



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 44 OF 2010

JOSEPHAT LISHENGA.....APPELLANT

VERSUS

MUGANDA WASULWA T/a KEYSIAN AUCTIONEERS.....RESPONDENT

(Being an appeal from the Ruling and Order delivered on 21st January, 2010

by Hon. Mrs. Gichohi (Senior Principal Magistrate) Milimani

Commercial Courts in CMCC No.7200 of 2004)

JUDGMENT

1. The Appellant Josephat L. Lishenga had sued the Respondent Muganda Walsulwa T/a Keysian Auctioneers & 2 others. The Appellants claim against the Respondent was for the sum of Ksh.680,000/= being the value of a motor vehicle Registration No. KAN 160V which the Appellant claimed was illegally attached and sold by the Respondent in purported execution of a court order in CMCC 6491/02. The Appellant also prayed for damages for loss of user, interest and costs.
2. The claim was denied by the Appellant. It was stated that the motor vehicle in question was proclaimed and attached in execution of a court decree in CMCC 6491/2002. It was contended that the joinder of the Respondent as a party in the suit was misconceived.
3. The case against the others was withdrawn. Subsequently the Respondent filed a Preliminary Objection on the grounds that the court had no jurisdiction to hear the suit by virtue of Section 34 Civil Procedure Act.
4. The trial magistrate sustained the Preliminary Objection and struck out the suit with costs. That is what triggered this Appeal.
5. The grounds of appeal are as follows:

“1.The Learned Magistrate erred and was completely wrong in striking out the Appellants suit on a preliminary Objection by the Respondent based on the provisions of Section 34 of Civil Procedure Act because the Respondent was not a party to the earlier Suit between the Appellant and Kenneth Maingi Masila namely Milimani CMCC No. 6491 of 2002, but was only a court broker who had been given warrants to execute a decree in that suit by the court.

2. The Learned Magistrate erred and was wrong in failing to appreciate that the Appellant’s cause of action was based on the provisions of Section 26 of the Auctioneers Act which cause of action arose following illegal and irregular execution of the court warrants by the Respondent in CMCC No. 649 of 2002 and which has caused damage and loss for the Appellant and for which the Appellant was in law entitled to sue for damages.

3. The Learned Magistrate was completely wrong in her interpretation and construction of Section 34 of the Civil Procedure Act especially in relation to “parties” to suits and their “Representatives”.”

6. The Appeal was canvassed by way of written submissions which I have considered.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions.

See for example the case of *Selle v Associated motor Boat Co. & others* [1968] E.A. 123 where it was stated as follows:-

“An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

8. Section 26 of the Auctioneers Act provides as follows:

“Right to recover damages from auctioneer

(1) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action:

Provided that nothing in this section shall:

(a) prevent the auctioneer from claiming contribution or indemnity from any other person;

(b) limit the damages recoverable under any other written law.”

9. The aforesaid provision of the law has not barred actions for damages against auctioneers who have unlawfully or improperly exercised the powers of a licenced auctioneer.

10. Although Section 34 Civil Procedure Act provides for all questions relating to the execution, discharge and satisfaction of a decree between parties in a suit and their representatives, it does not provide for payment of damages to a person who is not a Judgment debtor. The said provision stipulates as follows:

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”

11. In *Kuronya Auctioneers v Maurice Odhoch & another* [2003] eKLR, the Court Appeal faced with a similar situation, held as follows:

“Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment-debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails.”

12. It has been argued by the Respondent’s counsel that the Auctioneer was an officer of the Court merely executing warrants of the court and that the Appellant’s claim is barred by virtue of Section 6 of the Judicature (Cap 8) Laws of Kenya which provides as follows:

“...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.”

13. The Court of Appeal answered the same question in the case of *Kuronya Auctioneers* (Supra) as follows:

“...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.”

14. With the foregoing I find merits in the appeal and allow the same with costs. The order made by the trial magistrate striking out the Appellant’s suit is hereby set aside and ordered that the suit do proceed to hearing.

Dated, signed and delivered at Nairobi this 31st day of Jan, 2018

B. THURANIRA JADEN

JUDGE