



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO.69 OF 2012

KENYA WOMEN FINANCE TRUST.....APPELLANT

VERSUS

PHILIP LUTEYA.....RESPONDENT

(Appeal from the judgment of P. Achieng SRM in Kakamega

CMCC No.287 of 2009 delivered on 6th July 2012)

JUDGMENT

1. This is an appeal from the judgment of *Hon P. Achieng, SRM*, delivered on 6th July 2012 in which the magistrate entered judgment for the plaintiff/respondent to the sum of *Kshs.128,000/-* with costs against the defendant/appellant, after the respondent had sued the appellant for wrongful/unlawful attachment and sale of the respondent's photocopier machine model KM-1620 valued at *Kshs.128,000/-*. The defendant/appellant was aggrieved by the said judgment and has hence filed this appeal.

2. The grounds of appeal are that:-

1. The learned trial magistrate erred in finding that the plaintiff had proved his case on a balance of probability.
2. The learned trial magistrate erred in finding that appellant was obligated to pay to the respondent *Kshs.128,000/-* for the Copier without specific proof.
3. The learned trial magistrate erred in finding that indeed that the appellant had attached and sold the respondent's Copier when there was compelling evidence to the contrary.
4. The learned trial magistrate did not give any or sufficient regard to the appellant defence in KAKAMEGA CMCC NO.287 of 2009.
5. The learned trial magistrate based her finding on wrong legal principles and incorrect evaluation of evidence on record.

3. **CASE FOR RESPONDENT/PLAINTIFF:**

The evidence of the respondent/plaintiff at the lower court was that he was the owner of a photocopier

machine *Model No. KM 1620 Serial Number H3135428* that he had purchased from Mfi Solutions Kisumu on 11th March, 2005 at a price of Kshs.128,000/-. That he put the machine at work at Kakamega Provincial General Hospital under the supervision of a worker at the hospital *Wilmina Malova PW2*. That he was earning between Kshs.18000/- and 24,000/- per month in gross. That on 24th August 2009 he was called by Wilmina who told him that there were people from Kenya women Finance trust who had gone to the hospital to attach the machine on the grounds that it was security for some loan. He went to the hospital and found the said people with policemen from Provincial Commissioner's office. He introduced himself to the people but they did not listen to him. They took away the machine. He later learnt that the husband to Wilmina, *Lazarus Malova*, had guaranteed his sister *Salome Anyona* for a loan of Kshs.50,000/- with a photocopier *Kyocera Model KM 1620 S/N200412* as surety. He later sued the appellants seeking for release of the photocopier and/or its equivalent. Judgment was then entered for him at Kshs.128,000/-.

4. The respondent's evidence was supported by Wilmina Malova, PW2, who stated that her husband had then died when the officers of the appellant went to attach the machine. She said that she was not aware that her late husband had guaranteed his sister a loan of Kshs.50,000/- with KWFT.

5. The plaintiff said that the appellants took the wrong photocopier machine and not the one that was guaranteed in their documents. During his evidence he produced an invoice and a purchase receipt from the company he bought the machine from – Pex1(a) and 1(b) respectively.

6. CASE FOR APPELLANT/DEFENDANT:

The evidence for the appellant/defendant was adduced by ts Kakamega branch office manager, *Charles M. Wainaina DW1*. His evidence was that their organization had through LubaoWomen Group extended a loan of Kshs.50,000/- to one *Salome Anyona Inguche*. That the guarantor was one *Lazaro Inguche Malova*. The security was a photocopier *Kyocera 1620 S/N 200412, 2 cows and furniture*. That the loanee defaulted in paying the loan and the group attached the photocopier machine which was sold for Kshs.40,000/- in recovery of the guaranteed loan. During his evidence he produced the following documents as exhibits:

(1) Loan forms –Dex1

(2) Agreement of sale of photocopier Kyocera model KM – 1620 S.N 200412 to one Martin Shinyoli Inyanyi DEx2.

(3) A letter by the said women group to their office indicating that the group had impounded a photocopier Kyocera 1620 in recovery of loan owed from Salome Inguche – Dex3.

7. The witness denied that they sold plaintiff's/respondent's photocopier as his was Mita Copier KY 1620 S/N H3135428 while the one that the group sold was Kyocera Model KM 1620 S/N 200412.

8. FINDINGS OF TRIAL MAGISTRATE:

The trial magistrate held that the photocopier taken way from Kakamega Provincial General Hospital and sold is not the same one that was placed as security for the loan owed to Salome Inguche. Further that the respondent did not seem to have scrutinized the items given as security to confirm whether they actually existed as well as their ownership. He accordingly found that the photocopier carried away belonged to the plaintiff and entered judgment for the plaintiff/respondent.

9. SUBMISSIONS:

The advocates for the appellants, *Wanyama & ~Wanyonyi & Co. Advocates* submitted in their appeal that since the photocopier machine was in possession of PW2 and that her husband had alleged it to be his and offered the same as security, the respondent ought to have sued PW2 for compensation of the same and not the appellant. That in attaching the photocopier the appellants were realizing their debt and cannot

thereby be faulted. They submitted that the case has not been proved against the appellants.

10. The respondent while acting in person submitted that he never guaranteed anybody any loan to warrant attachment of his photocopier. That the loan forms produced by appellant indicate the place of business of the guarantor as Lubao market and residence as Chombeli. That the respondent denied living at Chombeli or carrying out business at Lubao market. That the guarantor's declaration form is not dated and therefore one cannot tell whether the same was executed and in respect of which loan, if any. That the attachment and sale was illegal.

The question for determination is whether the appellant/defendant unjustifiably carried away the respondent/plaintiff's photocopier machine model (mita) KM-1620 serial number H3135428 from respondent's business premises.

11. DETERMINATION:

This is the first appellate court over the matter. It is the duty of the first appellate court to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify - see Selle –vs- Associated Motor Board [1968] EA 123.

12. It was the evidence of the respondent that officers of the appellant carried away his photocopier model No. Mita KM-1620 serial No.H3135428. He produced documents to prove the model number. He and his witness stated that the photocopier was carried away from the respondent's business premises at the then Kakamega Provincial general hospital. The respondent stated that he had not guaranteed anybody any loan.

13. The appellant on the other hand says that Lubao Women Group had loaned money to one Salome Anyona and one Lazarus Malova had placed a photocopier machine Model No. Kyocera KM 1620 S/N 200412 as security. They say that that is the photocopier that was attached in regard to the loan extended to Salome Inguche.

14. The law of evidence requires that whoever asserts a certain fact has the burden of proving it. *Section 107(1)* reads as follows:-

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

15. *Section 108* of the said Act states:

“The burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all were given on either side.”

16. I find that the respondent had established a strong case that officers of the appellant had taken away his photocopier machine Model No. KM 620 S/N H3135428 from his business premises at Kakamega Provincial General Hospital. The respondent was there when officers for the respondent took away the photocopier. His witness PW2 corroborated his evidence that the photocopier was carted away by the appellant's officers. The respondent produced ownership documents for his photocopier that also indicated the model number. There was no evidence that the respondent had guaranteed anybody any loan. Evidence adduced before the court indicated that the person who had been guaranteed the loan was Salome Inguche and the guarantor was one Lazaro Inguche Malova. The photocopier that was used to guarantee the loan was model Kyocera KM 620 S/N 200412 that did not belong to the respondent. It is apparent that the officers for the appellant did not confirm whether the machine they were taking away was the one guaranteed in their loan forms. They took away the wrong photocopier.

17. The witnesses for the appellant who did the attachment did not testify in the case. The makers of the documents that the appellant relied on in the case were not called to testify. It is those people who did the attachment who could deny or confirm that they attached the respondent's photocopier machine. It is

them who could tell the court as to the model number of the photocopier that they attached. It is them who could tell the court from whom and where they did the attachment. Without the appellant calling any such evidence, the evidence of their branch manager DW1 amounted to heresy evidence. The only inference I can draw in the appellant failing to call their key witnesses in the case is that they had realized that they had attached the wrong photocopier and that there was no veracity of the documents they produced in court in relation to the respondent. I accordingly concur with the trial magistrate that the appellant had not rebutted the evidence adduced by the respondent that the appellant unjustifiably took away his photocopier machine model No. KM 620 S/N H3135428. The respondent did not owe the appellant any money neither had he guaranteed anybody any loan. The attachment was therefore unlawful.

18. The respondent produced an invoice PEx1(b) that indicates that the photocopier was bought in the year 2005 at a cost of Kshs.128,000/-. Though the photocopier had depreciated in value when it was taken away in 2009, prices of photocopiers had also gone up at the same time. The appellant unlawfully took away the respondent's photocopier for a non-existent debt. I find that it was correct for the trial magistrate to order for the respondent to be compensated on the value of the photocopier. The entry of judgment for Kshs.128,000/- cannot thereby be faulted.

19. For the reasons stated above, there are no merits in this appeal and it is thereby dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 27th day of April, 2017.

J. NJAGI

JUDGE

In the presence of:

Miss Bikeyo HB Kweyu for appellant

Cc Paul