



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 3 OF 2017

EQUITY BANK LIMITED.....APPELLANT

VERSUS

PATRICK J. O. OTIENO.....RESPONDENT

[Being an appeal from the Judgment and Decree of the Honourable Mr. T. Obutu

Senior Principal Magistrate in Kisumu CMCC No. 167 of 2014]

JUDGMENT

Sometimes in the year 2010 the Appellant in this case gave instructions to Pambo Investments Auctioneers to repossess and sell at a public auction a Motor Vehicle Registration Number KBK 268J belonging to their defaulting client. Pursuant to those instructions Pambo Investments repossessed the Motor Vehicle, a lorry, and subsequently sold it at a public auction in which the Respondent was declared the highest bidder. That auction was held on 18th November 2011 and according to the Respondent and documents issued by the Auctioneer the Respondent duly paid the purchase price of Kshs.3,500,00 and the subject Motor Vehicle was released to him. Thereafter the Respondent entered into a hire agreement with a third party in regard to the truck. The terms of the contract are contained in an agreement dated 15th March 2011 and according to Clause 2 of that agreement the Respondent was to earn Kshs.20,000 per day for an agreed 20 days per month payable in advance for hire of the lorry to the third party. It was and still is the Respondent's case that the agreement was frustrated because he could not obtain the requisite inspection certificate for the lorry as he did not have a log book. He blamed the Appellant for the frustration of the contract as even though he had paid the purchase price to the Auctioneer in full the Appellant continued to withhold the log book. On its part the Appellant Bank maintained that the Respondent had not paid the purchase price as required under the law and therefore the sale was never completed and hence their refusal to hand over the log book. This stand-off culminated in a suit where the Respondent claimed from the Appellant a sum of Kshs.20,000 per day with interest from 1st March 2011 till payment in full, release of the log book, costs and interest. Despite a Preliminary Objection raised on his pecuniary jurisdiction the trial magistrate proceeded to hear the case and in his judgment awarded the Respondent a sum of Kshs.10,500,000 plus interest at court rates for loss of earnings, and made an order that the Respondent was entitled to be issued with the log book of the vehicle. The trial magistrate awarded the Respondent costs of the suit. Being aggrieved the Appellant filed this appeal and has in his Memorandum of Appeal set out the following grounds:-

- 1. "THAT the Learned Senior Principal Magistrate erred in law and in fact in finding that a lawful auction was conducted in respect of motor vehicle registration number KBK 268J and a valid Certificate of Sale issued to the Respondent.***
- 2. THAT the Learned Senior Principal Magistrate erred in law and in fact in finding that the Respondent made payments of the full auction amount within the period set out by the Respondent for the payments of the auction price.***
- 3. THAT the Learned Senior Principal Magistrate erred in law and in finding That he had the requisite pecuniary jurisdiction to hear the suit before Him while in actual fact he did not.***
- 4. THAT the Learned Senior Principal Magistrate erred in law and in fact in failing to find that the Respondent had a duty to mitigate his losses.***
- 5. THAT the Learned Senior Principal Magistrate erred in both law and fact in making an award for loss of earning over a period of 35 months a fact that was not pleaded by the Respondent and neither was supported by any evidence at the hearing before the Learned Senior Principal Magistrate or at all.***

6. THAT the Learned Senior Principal Magistrate erred in both law and fact in taking into account extraneous matters in making an award to the Respondent.”

The appeal was canvassed through written submissions. Counsel for the Appellant condensed the six grounds of appeal and argued them under the following four broad heads –

- a) **“Whether the Learned Magistrate had the monetary jurisdiction to hear and determine the suit between the parties.**
- b) **Whether there was no valid auction process and therefore the Respondent could not acquire a good title to the motor vehicle in question.**
- c) **Whether there was a legal or factual basis for the Honourable Magistrate to make an award in the sum of Kshs.10.5 Million in favour of the Respondent for alleged loss of user or at all.**
- d) **In the alternative, but without prejudice to (c) above, whether the Appellant was obligated to mitigate his losses.”**

On the issue of jurisdiction it was submitted that parties are bound by their pleadings and that the Respondent’s claim as framed exceeded the jurisdiction of the trial magistrate. Counsel argued that by the time the Complaint was filed the period was two years and seven months or 965 days and the claim of Kshs.20,000 per day from 1st March 2011 therefore translated to Kshs.19.1 Million or thereabouts and as at the time the hearing commenced in October 2016 more than Sixty Six months had lapsed and the claim worked to Kshs.39.6 Million. According to Counsel this was way in excess of the trial magistrate’s pecuniary jurisdiction of Kshs.4 Million which however was by 15th December 2015 enhanced to Kshs.10,000,000. Counsel contended that this issue of jurisdiction is not new as it was also pleaded in the Appellant’s written statement of defence and canvassed by way of a preliminary objection before the hearing. Counsel urged this court to review the issue afresh and make its own determination as being the first appellate court it is entitled to do so. Relying on several judgments among them the celebrated case of **The Owners of Motor Vessel “Lillian S” Versus Caltex Oil Kenya Limited [1989] KLR** Counsel urged this court to find that the judgment was made without jurisdiction the claim having been in excess of the pecuniary jurisdiction of the Trial Magistrate and on that ground set it aside.

On the merits Counsel submitted that the auction was not completed and that therefore the Respondent did not acquire a good title, or at all, to the Motor Vehicle and as such his claim could not have succeeded. Counsel contended that the purchase price was never remitted to the Appellant by the Auctioneer as alleged and relying on a letter dated 31st March 2012 from the Auctioneer stated that it was clear that even by 31st May 2012 the same had not been remitted. Counsel stated that the Trial Magistrate did not properly apply his mind to the evidence and contended that there was no single evidence that the Respondent paid the entire auction price within 7 days as required. Citing the Court of Appeal decision in **Nancy Kahoya V. Expert Credit Limited & Another [2015] eKLR** Counsel submitted that in any event the Respondent’s remedy lies in suing the Auctioneer for damages.

Counsel further argued that notwithstanding and even had the Trial Magistrate had the requisite pecuniary jurisdiction to try the matter his claim still could not have succeeded on the merits as firstly the agreement was for a specific purpose and was not open ended. Secondly as the same was not signed by the Respondent and its authenticity was therefore in issue and thirdly as the agreement was not evidence of performance. He contended that as was held in **Patrick Munjito V. Francis Muraguri & 2 Others NAIROBI HCCC No. 281 of 2009** a claim for loss of user is in the nature of mesne profits and must be specifically pleaded and proved by way of invoices and other evidence of performance. He further contended that there was no basis for the Trial Magistrate to pay loss of user for 35 months yet that period was not what was pleaded and that the Trial Magistrate erred by substituting the Respondent’s pleadings with his own view.

On the issue of mitigation of loss Counsel for the Appellant submitted that the Respondent could have taken advantage of Section 9 of the Traffic Act to apply for the log book from the Registrar of Motor Vehicles and therefore mitigated his losses. Upon those grounds Counsel urged this court to allow the appeal as prayed.

For the Respondent it was submitted that the Respondent was indeed declared the highest bidder at the public auction and that he paid the entire purchase price at the fall of the hammer and was therefore a bonafide purchaser. It was also submitted that the Appellant had no legal basis to withhold the log book as the Respondent was not privy to the goings on between the Appellant and the Auctioneer and that in any event the bank had the liberty of enjoining the Auctioneer to the suit and as it did not it should be estopped from making allegations against the Auctioneer.

On jurisdiction Counsel for the Respondent submitted that contrary to the Appellant’s assertion the Trial Magistrate addressed the issue in his judgment and came to the conclusion that he had the requisite jurisdiction. Relying on **Mombasa H.C.C.C. No. 14 of 1999 Mombasa Developments & Another V. The Attorney General & 2 Others [2000] eKLR** Counsel submitted that the Learned Magistrate acted lawfully by awarding what to him was a reasonable amount.

On the issue of mitigation of loss Counsel contended that the Appellant should not be allowed to hide under this cover yet its hands are unclean. Citing the maxim that *“He who comes to Equity must come with clean hands”* Counsel submitted that despite the Appellant admitting that it had received Kshs.3,050,000 it continued to hold onto the log book and hence breached its cardinal obligation and so should be estopped from hiding under the principle of mitigation of loss.

On the period of 35 months Counsel relied on Hayanga J’s decision in **Mombasa Developments & Another V. Attorney General & 2**

Others [2000] eKLR and submitted that the Trial Magistrate was right in relying on that period as the basis of the award. Counsel further submitted that the Trial Magistrate acted within the law, the facts and reasonable discretion and that this appeal lacks merit and should be dismissed with costs to the Respondent.

This being the first appellate court I have a duty to reconsider the evidence and evaluate it so as to draw my conclusions while bearing in mind that I neither saw nor heard the witnesses. – see **Selle & Another V. Associated Motor Boat Company Limited and Others [1968] EA. 123**. I however propose to begin with the issue of jurisdiction because as was stated by Nyarangi J in **The Owners of Motor Vessel “Lillian S” v. Caltex Oil Kenya Limited [1989] KLR 1 at Page 14** –

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction*”**

The late Nyarangi J was relying on a passage from **Words and Phrases Legally defined – Volume 3:1 – N Page 113** where jurisdiction was defined thus:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

In this case when the issue of jurisdiction was raised by way of a Preliminary Objection the same was heard by Lucy Gitari, Chief Magistrate, as she then was, and finding that the value of the subject matter was Kshs.3,500,000 and that the claim for Kshs.20,000 per day was anticipatory but not a liquidated one she concluded that she had jurisdiction to hear the case. She observed that the question of monetary jurisdiction would only arise at the point when the court would give its final award and that the court would not award what was beyond its jurisdiction and that it was not expected that a party could file a suit in a court and expect to be awarded an award in excess of the jurisdiction of that court. In the end she stated –

“What is raised in the Preliminary Objection is not clear. Counsel to the applicant is making calculations and conclusion to arrive at figures. These are facts which have to be ascertained. The Preliminary Objection has not passed the test set out in the above authority. The value of the subject matter which can be ascertained from annexures is within the jurisdiction of this court. In the circumstance I find that the Preliminary Objection has no merits. I dismiss it with costs.”

However when the hearing commenced it went before Honourable Obutu, Principal Magistrate whose jurisdiction by that time had been enhanced to Kshs.10 Million. At the time of the ruling the Chief Magistrate’s pecuniary jurisdiction was Kshs.7 Million. In his judgment the Trial Magistrate commented that as the ruling on issue of jurisdiction had not been appealed then he had the requisite jurisdiction to handle the matter.

I however, with due respect, beg to differ with that ruling. In my opinion the subject matter of the case was not the lorry whose value was Kshs.3,500,000 being what the Respondent alleges to have paid at the auction but his claim for frustration of the hire agreement which was particularized and pleaded as –

“a) The sum of Kshs.20,000/= per day with interest thereon from 1/3/2011 till payment in full” and

b) An order compelling the defendant to avail the log book of Motor vehicle registration number KBK 268J Nissan Diesel to the Plaintiff

c)”.

In essence the Respondent was making a claim for loss of user not even loss of earnings. Even then a claim for loss of earnings is in the nature of special damages as unlike general damages it is capable of being ascertained by simple arithmetic. Indeed it was possible by

counting the number of days from the 1st day of March 2011 to 11th April 2014 when the suit was filed and multiplying them with Kshs.20,000 to determine exactly how much the Respondent's claim was up to that point. This was a liquidated amount. The Respondent was saying that because the Appellant had withheld the log book it was liable, it was based on the hire agreement between him and the third party, to him for a sum of Kshs.20,000 per day until the suit was determined. His claim was not for damages at large but for a specific amount of money capable of being ascertained. Indeed in a subsequent application for Summary Judgment filed on 14th May 2014 one of the Respondent's grounds was that:-

“the judgment sought by the Plaintiff/Applicant (“the Applicant”) herein is for a straight forward liquidated sum.”

The said application was canvassed by way of written submissions and this is what his Advocate stated:-

“On the first requirement the plaintiff does rely on Kenya Power & Lighting Co. Ltd v Alliance Media [2014] eKLR while highlighting the holding of the same court in Gurbaksh Singh & Sons Limited v Njiri Emporium Ltd [1985] KLR 695 Found it worthy to indicate that; ‘Summary judgement should be entered only where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere fact of arithmetic.’

In light of which the plaintiff submits humbly that what is being claimed is very specific, due and payable and further that the amount claimed has been ascertained and is also capable of being ascertained as a mere fact of arithmetic. (emphasis mine).

It cannot therefore be the case that the Respondent's claim rested on the value of the subject matter which is what was disclosed in the annexures referred to in the ruling of the Chief Magistrate. In the ruling on the application for Summary Judgment the Trial Magistrate J. N. Nyaga, Chief Magistrate, as he then was, did the arithmetic and found that as at 4 years, or time of the ruling, the Plaintiff's claim stood at Kshs.23,040,000/= plus interest. In his ruling one of the reasons he gave for not granting the application for summary judgment was that given the arithmetic the issue as to whether the court could try the case was a triable issue. The Learned Trial Magistrate should have taken the cue from this ruling and not heard the matter which clearly was in excess of his monetary jurisdiction. On that ground the proceedings before him and the subsequent judgment was a nullity and for that reason I shall allow the appeal, set aside the judgment and order

that the matter go for retrial before a court with jurisdiction. The costs of the appeal are awarded to the Appellant. It is so ordered.

Signed, dated and delivered at Kisumu this 19th day of April 2018

E. N. MAINA

JUDGE