



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL SUIT NO. 12 OF 2009.

GARISHON CHRISTOPHER ODARI ::::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

JAMES OMARI)

LIFEWOOD AUCTIONEERS LTD) ::::::::::::::::::::::::::::::: DEFENDANTS.

MIHESO A. MASIZA)

J U D G M E N T.

The plaintiff, **GARISHON CHRISTOPHER ODARI**, is a resident of Kitale and a farmer by occupation. He undertakes mixed farming including dairy farming at his own portion of land and has been doing so since the year 1975. He is currently over eighty (80) years old and lives at his residential house situated about a kilometre from his farm.

The first defendant, **JAMES MAKORI**, is a registered auctioneer carrying on business in the name of **LIFEWOOD AUCTIONEERS LTD.**, a limited liability company which is the second defendant herein. He holds a class “B” auctioneers license and has an experience of over fifteen (15) years in the auctioneering business.

The plaintiff averred in his amended plaint dated 10th November, 2010, that on or about the 23rd January, 2009, the first and second defendants trespassed into his parcel of land No. Kitale Municipality Block 18/Bidii/768 and seized thirty nine (39) pedigree cows in the purported execution of the decree issued in Kitale CMCC No. 15 of 2008 in which the plaintiff was not a party. In doing so, the first and second defendants were acting at the instance of the third defendant, **MIHESO ABINAZA MASIZA**, who is a businessman cum farmer in Kitale and a neighbour of the plaintiff. He had instituted the aforementioned Kitale CMCC No. 15 of 2008 against the plaintiff's son, George Odari, and obtained a judgment and decree against him, which decree was handed for execution to the first and second defendants.

The plaintiff averred that after his said animals were seized by the first and second defendants they were sold on the same date without advertisement for the amount of Ksh. 230,000/= which was paid to the third defendant and which was ridiculously low and a total fraud. That, the action by the three defendants was reckless, negligent and malicious such that he (plaintiff) suffered loss and damage. He further averred that as a dairy farmer, his dairy activities are his sole source of income hence the first defendants act of illegally and unprocedurally attaching and selling his cows cost him embarrassment,

financial detriment, loss, damage, stress and mental anguish. He therefore prays for special and general damages against the defendants and a declaration that the attachment and sale of his cows was wrongful, unlawful, illegal, null and void and amounted to trespass. He thus prays for judgment against the defendants jointly and severally for the sum of Ksh. 1,149,000/= being value of the seized cows loss of milk profits at the rate of Ksh. 70,000/= per month, loss of business profit (Bidii dairies) at the rate of 80,000/= per month and loss of future earnings from prospective calves.

At the hearing of the suit, the plaintiff reiterated the contents of his statement of claim and added that on the material 23rd January, 2009, at about 7.00 a.m., the first defendant accompanied by armed police officers trespassed into his farm and proceeded to the cattle shed where they found and drove away thirty nine (39) dairy cows belonging to him. This was done in the presence of his herdsman including one Shem who followed the animals and saw them being sold along the way.

The plaintiff contended that he had no prior knowledge that the animals were to be taken away but later learnt that there was a court execution order issued in a case at the chief magistrate's court Kitale in which his son called George Odari, was involved. He said that the said son was an adult aged about fifty (50) years and lived on his own and had his own property.

He further contended that he had nothing to do with the said case and was not a party therein.

That, the defendants did not bother to establish the ownership of the attached animals and acted negligently thereby causing him damage as he was a retired civil servant and depended on his dairy farming. He stated that he incurred loss of the animals and their milk produce which was about two hundred (200) litres per day. His farm contained a milk processing plant installed in the year 2005 and which added value to his milk production but had to be closed due to the unlawful attachment of his dairy animals. He produced the title to his farm (P. Exh. 1) and a certificate of registration of his dairy business (P. Exh. 3) which operated under the name "Bidii". He indicated that his milk processing plant was sustained by his dairy farm and stated that the plant supplied milk to KCC Ltd. He produced necessary vouchers and statements to confirm the fact (i.e. P. Exh. 4). He also produced vouchers from Bidii Dairies (P. Exh. 5) which he said was independent of his Bidii Farm.

The plaintiff also produced the warrants of execution from the chief Magistrate's Court Kitale (i.e. P. Exh. 6) and the necessary proclamation from the defendants (P. Exh. 7) which indicated that the animals belonged to George Odari. He implied that the animals were not sold by public auction although the notification dated 23rd January, 2009 (P. Exh. 8) indicated as much. He contended that the sale of his animals by the first and second defendants was unlawful and that the third defendant benefited from that transaction. He said that the value of his animals was Ksh. 1,149,000/= although the current market value would be more than eight (8) million Kenya Shillings. He also said that his milk production earned him Ksh. 70,000/= per month and contended that his animals were not seized in his son's farm and that his son (George Odari) had no animals of his own.

He said that being unaware of the execution order, he did not raise any objection. He said that he became aware of the order after the animals were attached and sold. His herdsman, **Charles Modo (PW2)**, said that he saw the animals being driven away at about 7.00 a.m. by a group of people and reported the matter to his colleague, **Shem Wepukhulu (PW3)**, who arrived at the scene and found that the animals had already been driven away. He immediately relayed the information to the plaintiff and was instructed to follow the animals. He did so and found the animals being sold along the road. He contended and confirmed that a total of thirty nine (39) animals were driven away.

Peter Oduor (PW4), a livestock production officer with the Ministry of livestock development was requested by the plaintiff to carry out an evaluation of the plaintiff's material farm. He completed the exercise on the 3rd February, 2009, and compiled a report although he had in the year 2008 carried out similar exercise and prepare necessary reports. He produced the three reports (P. Exh. 9 a-c) of the valuation he carried out on the 27th June, 2008, the 27th December, 2008 and the 3rd February, 2009.

In a joint statement of defence dated 26th November, 2010, the first and second defendants deny

the allegations made by the plaintiff regarding the seizure of the material animals and the alleged loss and damage occasioned by the said seizure and contend that on the 23rd January, 2009, they seized only twenty (20) cows and five (5) calves which were sold by public auction pursuant to warrants of attachment and sale issued in Kitale CMCC No. 15 of 2008 between the third defendant and George Odari. That, the animals were seized from the compound of the plaintiff's son, George Odari, after having been proclaimed on the 22nd December, 2008. that, the notification of the sale scheduled for 23rd January, 2009, was served upon the said George Odari and despite all that, the plaintiff did not raise any objection nor was any court order issued to stop the sale of the animals.

The first and second defendants further contended that the attachment and sale of the animals was in strict compliance with the relevant law thereby rendering this suit a belated afterthought. They therefore prayed for the dismissal of the suit.

In his testimony, the first defendant, **James Makori (DW2)**, stated that he received the necessary warrants of attachment and sale from the court for purposes of executing against the judgment debtor, George Odari. The warrants were dated 15th December, 2008 (E. Exh.1) and during the execution process, the judgment debtor was identified to him (DW2) by the third defendant on the 22nd December, 2008, through a process server. He (DW2) proceeded to the home of the judgment debtor situated at the Bidii area of Kitale Municipality. He did not find the judgment debtor but found one Moses Wafula. He (DW2) proceeded to proclaim household goods and livestock at a milk processing plant within the same compound. He found the animals grazing at the plant being minded by the said Moses Wafula who signed the necessary proclamation (D. Exh. 2) giving the judgment debtor a period of seven (7) days to discharge his debt. There was a forty eight (48) hours notice (D. Ex. 3) accompanying the proclamation which showed that thirty (30) mature animals, fifteen (15) calves and four (4) goats valued at Ksh. 390,000/= were proclaimed.

The first defendant went on to testify that he wrote to the court on 23rd December, 2008 (see, D. Exh. 4) specifying his action but the judgment debtor did nothing regarding the debt even after the expiry of the seven (7) day period and the 48 hrs notice. Therefore, on the 23rd January, 2009, he proceeded to the judgment debtor's home accompanied by two police officers. He found the judgment debtor and the said Moses Wafula and proceeded to seize twenty five (25) animals including twenty (20) mature animals and five (5) calves which were at the milk processing plant erected on plot No. 15/17 Kitale Municipality belonging to the judgment debtor adjacent to plot No. 312 originally belonging to the judgment but transferred on 28th January, 2009, to one Esther Ayuma and two others.

The first defendant produced necessary documents (D. Ex. 5) confirming that the aforementioned plot No. 15/17 belonged to the judgment debtor and contended that he did not trespass into the plaintiff's farm at plot No. 768 Bidii farm. He said that after seizing the animals, he drove them towards Kitale town and took them to a place near a radio station. It was then that an advocate called Kidiavai, instructed him not to sell the animals as the judgment debtor was preparing to settle the debt. However, the debt was not settled resulting in the sale of the animals at a total cost of Ksh. 230,000/=.

Thereafter, he (first defendant) wrote to the court (see D. Exh. 6) and forwarded a cheque for the sum of Ksh. 170,000/= to the instructing advocate (see, D. Exh. 7). His charge was Ksh. 58,000/= while the court collection fees was Ksh. 1,500/=. he contended that the notification of sale was issued on 23rd January, 2009 showing that a total of twenty five (25) animals were seized but the judgment debtor refused to sign it. Further, the animals were sold at the best market price (see, D. Exh. 8) and not at an undervalued price.

The first defendant said that he undertook his duty in a professional manner and contended that he was not informed that the animals did not belong to the judgment debtor as there was no objection to attachment lodged by any person.

That, he seized the animals from property belonging to the judgment debtor and not the plaintiff and at the time of the sale by auction no order was served upon him to stop the exercise.

P.C. Godfrey Maina (DW1), confirmed that he and a colleague accompanied by first defendant to a place called Bidii farm where a number of dairy cattle were attached at about 9.00 a.m. and sold at mid-day. Thereafter, he returned to the Kitale police station and entered the transaction in the occurrence book (O/B). He did not see the owner of the attached animals.

The third defendant, **Miheso Abinaza Masiza (DW3)**, filed a statement of defence dated 16th December, 2010, in which he denied the allegations made by the plaintiff regarding the seizure of the animals and contended that he had nothing to do with the seizure and subsequent sale of the animals by the first and second defendants acting on warrants issued by the court. That, the animals were seized from the compound of the plaintiff's son, George Odari, after a proclamation had been issued on 22nd December, 2008.

that, the laid down procedure was followed in the attachment and sale of the animals without any objection from the plaintiff and that the reliefs sought against him (third defendant) are not legally obtainable and therefore this suit should be dismissed with costs.

In his testimony, the third defendant stated that he sold a vehicle to George Odari who defaulted in the payment of the balance of the purchase price. He (third defendant) applied for execution. Warrants of attachment and sale were issued to the first and second defendants who effected execution in his absence. He had earlier directed the first defendant to a process server called Archibald Nyukuri for purposes of tracing the judgment debtor's home. He was later paid the decretal amount through his advocate (see D. Exh. 9). he said that he did not trespass into the plaintiff's home as he did not accompany the auctioneer and that he did not issue the warrants of attachment and sale. He did not understand why he was dragged into this case and was not aware of any objection to attachment or any order to stay the execution. He prayed for the dismissal of this suit.

It is clear from the pleadings and the evidence that the fact of attachment and sale of dairy animals said to belong to the plaintiff was not disputed. Indeed, the attachment and sale was a culmination of a legal process emanating from the chief Magistrate's Civil case No. 15 of 2008 in which the plaintiff was not a party and in which was decree was issued against the plaintiff's son in favour of the third defendant.

Basically, the issue arising for determination was whether the attachment and sale in so far as it related to the plaintiff was proper and lawful because ideally the execution process in the aforementioned case was targeted at George Odari, the plaintiff's son.

There was no doubt that the first defendant acting for and on behalf of the second defendant was lawfully authorized to carry out the attachment and sale. The necessary warrants of attachment and sale dated 15th December, 2008 (D. Exh. 1) were issued by the court at the behest of the third defendant through his advocate who was thus the instructing advocate for the purposes of execution. The warrants were for execution of a money decree i.e. a sum of Ksh. 335,996/= together with costs and interest.

It was on the strength of the said warrants that the first defendant in the company of police officers descended on a dairy farm within Kitale Municipality on the 22nd December, 2008, and proclaimed household goods and some animals believing that they belonged to the plaintiff's son judgment debtor.

The proclaimed goods included two sofa-sets, a T.V set and video deck, a wall unit and forty-nine (49) animals including 30 dairy cattle, 15 calves and 4 bulls.

Some of the animals were eventually seized by the first defendant on the 23rd January, 2009. he said that the dairy farm was the home of the judgment debtor which was pointed out to him through a process-server.

The said process server was not called to testify and indicate why he believed that the dairy farm was the judgment debtor's home but is clear that he was at the time acting on instructions from the third defendant who confirmed as much in his testimony.

After the seizure of the animals, the plaintiff laid claim to them saying that they were seized from his dairy farm and not that of the judgment debtor. His belated attempts to recover the animals proved futile and that is why he filed the present suit against the defendants for damages due to wrongful attachment and sale of his animals.

Whether the plaintiff's claim was genuine depended at most on the ownership of the animals which were attached and sold by the first defendant. The plaintiff's interest in the whole process was the animals and nothing else. He said that they were his source of income and that their attachment and sale occasioned him loss and damage. He blamed the defendants for his loss but they denied culpability and maintained that they carried out a lawful execution against the plaintiff's son. They thus implied that the animals which were attached and sold by the third defendant belonged to the plaintiff's son and not the plaintiff.

It was the first defendant's evidence that the animals at the time of proclamation and seizure were at or near a milk processing plant situated in the same compound with the judgment debtor's home cum farm. He said that the plant stood on a parcel of land viz plot No. 15/17 Kitale Municipality. He relied on a certificate of registration (P. Exh. 3) and a green card (D. Ex. 5.) to show that the land did not belong to the plaintiff but his son, George Odari Ambalwa.

Indeed, the green card (D. Ex. 5) showed that the aforementioned plot of land belonged to the judgment debtor. The certificate of registration (P. Exh. 3) indicated that a business under the name "Bidii Dairies" operated on the material plot which belonged to the judgment debtor upto the 5th June, 2007, when it was sub-divided and separate titles including title No. 312 issued. Title No. 312 was issued to the judgment debtor before he transferred it on 28th January, 2009, to Esther Ayuma Vuduma and two others. The said Esther Ayuma is wife to the judgment debtor.

It was the plaintiff's admission that his son's farm was at the material plot 15/17 where his (plaintiff's) dairy farm was also situated as well as his milk processing plant. He implied that the plant was the business entity called Bidii Dairies or that it belonged to that entity which was his property. He contended that the subject animals were seized at his dairy farm forming part of the material plot 15/17 but said that his residential home was a neighbouring plot No. Block 18/1221 which is also his property. He produced the necessary title-deed (P. Exh. 1). His allegation that the animals were seized from a plot No. 18/768 was misleading as no attempt was made to show its connection with plot No. 15/17.

Be that as it may, the disputed attachment and sale related to movable goods and not immovable goods. It mattered not whether the animals were seized at plot No. 15/17 and/or plot No. 18/768 and/or plot No. 18/1221. What mattered was the ownership of the seized animals and since they were found at and driven away from the milk processing plant, the ownership of the plant was a crucial factor in determining the ownership of the animals.

The plant, it may safely be stated, was part of the business called "Bidii Dairies" whose sole proprietor was the plaintiff as shown in the certificate of registration (P. Exh. 3). It would therefore follow that the plant belonged to the plaintiff and so did the animals which were found and seized from thereby the first defendant.

The plaintiff contended that he did not engage in business jointly with his judgment debtor son thereby implying that the son had nothing to do with the seized animals.

Even if the animals were found inside land or home belonging to the judgment debtor, it did not necessarily mean or prove that the animals belonged to him (judgment debtor)

The plaintiff's employees, **Modo (PW2)** and **Wephukhulu (PW3)**, were emphatic that the seized animals belonged to the plaintiff rather than the judgment debtor. Their respective evidence in that regard was never discredited. They appeared in the eyes of the court to be credible witnesses.

Modo (PW2) was actually present when the animals were seized and driven away by the first defendant and his group. He said that a total of 39 out of 77 animals were driven away.

Wepukhulu (PW3), was away when the animals were seized at about 7.00 a.m. He was given necessary information by his colleague (PW2) and reported the matter to the plaintiff who was in his homestead nearby. He was instructed by the plaintiff to pursue the animals and he found them being sold on the way as they were being driven away.

It is the finding of this court that the plaintiff has established on a balance of probabilities that the animals seized and sold by the first defendant in a lawful execution of a decree obtained in favour of the third defendant against his son belonged to him and not his son.

Consequently, the attachment and sale of animals belonging to the plaintiff who was not a party in CMCC No. 15 of 2008 was wrongful and a demonstration of negligence and recklessness of the first defendant in the execution of his duty as an auctioneer. He apparently disregarded the auctioneers rules and/or applied them haphazardly with a view to covering up for his glaring mistake of failing to ascertain the true ownership of the animals before he proclaimed, attached and sold them rather hurriedly and unprocedurally. He did not act in a manner befitting an officer of the court even if he truly believed that the animals belonged to the judgment debtor.

The proclamation was effected in the absence of the owner of the animals be it the judgment debtor or the plaintiff. There was no proof that the person called Moses Wafula was an employee of the judgment debtor or the plaintiff. He was not called to testify nor was the actual judgment debtor.

Notwithstanding the absence of the owner of the animals, the first defendant went ahead to make his own conclusion that the animals belonged to the judgment debtor without even imagining the possibility that the animals could have belonged to somebody else. It later turned out that he proclaimed the wrong animals but still went ahead to seize them on the 23rd January, 2009, when the warrants had already expired on the 15th January, 2009 and there was no evidence that time for the validity thereof had been extended by the court.

Even after seizure, there was no compliance with R. 8 (3) of the Auctioneers Rules which provides for notification to the creditor and the debtor and the court (if any) of the arrangements considered desirable or necessary for the safe custody, health, feeding, watering or transport of the livestock seized, the costs thereof and their payment in advance or as the court may think just, such fees and costs being in addition to those provided for in the rules.

The forty eight (48) hours notice and now seventy-two (72) hours notice by dint of Legal Notice No. 144/09 was not adhered to in the present circumstances.

Apparently, the animals were sold without any or proper advertisement. It was also doubtful whether the sale was by public auction if the evidence of the plaintiff's employee (PW3) is given proper consideration. Most likely than not, the first defendant disregarded and/or flouted Rules 16 and 17 of the Auctioneers rules.

In sum, the first defendant's conduct in the entire execution exercise was awful and became even worse by the sale of the animals at a value which was apparently very low for a pedigree dairy animal.

The third defendant had no significant role to play with regard to the actual attachment and sale of the animals by the first defendant but it was evident that he was the one who instructed a process server to point out to the first defendant, the judgment debtor.

Pointing out the judgment debtor or his home did not necessarily mean pointing out the judgment debtor's property including animals. The plaintiff would thus be entitled to damages from the first and second defendants but not the third defendant for loss of his animals. He may not be entitled to damages for loss of income or business for the reason that the evidence indicated that he was in possession of other dairy animals to produce milk for the milk processing business. What he may have experienced due to the seizure and sale of some of his animals was low production of the milk but this would have been temporary and if there was adequate will on his part, the loss would have been mitigated. It would appear

that no efforts were made by him (plaintiff) to mitigate his loss as there was inadequate evidence showing that the animals left behind by the auctioneers were only calves and bulls. In any event, this fact was discredited by the report of the livestock production officer (PW4) dated 3rd February, 2009.

With regard to the loss of animals, the plaintiff alleged that a total of thirty-nine (39) animals were driven away and sold by the first defendant. He was however, uncertain about the number of the animals taken away. He was not present at the time. His workers, Modo (PW2) and Wephukhulu (PW3) indicated that thirty nine (39) animals were driven away. However, Wephukhulu (PW3) was not present at the time. He relied on what he was told by Modo (PW2) who indicated that the plaintiff had a total of seventy-seven (77) animals before some were driven away. He was however, not in a position to confirm the figure.

Going by the purported notification for sale dated 23rd January, 2009 (P. Exh. 7 (b) and the letter by the first defendant to the court dated 23rd January, 2009 (D. Exh. 6), it may safely be slated that a total of twenty five (25) pedigree animals inclusive of twenty (20) cows and five (5) calves were illegally driven away and sold by the first defendant in execution of a decree issued not against the plaintiff but the plaintiff's son who was not the owner of the animals.

The seized animals were all sold at a sum of Ksh. 210,000/= being Ksh. 10,000/= for each cow and Ksh. 10,000/= for the calves yet the decretal amount was about Ksh. 344,005/=.

A person did not have to be a farmer to know that a pedigree milking cow could not fetch Ksh. 10,000/= or less even at the material time. It may be noted that the 48 hrs notice (P. Exh. 7) referred to thirty (30) dairy animals, ten (10) calves and four (4) small bulls all valued at Ksh. 390,000/=. It is without doubt that the first defendant was in a hurry to dispose of the animals and this explains why he sold them at an undervalue which was a further reflection of his negligence in the entire process.

The estimates carried out by the livestock officer (PW4) indicated that a cow as at the 3rd February, 2009 (see, P. Exh. 9 (c)) could fetch a minimum of Ksh. 21,000/= and a maximum of Ksh. 40,000/=.

the current marked value would of course be higher running to a maximum of approximately Ksh. 50,000/=. therefore, at the rate of Ksh. 50,000/= per cow and Ksh. 10,000/= per calf, the plaintiff would be entitled to a sum of Ksh. 1,050,000/= for the loss of his animals.

The claim for loss of profit was not justified and was an attempt by the plaintiff to unjustly enrich himself.

All said, judgment be and is hereby entered for the plaintiff against the first and second defendants jointly and severally for the sum of Ksh. One million and fifty thousands (Ksh. 1,050,000/=) only together with costs and interest.

The suit against the third defendant is dismissed with costs to himself.

Ordered accordingly.

[Delivered and signed this 31st day of July, 2014.]

J.R. KARANJA.

JUDGE.