



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 8 OF 2013

EQUITY BANK LIMITEDAPPELLANT

VERSUS

HELLEN WANJIKU NJEHIARESPONDENT

J U D G M E N T

1. At Paragraph 10A of the amended plaint the Respondent prayed for the following reliefs;

“The Plaintiff prays for a declaration that any purported sale and transfer and registration of the vehicle by the 1st and 2nd Defendants to the 3rd Defendant is unlawful null and void and of no legal effect whatsoever and the Registrar of Motor vehicle be ordered to cancel any such registration or transfer and the Defendants be ordered to return the said Motor vehicle or alternatively pay damages equivalent to the value of the said motor vehicle inclusive of damages for loss of business at the rate of Kshs 5000 per day with effect from 25/5/2010 to 3rd August 2010 (i.e. Kshs 355,000) and any further sum the court shall deem fit to grant upto the date the vehicle is returned back.”

The Respondent equally prayed for interest.

2. The genesis of the issues herein was in regard to motor vehicle registration No KAW 750H Matatu Town Ace which the Respondent vide a chattels mortgage offered by the Appellant purchased it for a total sum of Kshs 483,900.

The Respondent continued paying the same by instalments but due to post election violence of 2007-2008 the Respondent business was affected and could not meet the arrears. The Respondent from the evidence on record requested for the loan to be rescheduled which was allowed by the Appellant. The Respondent apparently defaulted and as at the time of filing suit default the loan arrears stood at Kshs 126,800 or thereabouts according to the Respondent.

3. Consequently the Appellant did exercise its statutory power of sale and instructed M/s Lifewood Traders to attach and sale the vehicle which they did. The Respondent then moved the court by filing the suit at the lower court where the court gave the orders in favour of the Respondent on 22/December 2009 as follows.

“ (1) That a mandatory injunction be and is hereby issued compelling the Defendant, its servants agent, auctioneers acting under the Defendant's instructions or otherwise however to release motor vehicle Reg. No KAW 750H Town Ace Toyota Matatu pending the determination of the main suit.

(2) That a temporary injunction is hereby issued restraining the defendants, its servants, agents and particularly Life wood auctioneers acting under the defendant instructions or any other person however from advertising for sale, disposing of motor vehicle Reg. No KAW 750W Town Ace Matatu pending hearing of the main suit.

(3) That costs to the applicant.”

4. According to the evidence on record by the Respondent the Appellant agent did attach the motor vehicle thereafter on 26th May 2010. The Respondent then proceeded to advertise for sale the same which was conducted by way of Public Auction on 21/6/2010.

The same was sold to a 3rd party one Mathews Machira Nyarango for a total bid of kshs 330,000/- . He was according to the auctioneer the highest bidder.

5. As a result of the said sale the Respondent amended the plaint so as to bring in the said 3rd party which application was allowed.

6. It is instructive to note also that the appellant after the above court order was issued did file an appeal together with an application in the High Court vide Civil Appeal No. 3/2010 at Kitale where the auctioneer was to appear before the Honourable Judge. The orders seemed to have lapsed and the application was later dismissed for want of prosecution.

7. Those were the circumstances obtaining as at the time the parties testified during full trial. In other words by the time the matter was heard by way of oral evidence the motor vehicle had been sold and transferred to the 3rd party.

8. The Respondent reiterated what I have summarised above and from the evidence its clear that she was clearly on default. Her argument was that though in default the second attachment and sale of the vehicle was illegal and uncalled for as there was a valid court order which clearly cushioned her till the suit was determined.

9. The Respondent further stated that she was praying for damages on loss of use of the said vehicle amounting to Kshs 5000 per day. She produced record to show that at least that was the minimum she was receiving each day. The same seemed not to have been contested by the Appellant.

10. On its part the Appellant clearly demonstrated that the Respondent had defaulted in loan repayment and that on several occasions she had asked for the rephasing of the loan. That request was accepted but yet again she defaulted. The Appellant admitted that it instructed the 2nd Respondent to attach and advertise the vehicle for sale so as to recover the loan. This attachment was after the initial one where the Respondent had sought the courts intervention.

ANALYSIS AND DETERMINATION

11. I have perused the court's proceedings at the lower court as well as the judgment. I have equally perused the Memorandum of Appeal together with the parties submissions herein.

12. The issues raised in the Memorandum are similar to those which the trial court had posed for determination namely;

(i) Whether the Appellant and in particular the 2nd Defendant was in contempt of the court orders.

(ii) Whether the value of security was recoverable as damages by the Respondent having been sold by way of public auction.

(iii) Whether the court erred in awarding the Respondent the sum of Kshs 355,000 as special damages for loss of use of the motor vehicle between 25/5/2010 to 3rd August 2010.

(iv) Whether the Appellant had right of recovery of the loan despite the disobedience of the court order.

(v) Whether the trial court considered extrenuous issues.

13. On the 1st issue of contempt of the orders, the Appellant did submit that it was not in contempt of the same as it was never served with the orders. Its now trite law that for one to succeed in enforcing contempt proceedings the said order ought to be served. Halburys Laws of England on Contempt states that;

“ As a general rule, the order of court requiring a person to do or abstain from doing any act may be enforced unless the copy of the order has been served personally on the person required to do or abstain from doing the act in question. In the case of an order requiring a person to do an act the copy must be send before the expiration of time limit which he was required to do the act. Where the order is made against a company, the order may only be enforced against an officer of the company if the particular officer has been served personally to do an act within a specified time, the copy must be served on the officer before the expiration of that time.”

14. That is the ideal situation. In the suit before the lower court, there is abundant evidence that the appellant together with the 2nd defendant were in clear picture of the court order. In the certificate of service dated 26 May 2010 James Onkundi Omakori the Auctioneer stated under prayer 4 that:

“That on the 26th day of May 2010 I went to Kapenguria stage and found the same motor vehicle at the Matatu stage with the driver Mr Njihia inside whom I had known before when I again repossessed the same vehicle but released to the owner by the court” (underlining mine).

15. Again the proceeding in the High Court case Appeal No 3/2010 between the parties herein stated on 21/1/2010 that;

“Mr Kidiavai : We need a stay.

Order: ((I) By consent there be a temporary stay of the lower court order of 22/12/2009 and the interparties hearing.

(2) Interparties hearing on 21/4/2010.”

16. When cross-examined during the main hearing DW1 James Onkundi Makori stated as follows;

“There is a specified motor vehicle in this issue in the order. I assumed that the instructions for the last repossession was not proper. The advertisement and sale were also improper.”

17. DW2 Bidan Mwangi Muiruri in his evidence in chief stated that

“The second repossession was in October 2009. By that time she was to have completed the loan. Lifewood auctioneers repossessed the vehicle the second time. The vehicle was not sold as we were served with an injunction.”

18. On cross examination the said DW2 stated that

“When we instructed the auctioneer in May 2010 to repossess and advertise for sale the

bank was aware of earlier court order which was served upon. -----

Its true that the vehicle was sold after the advertisement. Its true that the suit herein is still pending hearing and determination. I would say that the bank disobeyed the order (pexhibit 5)”

19. From the above set of proceedings I have no doubt in my mind that the Appellant was well seized of the court order.

Infact the High Court ordered it to have the vehicle taken to the police station for safe custody. That order seemed not to have been effected.

20. Can it therefore be said that there was no contempt of the order? I do not think so. Infact the admission by both the appellant and the auctioneer are glaring. They choose to disobey the order blatantly. They proceeded to repossess the vehicle with full knowledge that the order clearly stated that the vehicle was to remain with the Respondent till the main suit was determined.

21. The issue that confronted the trial court in my view was not whether there was contempt of the orders. It was the hearing and determination of the full suit. I believe that the said court had it been told to determine at the interime stage the question of whether or not the orders had been breached by the defendants, it would have done so. The respondent appeared to have decided to forego this preliminary issue and have the suit fully determined. This was of course within her discretion.

22. The trial court decided the matter wholesome. It found that indeed the order had been breached and it awarded damages to the respondent. I do concur with the court's finding. There was no need to determine the issue of contempt then thereafter have the suit heard and determined. The appellant blatantly together with the second defendant violated the court order.

23. Equally despite enjoying the court order the respondent was still in default. Nonetheless there was no reason for repossessing the motor vehicle without seeking the direction from the court . Perhaps the best option was to apply to have the order discharged or varied.

In short the appellant played into the hands of the Respondent.

24. Having stated so, the second issue was whether the security was recoverable as damages despite the sale by way of Public auction. The attachment was illegal as earlier stated and the only recourse was to compensate the Respondent.

In Kenya Industrial Estates Ltd Vs Lee Enterprise Ltd (2009). KLR 135, the court stated as follows:-

“ Where, however, the goods are destroyed, the owner is entitled to *restitutio intergrum* and the normal measure of damages is the cost of replacement of the goods, that is, the market value at the time and place of destruction.”

25. The trial court in my new correctly found that the value of the vehicle as at the date of sale could not be ascertained.

No valuer was called to verify . The value as at the time of taking the loan was Kshs 500,000 which had obviously depreciated as is with motor vehicles . She based her value on the sum sold, namely Kshs 330,000. In the absence of any contested value I find that line of reasoning proper.

26. The award of loss of use in my view was proper. For the period she did not use her vehicle yet the court order was subsisting, she ought to be compensated. The Appellant has argued that there was no basis for the sum of Kshs 5000 per day as it was not produced. I do not think so. The amended plaint together with the P.S.V. Duty worksheet produced as evidence is clear. The work sheet was not contested at all by the Appellant and neither was it disputed that the vehicle was in use during the attachment. It

was surely bringing in some income. In any event there was no reason for the appellant not to have released the Respondent vehicle no sooner had it learned of the court order.

27. The Appellant has argued that the trial court did consider extreneous matters in arriving at its judgment.

The 5 issues considered were not remote to say the least. They were instead germaine and merited the courts consideration. That argument was pedestration to say the least.

28. On the question of whether despite the disobedience of the court order the appellant had a right of recovery of the loan, I find that the answer was well answered by the conduct of the Appellant. The attachment of the vehicle and subsequent sale of the same to the 3rd party “Legitimatised” its recovery of the loan. In short, the damages awarded to the respondent in my view mitigated her loss. The 3rd party as rightfully found by the court was a purchaser for value without notice and cannot be penalised. The Respondent would not recover her vehicle anymore. But I presume the damages awarded with interest shall mitigate her loss.

CONCLUSION

29. In conclusion therefore I find that there was significant evidence that the Appellant breached a valid court order which had ordered the Respondent to enjoy the use of the vehicle pending the determination of the main suit. The Appellant rushed to instruct the auctioneer to attach and sale the vehicle to 3rd party, whom the court rightly found to be purchaser for value without notice. The proceeds from the sale in my view satisfied the loan and the balance released to the Respondent which amount she has not disputed. The damages of Kshs 355,000 for loss of use is adequate.

The upshot is that the appeal is hereby dismissed with costs to the Respondent.

Dated this 15th day of August

H.K. CHEMITEI

JUDGE

Kisa for Appellant

Ingosi for Respondent

Emily – Court Assistant