon per day; and that at no time did her son tell her that he had borrowed a loan from the Appellant as he was living in town. In her evidence the 5 cows would fetch a market price of **Kshs. 200,000/=**; while the sheep would go for **Kshs. 10,000/=** each; and that her efforts to claim them back from the Appellant did not yield any positive result. He therefore resorted to filing the suit.

10. The Respondent called her daughter, **Viola Kipsang (PW2)** as a witness; and she confirmed that she was at home on **24 May 2013** when 4 people went there and asked to be shown where Dan lives. She stated that she accordingly showed them Dan's home but they did not find him at home; and that the people then proceeded to their cattle boma and took 5 cows and 3 sheep belonging to the Respondent. She added that she got to learn that the people were agents of the Appellant, and that in spite of their protestations, they took away the animals without heeding their explanations that the said animals belonged, not to Dan but the Respondent.

11. The last witness before the lower court was **Hosea Kiprono Teigong (PW3)**. He told the court that the Respondent is her neighbor; and that he had known her for over 30 years. He confirmed that she had cows and that she is also a farmer. **PW3** testified that on **24 May 2013**, he was at home at about 9.00 a.m. when a village elder called **Mr. Aiyabei** called him and informed him that some people from Kenya Women had gone to the Respondent's home to attach her cows. He was accordingly asked to intervene in his capacity as a village elder of the neighbouring village. He further stated that by the time he arrived at the Respondent's home, the people had already left with the animals. They followed them with a view of explaining that the Respondent had nothing to do with the loan in question but their efforts went unheeded. **PW3** further stated that he accompanied the Respondent in her follow up visits to the offices of the Appellant at Eldoret and Eldama Ravine and got to learn that Dan's wife, one Vicky, had taken a loan from them which was guaranteed by Dan. **PW3** concluded his evidence by asserting that the cows belonged to the Respondent, having been bought for her by her late husband; and that she had been earning an income from them.

12. As has been pointed out herein above, the Appellant opted to call no evidence; and therefore the main issue for reconsideration is whether the Respondent had proved her case to the requisite standard with particular reference to the following issues:

- a. Whether the Appellant was justified in seizing the Respondent's cows and sheep;
- b. Whether the value of the 5 cows and 3 sheep was proved to the requisite standard;
- c. Whether the orders made by the lower court are justified.

13. I say so because, from the evidence of the three witnesses who testified before the lower court, there is no gainsaying that the Respondent's 5 cows and 3 sheep were seized at the instance of the Appellants on **24 May 2013**. Similarly, there is no contestation that the

seizure was on account of a loan owed to the Appellant by one Vicky, the daughter in law of the Respondent in respect of which her son Dan was the guarantor. That being the case, the lower court cannot be faulted for holding that the said seizure or attachment was wrongful, granted the clear and uncontroverted evidence by the Respondent that she had nothing to with the loan.

14. As to the value of the 5 animals and 3 sheep, again the lower court had nothing but the uncontroverted evidence of **PW1** to rely on as to the value of the animals. She gave an estimate guided by the prevailing market rates. She explained, which explanation is reasonable, that she did not anticipate that her cattle would be attached so as to keep records; and at that point it was too late to call an agricultural officer to undertake an assessment, as was suggested to her in cross-examination by Counsel for the Appellant, because the animals were no longer in her possession or custody. It is noteworthy too that, although the Appellant pleaded at paragraph 8 that the animals had been offered as security for facilities offered to **Vicky Too**, the Appellant did not avail any valuation thereof, done by it for that purpose.

15. **Section 107(1)** of the *Evidence Act, Chapter 80 of the Laws of Kenya*, is explicit that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

16. Likewise, **Sections 109 and 112** of the *Evidence Act* provide that:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. In the premises, it is my considered finding that, on the basis of the unrebutted evidence presented by the Respondent there was good cause for holding that the value of the subject animals was Kshs. 230,000/=. In this regard, I would agree with and adopt the expressions of **Mabeya J.** in **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR**, that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

18. The same position was taken in **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001** thus:

"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

19. On the issue whether the orders granted were warranted, Counsel for the Appellant pitched the argument that since the Respondent did not specifically pray for the value of the cows and sheep in her prayers, the lower court erred in awarding the sum of **Kshs. 230,000/=**, which is in the nature of special damages without the same sum being pleaded specifically or proved. He relied on **William Kiplagat & Another vs. Benson Omwenga Civil Appeal No. 180 of 1993** in which it was held that:

"...special damages must be pleaded as much as particularity as circumstances permit and in this connection it is not enough to simply aver in the plain as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars of the special damage ...strict proof of those particulars."

20. It is manifest from the Plaint dated **1 November 2013**, that the Respondent was intent on recovering her animals in the manner set out in Paragraph 8 thereof. The Respondent also prayed for general damages for loss suffered till date of release. The suit was not determined until **13 November 2017** with the Appellant being responsible for two botched ex parte proceedings in which the trial court wrote considered judgments that were later to be set aside at the instance of the Appellant. In the premises, it was well within the prayer of the Respondent for an award of General Damages to be made taking into account the value of the animals.

21. In the result, it is my finding that the appeal is completely devoid of merit and it is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2019

OLGA SEWE

JUDGE