



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL APPEAL NUMBER 2 OF 2016

EZRA WAFUBWA NAMBUCHI :::::::::::::::::::::::::::::::APPELLANT

VERSUS

KENYA WOMEN FINANCE TRUST :::::::::::::::::::::::::::::::RESPONDENT

JUDGMENT

On 27.10.2010, the appellant herein filed a Civil Suit number 145 of 2010 in the lower court seeking the following reliefs:-

- a) An order directing the defendant to release motorcycle registration number KBB 600Y, Focus, to the plaintiff forthwith or alternatively it's monetary value.**
- b) General damages for illegal and unlawful seizure.**
- c) Cost of the suit.**
- d) Any other relief the court deems fit to grant.**

His case is that on 8th September, 2007 he bought a motor cycle registration number KBB 600Y from Focus motorcycle manufacturing company limited, in Kisumu for 65,000/-. He was given its original log book and a duly filled transfer form to enable him transfer it in his name. Before he had transferred it to his own name, in May, 2009 he gave it to his sister (PW-2), namely Antoinette Namaemba Mambuchi, to engage it in Bodaboda business on his behalf. PW-2 employed one Bonventure Wamukoya Onchango to operate it along Kaplamai – Maili Nane Route. He operated it for 3 months. The proceeds from the business were forwarded to the plaintiff. However Bonventure Wamukoya Onchango got unwell and PW-2 got another operator. The new operator told her one day that the motorcycle was repossessed by Kenya Women Finance Trust (KWFT). On 14th May, 2009 at 3.00pm she told the plaintiff about it. It was alleged the motorcycle had guaranteed a loan. The plaintiff went to Kenya Women Finance Trust Offices in Kapenguria. He was told one Osusus and other members of Kenya Women Finance Trust took it. He told them he was the owner of the motorcycle and had not taken a loan using it as security or even guaranteed anyone loan using it. He was told one Margaret Ochogo, a member of Noela Nandika Group had taken a loan of which she was guaranteed by her husband one Bonventure Wamukoya Ochango, and they had listed the motorcycle in the Loan Security Declaration Form as one of the securities. She defaulted to repay the loan and the motorcycle was attached. The manager of Kenya Women Finance Trust was willing to give the motorcycle back to him but he declined as it had depreciated and was in a bad state. Before seizure it was earning him 1,300/- per day. He produced the original log book and the transfer form as exhibits.

The defense was filed on 8th February, 2013, of which in paragraph 3 it is stated that if the defendant's agents/or employees seized any motorcycle registration number KBB 600Y in May 2009 at Kapenguria, and which no admission is made, then the same was properly and legally seized as it had been used by both Bonventure Ochango and Margaret Midecha Asele on 3.8.2007 which he said Margaret Midecha Asele had defaulted in repayment.

The defendant in defense called one Gabriel Kipngeno Rotich as DW-1. He said he was an employee of Kenya Women

Finance Trust Kapenguria Branch. While working there he dealt with a group called Noela Nandika in the year 2009. The group members used to take loans. One of them was Margaret Anzela. She took a loan in the year 2009 of which she was servicing. She swore an affidavit to that effect. He could not remember the amount of the loan. As security for her loan she pledged 5 cows, stocks, sideboard, bicycle, Sirikwa seats and a motorbike. She signed a confidential loan security declaration form. There is a clause in it that in case of default the lender reserves the right to seize the pledged securities and sell to recover the loan balance. The group members as well can guarantee a borrow. A married member can also be guaranteed by the spouse. The husband of Margaret also executed a guarantor commitment form.

The witness further said in the event of default the group members are required to contribute the sum due and pay the lender, then afterwards the group members can pursue the borrower and seize the pledged items. He alleged in this case they paid the outstanding loan, then they looked for the borrower who had since relocated from Kesogon. When they traced her they seized her motorbike and sold it.

On cross-examination he admitted that the plaintiff is not a member of KWFT. He did not guarantee anyone any loan and his name does not appear in the defense produced exhibits. The motorcycle which was pledged was not described by its registration number. He could not tell which motorcycle was pledged as security. He confirmed motorcycle registration number KBB 600Y is the one that was seized. They never established to whom the motorcycle belonged nor who the registered owner was. The borrower did not show them the log book of the motor cycle she was pledging as security. He further made it clear that in their defense they admit having repossessed the motor cycle because of default.

The trial magistrate evaluated the evidence and concluded that the plaintiff failed to prove that he was the lawful owner of the alleged motorcycle. He did not have the purchase agreement and the transfer document had not been effected and the log book issued in his name. The log book produced was in the name of the alleged seller. On the ground she dismissed the suit with costs.

The plaintiff dissatisfied with the said finding appealed to this court on the grounds that:-

- 1. The learned trial magistrate misdirected herself in law and in fact when she held that the subject motorcycle registration number KBB 600Y had to be registered in the appellants names for his claim to succeed.**
- 2. The learned magistrate misdirected herself in law and in fact when she failed to consider that the appellant had in his possession all the documents of ownership of the motorcycle.**
- 3. The learned magistrate erred in law and in fact when she held that since the transfer had not been perfected, the appellants claim could not succeed.**
- 4. The learned trial magistrate erred in law and in fact when she found that the appellant had not been advanced any money by the respondent and that indeed the motorcycle was not offered as security, yet went ahead to dismiss the appellant's suit.**
- 5. The learned magistrate erred in law when she failed to address all the issues raised in evidence.**
- 6. The judgment was for a different case number 1261 of 2015 and not 145 of 2010.**
- 7. The learned trial magistrate erred in law when she failed to find that the appellant had proved his case on a balance of probabilities.**

I have weighed the evidence, considered the judgment delivered in the suit, grounds of appeal and submissions by both sides. The facts of the case are well settled and are not in dispute, save for the ownership of motorcycle registration number KBB 600Y. To establish ownership the appellant produced a purchase receipt of which does not have the name of the purchaser. He as well produced a transfer form duly filled though was not submitted to effect the transfer. The other document produced is

the original copy of the log book in the name of the alleged seller of the said motorcycle. It's not in dispute that the appellant had the possession of the motorcycle by the time it was repossessed by the respondent. The transfer form produced is in his favour as the new owner of the said motor cycle. The only thing which had not been done is effecting the transfer for him to be registered as its owner. However all the documents needed for that purpose were in his possession and had been well executed. The question then is, does this establish ownership of the said motorcycle on balance of probabilities?

Section 8 of the Traffic Act of which was relied by the respondent in their submissions, reads that:-

“Owner of vehicle; the person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

The words here, **“unless the contrary is proved,”** cannot be wished away. They imply there are circumstances or situations under which the registered owner may not be the owner. Mostly it's the purchaser of a motor vehicle who takes the documents for registration to the Registrar of Motor Vehicles for registration. The seller simply executes the documents and hand them over to the purchaser for the said purpose. When the vehicle and the fully executed documents for transfer of ownership are handed to the purchaser, as a matter of fact it can't be said that the seller remains the owner of the said motor vehicle. The person given the loan by the respondent is neither the appellant and nor the registered owner of the said motorcycle. If the registered owner is the one who had been advanced the loan it would have been easy to understand. The security document in which the motorcycle was indicated as security did not describe it in any manner. Its colour, size, make, chassis/frame number, engine number and registration number were not given. There is no evidence that the attached motorcycle by the respondent, is the one which was offered as security. It's clear from the respondent that they did not exercise due diligence in securing the loan they advanced to their member, one Margaret Midecha. It's baffling how she was just allowed to list the security items without requiring her to proof ownership. One wonders how respondent was able to identify which motorcycle to attach given that it was not described in any manner. It's clear they attached a motorcycle which did not belong to their client. Their action is not justifiable by any means. They are very much aware of this fact and that is why DW-1 tried to run away from the open truth towards the end of his evidence-in-chief when he purported that the alleged motorcycle was attached by other members in the borrower's group, who had guaranteed her and had to pay the loan balance when she defaulted.

There is no doubt that as a result of the unlawful and unjustifiable seizure of the appellant's motorcycle, he suffered some damages of which the court is entitled to award in redress. The trial court was wrong in its finding that the issue of ownership of the motorcycle was not settled to the required standard in law. It was, and on the ground the appeal succeeds.

The appellant had a prayer for release of his motorcycle or in alternative its monetary value. The seizure was in the year 2010. We are in the year 2017. When he saw it last, and we are not even certain that it's currently available, and the condition it is in, it was in a bad condition. It might not serve any meaning purpose to have it back and such an order might as well be in vain. The fair award to him is monetary value for its estimated value then. Given that while new the cost was 65,000/- and had been used as a bodaboda, a sum of Kshs.45,000/- will serve the purpose.

General damages for illegal and unlawful seizure is considered at 15,000/-. Costs and interest at court rates is awarded to him. Interest to be calculated from the date of the judgment of the lower court, that is 7th January, 2016, till payment in full.

This court so finds and orders.

S. M. GITHINJI
JUDGE

Ms Sitati holding brief for Madam Arunga for the appellant. Respondents Advocate absent.

COURT

Judgment is read and signed in the open court in presence of the present advocate, this 11th day of December, 2017.

**S. M. GITHINJI
JUDGE
11.12.2017**