



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. 8 OF 2014

CHRISPIN OMONDI ODUOR.....1ST APPELLANT

TAGO ATHIENO.....2ND APPELLANT

VERSUS

PIUS ONYANGO OBAT.....RESPONDENT

(Appeal from judgment of T.W. Cherere Chief Magistrate in Busia CMCC No. 340 of 2013 delivered on 20th March, 2014)

JUDGEMENT

1. The appellants, Chrispin Omondi Oduor and Tago Athieno had sued the Respondent, Pius Onyango Obat in Busia Chief Magistrate's Court Civil Suit No. 340 of 2013 seeking special damages of Kshs. 50,000/-, general damages and aggravated damages and costs of the suit. According to the appellants, the cause of action arose when an auctioneer acting on the instructions of the Respondent attached their livestock purporting to execute the decree in Busia PMCC No. 837 of 1997. After hearing the case, T.W. Cherere, Chief Magistrate in a judgment delivered on 20th March, 2014 found that the appellants had not proved their case and dismissed the same with costs to the Respondent.

2. The appellants being aggrieved by that decision have thus appealed to this Court through the Memorandum of Appeal dated 10th April, 2014 on the grounds that:

“1) The Learned Trial Magistrate erred in law in her evaluation of evidence tendered thereby arriving at the wrong decision.

2) That the Learned Trial Magistrate ignored evidence tendered especially Auctioneers attachment documents thereby arriving at the wrong decision.

3) That the judgment offering provision of Order 21 Rule 4 of the Civil Procedure Rules (sic).

4) That the Learned Trial Magistrate ignored provisions of the Evidence Act Cap 80.”

3. The appellants therefore seek the setting aside of the judgment of the trial Court and an order entering judgment in their favour as prayed in the plaint. They also seek the costs of the proceedings before the lower Court and this appeal.

4. In the written submissions filed on 20th July, 2016 by the appellants they identified two issues for determination by this Court.
5. It is the appellants' case that the trial magistrate erred by concluding that they had not proved that Kuronya Auctioneers had been instructed by the Respondent to execute the decree. According to them, they had proved that their animals were attached by the said auctioneer acting on the instructions of the Respondent in purported execution of the judgment in Busia PMCC No. 837 of 1997. It is the appellants' case that the auctioneer sold the animals and filed returns in Court.
6. The appellants assert that they indeed tendered sufficient evidence before the magistrate's court to demonstrate that the attachment and sale was unlawful and the same had been executed on the instructions of the Respondent. The appellants contend that in light of the documentary evidence which they had tendered in Court, the magistrate erred in concluding that there was no evidence that the Respondent had instructed the auctioneer.
7. Further, the appellants submit that the trial magistrate ought to have taken judicial notice of the fact that not all animals are bought and they therefore do not have receipts. It is their position that the decision to dismiss their claim for special damages was erroneous.
8. The second issue identified by the appellants is whether a judgment decree can be executed after twelve years. It is their case that Section 4(4) of the Limitation of Actions Act, Cap 22 bars execution of a judgment after twelve years from the date of its delivery. It is their case that the decree that was being executed was issued on 3rd March, 2000 and the execution took place in May, 2012 which was over twelve years after the issuance of the decree. The appellants cited the decisions of **Danson Muriithi Ayub v Evanson Muthamo Muroko [2015] eKLR** and **M'Ikiara M'Rinkanya & another v Gilbert Kebeere M'Mbijiwe [2007] eKLR** in support of this proposition.
9. The appellants also appear to suggest that the Respondent failed to extract a decree after obtaining judgment within the stipulated time. They submit that he is therefore not a decree holder as per the requirement of Order 22 Rule 22(1)(b) of the Civil Procedure Rules, 2010.
10. The Respondent approached the appeal by taking up grounds 1, 2 and 4 of the appeal together. It is the Respondent's position that paragraph 9(a) of the Complaint stated that the appellants' claim was for special damages amounting to Kshs. 50,000/- being the value of the animals said to have been sold by Kuronya Auctioneers on instructions of the Respondent. It is the Respondent's case that the law requires that special damages must not only be specifically pleaded and particularized but must also be strictly proved. The case of **Hahn v Singh[1985] eKLR** is cited in support of this legal principle.
11. According to the Respondent the trial magistrate correctly arrived at the conclusion that the claim was one for special damages and the same needed to be specifically proved which was not done in this case.
12. Further, that the Respondent had specifically denied instructing the auctioneer and it was upon the appellants to prove that it was indeed the Respondent who instructed the auctioneer. It is the Respondent's view that the moment he denied instructing the auctioneer it was upon the appellants to enjoin the auctioneer in the suit for the purposes of determining liability.
13. On ground 3 which is premised on Order 21 Rule 4 of the Civil Procedure Rules, 2010, the Respondent submitted that the magistrate's judgment fully complied with the said Rule. The Respondent pointed out that the issues in question were clearly identified and the reasons for the decision given. The Respondent therefore urged this court to dismiss the appeal.
14. In **Mohamed Mohmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR**, Hancox, JA demarcated the boundaries of a first appellate court by stating that:

“More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses, and will

only interfere with them if they are based on no evidence, or on a misapprehension of the evidence, or the judge is shown to demonstrably to have acted on wrong principles in reaching the findings he did.”

In line with that decision, I find that what I need to consider in this case is whether the decision appealed against was arrived at based on no evidence or upon misapprehension of the evidence. I also have to decide whether the magistrate acted on the wrong principles in arriving at her judgment.

15. The starting point is to determine whether the decision of the magistrate was a judgment as per the requirements of Order 21 Rule 4, Civil Procedure Rules, 2010. That Rule provides:

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.”

I have perused the judgment of the lower court and I find that the case is stated, the issues for determination are identified, the decision is clear and the reasons for that decision are given. The judgment therefore meets the requirements of Order 21 Rule 4 and the appellants’ criticism of the magistrate on this score fails. Consequently, I find that Ground 3 of the appeal lacks merit and the same is dismissed.

16. The next issue is whether the decree that was being executed was time barred. Section 4(4) of the Limitation of Action Act, Cap 22 does indeed bar execution of decrees after twelve years from the date of issuance. Whether the decree that was being executed herein was time barred is a matter that needs further consideration.

17. The appellants at paragraph 4 of their plaint dated 30th October, 2012 and filed in Court on 30th August, 2013 averred that:

“The plaintiff being dissatisfied with the same appealed to the High Court Kisumu {being Civil Appeal No. 165 of 2000} and applied for stay of execution.”

During the hearing of the matter which is the subject of this appeal, the 1st Appellant who testified as PW1 produced a copy of a stay order as an exhibit. The import of the pleadings and evidence is that the judgment and decree that had been obtained by the Respondent in Busia PMCC No. 837 of 1997 had been stayed. Unfortunately none of the parties bothered to explain to the trial Court the fate of Kisumu High Court Civil Appeal No. 165 of 2000. What is clear, however, is that there was a stay of the judgment and decree and the appellants’ argument that the decree that was being executed by the auctioneer was statute barred has no basis. The twelve years stopped running the moment the Court of Appeal halted the execution of the decree.

18. I did not understand the appellants’ argument that no decree had been drawn within the statutory period after the delivery of the judgment in Busia PMCC No. 837 of 1997. The issue is not found in the grounds of appeal. The same having arisen through submissions, I will make no finding on the same and leave it at that.

19. I now turn to the magistrate’s findings on the evidence adduced. In line with the current way of taking evidence, PW1’s evidence is scanty as he indicated that he was relying on the statement he had filed in Court.

20. It must be appreciated from the outset that the appellants specifically pleaded at paragraphs 5 and 9 of the plaint the number of animals attached (3 cows, 2 sheep and three lambs) and valued them at Kshs. 50,000/- . They cannot be faulted for not specifically pleading their claim for special damages. The question is whether they specifically proved that claim.

21. In the witness statement dated 3rd October, 2012 and filed on 30th August, 2013 the two appellants did not mention the number of animals attached and the value of those animals. In his evidence in Court,

PW1 (the 1st Appellant) did not allude to the number of animals taken and their value.

22. The magistrate stated that the appellants had not tendered evidence that their attached animals were valued at Kshs. 50,000/- . She then concluded that the claim being one of special damages ought to have been strictly proved. A claim for special damages must indeed be specifically pleaded and evidence adduced to support the claim. In **Hahn v Singh [1985] eKLR** the Court of Appeal reiterated the long established principle of law that special damages must be specially claimed and strictly proved. The Court held that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.

23. The appellants produced evidence in form of a letter dated 21st May, 2012 and filed in Court on 25th May, 2012 by Kuronya Auctioneers showing that the livestock was sold for Kshs. 22,100/- . That is the value the magistrate ought to have attached to the livestock and awarded to the appellants if she had found the Respondent liable for the attachment and sale of the appellants' livestock.

24. In the case before me it is clear that the magistrate's decision was erroneous. Although the appellants did not avail the valuation report from an expert on the attached livestock, there was evidence adduced by the appellants to show the value of the animals. As the animals had been sold they could not have been valued but a report from an expert could have guided the court on the value of livestock within the appellants' area of residence.

25. The next question is whether the appellants established that the attachment and sale of their livestock was unwarranted and whether the Respondent was liable for this attachment.

26. On the question of the liability of the Respondent, the magistrate held that:

“Defendant has however denied he instructed Kuronya Auctioneers to execution of judgment in Busia PMCC 837/97 on his behalf. It is trite law that whoever alleges must prove. Although the defendant's name appears on the letter marked PEXH 4 and a notice of sale dated 21.5.12 PEXH 5, the plaintiffs have not placed before the court any evidence to prove that the auctioneer was instructed either by the defendant or his counsel and the plaintiffs' case must hence fail.”

With respect to the learned magistrate, this conclusion was not supported by evidence adduced. The appellants had placed before the Court documentary evidence that the Respondent had instructed Kuronya Auctioneers to attach and sell the appellants' animals. A letter dated 21st May, 2012 and received in Court on the same date states:

“Under instructions received from PIUS ONYANGO OBAT we shall sell under mentioned animals by public auction on 21st May 2012...”

27. Further, despite the Respondent's denial in his statement of defence that he had given the auctioneer instructions to execute the decree, he admitted that he received Kshs. 8,000/- being proceeds of execution in Busia Civil Suit No. 837 of 1997. He never offered any explanation as to how and why he received and accepted money for an execution he did not authorize. Could the auctioneers have carried out execution for a judgment that was over twelve years old without instructions from the decree holder? The evidence that was placed before the magistrate clearly pointed to the fact that the auctioneer acted upon the instructions of the Respondent. Her conclusion that the appellants had not established that the Respondent had instructed the auctioneer was contrary to the evidence adduced.

28. The appellants in their plaint had set out to demonstrate that the Respondent had executed a stale decree; failed to issue a notice to show cause; failed to proclaim before attaching the animals; failed to abide by the auctioneering law; and under-valued their animals. The Respondent in his evidence did not demonstrate otherwise. What is clear is that the decree that was allegedly executed had been stayed by the High Court at Kisumu. The attachment and sale of the appellants' animals was not backed by a

proper and legal decree. The appellants were thus entitled to compensation.

29. The end result is that this appeal partly succeeds. The judgment of the magistrate dismissing the appellants' claim with costs to the Respondent is set aside and substituted with an order entering judgment in favour of the appellants. The appellants are awarded Kshs. 22,100/- as special damages for the livestock attached and sold. This is the only amount proved by the evidence which they adduced in the trial.

30. The magistrate had indicated in her judgement that she would have awarded Kshs. 30,000/- to the appellants as general damages had their claim succeeded. On my part, I am not satisfied that the appellants had established in their pleadings and evidence that they were entitled to general damages. They will therefore not get anything as general damages. They will however get the costs of this appeal and the costs for the proceedings before the lower Court. It is so ordered.

Dated, signed and delivered at Busia this 22nd day of Sept., 2016.

W. KORIR,

JUDGE OF THE HIGH COURT