



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 51 OF 2009**

**JOHN MUKEYA KITAIBI T/A NYUKI AUCTIONEERS.....APPELLANTS**

**V E R S U S**

**JOHNSTONE BARASA MAKOKHA ..... 1<sup>ST</sup> RESPONDENT**

**DINAH MAKOKHA ..... 2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

This is an appeal from the judgment in Kakamega CMCC No. 305 of 2007. The grounds of appeal are that the judgment is against the evidence on record, the award of Kshs.440,000/= as general and special damages is against the evidence on record, the respondents' suit was fatally defective and incurable, the burden of proof was shifted and that the suit before the trial court was res judicata.

Counsels for both parties agreed to determine the appeal by way of written submissions. The appellant contends that the respondents did not prove their claims. What was awarded was not pleaded in the plaint. The 2<sup>nd</sup> respondent was awarded KShs.40,000/= as damages for a grade cow yet no proof was made before the trial court. There was no evidence as to the value of the attached goods. The appellant also contends that the suit before the trial court was not valid. The appellant being an officer of the court was issued with warrants for execution in Kakamega CMCC No. 521 of 2005. The decree was for KShs.98199/=. The respondents ought to have pursued their claim within the same file as opposed to filing a fresh case. Counsel relies on the case of PAUL MURUNGA VS DAVID MUGO & 2 OTHERS- Nairobi HCCC No. 1327 of 1997 where the court held that a separate suit should not be filed in such situations.

The appellant also contends that there was no verifying affidavit sworn by the 2<sup>nd</sup> respondent accompanying the plaint. Therefore the claim by the 2<sup>nd</sup> respondent was not verified. The appellant would like the appeal to be allowed and the decision of the trial magistrate set aside.

Counsel for the respondents submits that the appeal lacks merit and that the record of appeal has not included most of the documents that were filed before the trial court. The appellant was sued before the Auctioneers Licensing Board and was found guilty. The respondents were advised to seek compensation in court. The appellant's license was suspended for six months. The appellant went to execute against the 1<sup>st</sup> respondent in Kericho which was outside his jurisdiction. The suit was not res judicata. The appellant did not appeal against the decision of the Licensing Board. The Auctioneers Board could not grant any form of compensation as its jurisdiction is limited to punishing auctioneers.

The background of the appeal is that there was judgment in Kakamega CMCC No. 521 of 2005 for KShs.65,591/=. The appellant went to execute against that judgment and it is the manner of execution that led to the current dispute. The respondents complained that several of their items were attached unlawfully and lodged the complaint before the Auctioneers Licensing Board. According to the 1<sup>st</sup> respondent several of his items including two television sets, coffee table, beddings and mattresses, cups and plates, cooker, two refrigerators each valued at KShs.95,000/=:, sofa sets and several other items were taken. One set of leather sofa sets was valued at KShs.250,000/=. The 1<sup>st</sup> respondent's ten suits were also attached and sold plus cartons of ceramic tiles, fire extinguishers and family clothes. On her part the 2<sup>nd</sup> respondent testified that her grade milk cow valued at KShs.40,000/= was attached.

Being dissatisfied with the mode of attachment the respondents filed a complaint before the Auctioneers Licensing Board. The Board penalized the appellant and advised the respondents to file a claim before the court. This led to the filing of civil suit No. 305 of 2007. The main issues for determination are whether the respondents proved their case before the trial magistrate and whether the suit was res judicata. According to the appellant the respondents ought to have pursued their claim through Kakamega CMCC No. 521 of 2005. This is the suit that led to the warrants of execution. Since the matter went to the auctioneers board and the respondents were advised to pursue their claim in court I do find that there is nothing wrong in the subsequent suit. The respondents could have filed a fresh suit or pursue their claim in the original file No. 521 of 2005. The suit was therefore not res judicata.

The record of the trial court shows that the appellant never testified. The plaintiff in that suit sought a declaration that the attachment was illegal and unlawful. It was found that the appellant went to execute even before the warrants had been issued. The appellant went to proclaim on 26.3.2007 yet the warrants were issued by the court on 30.3.2007. The respondents testified as to how they lost their properties. The main prayer before the trial magistrate was for restitution of their properties. The properties had already been sold and the court could not have granted that order. The prayer for KShs.40,000/= by the 2<sup>nd</sup> respondent was granted for the loss of her dairy cow. According to the appellant the items were sold and only realized KShs.18,780/=. The defence of the appellant acknowledged that a black and white cow had been attached. Other goods that were attached according to the appellant were an old sofa set, old Sanyo TV, old DVD, old bed, coffee table, one dining table, one metal bar, radio cassette, a carpet and two armed chairs. It is not clear to me how all those items could fetch 18,780/=. Even the cow on its own could have fetched more than KShs.10,000/=. According to the appellant the respondents told the Auctioneers Licensing Board that their goods were estimated at KShs.700,000/=. The court awarded KShs.440,000/=.

Although the 1<sup>st</sup> respondent did not plead for special damages and wanted restitution of his property, the trial court awarded general damages and assessed those damages at KShs.400,000/=. It is clear that the actions of the appellant occasioned losses to the respondents. The appellant went to execute at a place outside its jurisdiction. It is clear that the attached goods were worth more than the decretal amount. As an officer of the court the appellant ought to have exercised professionalism in its execution of the decree. The appellant was over zealous and appeared to have been on a mission to disable the respondents. Even the admitted attached items as per the defence were worth more than the decretal amount. I do find that the trial magistrate never shifted the burden of proof. The appellant never testified before the trial court. The respondents proved their case. Where there is an injury there must be a remedy and the trial court was correct in awarding the damages.

In the end I do find that the appeal lacks merit and the same is hereby dismissed with costs. Since the appeal took time to be determined interest on the decretal amount shall accrue after a period of sixty days hereof.

**DATED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2014**

**SAID J. CHITEMBWE**

**J U D G E**