



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO.142 OF 2012

STEPHEN GATHUA KIMANI PLAINTIFF

VERSUS

NANCY WANJIRA WARUINGI

t/a PROVIDENCE AUCTIONEERS DEFENDANT

JUDGMENT

By a plaint dated 28th June 2012, the plaintiff sued the defendant for General and Special damages and loss of use of motor vehicle Reg. No. KUP 953. It was pleaded by the plaintiff that at all material times he was the registered owner of motor vehicle Reg. No. KUP 953 which was comprehensively insured by United Insurance Company.

It was pleaded that on 19th day of December 1998, the said motor vehicle was involved in a road traffic accident and was attached by the defendant to recover the decretal sum from the suit filed against the plaintiff and held the same from 18th December 2007 to 10th April 2012 after the court had issued a release order.

It was further pleaded that the daily income before the attachment of the said M/V was Kshs.2000/= after deducting all expenses. As a result of the action by the defendant in refusing to release the said motor vehicle, the same had been valued as a scrap value of Kshs.80,000/=.

In response to the said plaint, the defendant on 6th August 2012 filed statement of defence in which she admitted that the plaintiff was the registered owner of M/V Reg. No. KUP 953 but stated that the said vehicle was lawfully attached by the defendant in execution of a decree issued in CMCC No.9965 of 2000 Milimani Commercial Court.

It was further admitted by the defendant that after attachment, the said M/V was taken by the defendant to Kianda Road Motor Garage where it was stored from 26th May 2005 to 10th April 2012 when it was released to the plaintiff. It was further pleaded that the honourable court in Milimani CMCC No.9965 of 2000 had ordered for the release to the plaintiff the said motor vehicle upon settling of the auctioneer's charge which the plaintiff never paid as a result whereof the motor vehicle was not released to him.

On 16th August 2012, the firm of Ng'ang'a Munene was appointed by the defendant and at the hearing herein, the PW1 Stephen Gathiya Kimani, testified on oath that he was the registered owner of motor vehicle Reg. No. KUP 953 which was involved in a road traffic accident with M/V KAK 806S owned by Habib Bank at the time when it was insured by M/s United Insurance Co. Ltd.

15. He was subsequently sued in Milimani CMCC NO.9965 of 2000 and judgment was subsequently entered against him. He further testified that he forwarded the judgment to M/s United Insurance and the said Insurance Company was therefore placed under Statutory Management. He stated that he went to the Statutory Management and requested for the release of the M/V but was advised to enter into an agreement with the Auctioneer and make payment which will be refunded to him at the time of settlement of claim.

He further testified that he was given an order on 2nd June 2005 and ordered to pay Kshs.10,000/= per month to the plaintiff in the said suit. He subsequently paid Kshs.70,000/= to the defendant and requested her to release the motor vehicle but she refused. At that time the outstanding charges were over Kshs.200,000/=. The defendant declined to release the M/V to him so as to put the same back in service as he continued to make payment but the defendant refused.

He further testified that the chairman of Matatu Owners Association Mr. Kimutai filed suit No.1345 of 2005 O.S. where the plaintiff was No.8 (eight) on the list in which the court ordered that civil proceedings be stayed. On 17th December 2007 ruling was delivered in favour of the policy holder of M/s United Insurance Company and the defendant was served with the said order by Harrison Kinyanjui Advocate but she refused to release the M/V which was subsequently released to him on 10th April 2012.

Cross examined by Mr. Ngang'a, the plaintiff stated that he was earning about Kshs.3000/= but did not have any audited accounts to support the same. He further stated that the ruling in Civil case No.1345 of 2005 ordered stay of execution in respect of all motor vehicles then insured by United. He stated that it was unlawful for the defendant to hold his motor vehicle and the money he had paid. He further stated that the motor vehicle was released to him on 10th April 2012 after signing a consent.

The defendant testified that on 21st April 2005 she was issued with a warrant of attachment against the plaintiff and on 9th May 2005, she proclaimed the same. On 26th May 2005 she took possession of the same. He did not make any payment but came with an order issued by justice Ang'awa in respect of motor vehicle Registration No. KAQ 148R to Benjo Service. The order however stayed all the proceedings at the stages where they were in respect of all case where United Insurance company was the insurer.

She further testified that she stayed execution of the M/V for over two years. It was her evidence that the plaintiff sued her in Nairobi Milimani Commercial Court and on 10th February 2012 she released the M/V to the plaintiff who acknowledged receipt of the same by signing. She testified that instead of paying her the plaintiff sued her in this cause. She produced bundle of documents in support of her defence.

Under cross examination by the plaintiff, she stated that the only order she received was the one staying proceedings and that the plaintiff thereafter went to her when they calculated the amount due of which he made part payments and that before she could sell the M/V she was issued with an order in CMCC No.9965 of 2005 Milimani staying execution of the decrees and that by a letter dated 14th July 2005 from Riunga Raiji & Co. Advocates, she was advised that the application had been dismissed and therefore should proceed with sale.

Upon advertising the M/V for sale, she was served with a court order dated 15th July 2005 granting temporary stay of sale. On 7th September 2005, she was served with an objection proceedings by one Susan Nyaguthi claiming ownership of the said motor vehicle. On 8th February 2006 another order was issued for stay and on 11th July 2006 she was advised that the said application had been struck off.

She further testified that on 9th October 2006 there was an order issued where by consent the plaintiff agreed to liquidate the decretal sum by installment of Kshs.10,000/= per month and the m/v be released upon sorting out the Auctioneers fee. On 26th October 2006 the plaintiff went to

her office where it was agreed that the total amount was Kshs.226,818/= of which the plaintiff paid Kshs.70,000/= and sought one week to look for money.

Submissions

At the close of the defence case, the plaintiff elected not to make any submissions. Mr. Nganga for the defendant submitted that the plaintiff had failed to prove any loss occasioned to him. It was submitted that the plaintiff failed to prove his case on a balance of probability. It was submitted that the plaintiff having admitted that his daughter had claimed ownership of the said motor vehicle, he did not have any locus standi. It was submitted that anytime the motor vehicle was advertised for sale the plaintiff would obtain an order which amounted to an abuse of the court process. It was further submitted that the plaintiff did not pay the balance of the Auctioneer's charges amounting to Kshs.186,818/= and therefore the case ought to be dismissed.

Issues

The following issues have been identified by the court for determination:-

- a) *Whether the plaintiff's claim should be against the defendant.*
- b) *Whether the plaintiff has proved his case against the defendant on a balance of probability in respect of general and special damages and loss of use of motor vehicle.*

The following facts are not disputed:-

The plaintiff's motor vehicle was attached by the defendant in execution of a decree issued by the Chief Magistrate's Court at Milimani in respect of CMCC No.9965 of 2000 wherein the plaintiff was the defendant and M/s Habib Bank Ltd was the plaintiff.

The following order were issued in respect of the said suit:-

- a) *on 2/6/2005 stay of execution and sale of m/v Reg. No.KUP 953 pending interparte hearing on 14/6/2005.*
- b) *15/7/2005 temporary stay of sale of m/v Reg. KUP 953.*
- c) *2/8/2005 stay of sale of the motor vehicle.*
- d) *8/2/2006 – interim stay of execution of decree upto 20/2/2006.*
- e) *18/9/2006 temporary stay of execution pending ruling on 29/9/2006.*

On 9th October 2006 R.N. Kimingi the SPM issued the following orders:-

That the judgment debtor be and is hereby allowed to liquidate the decretal sum by installment of Kshs.10,000/= per month with effect from the month of October 2006.

That the suit motor vehicle registration NO.KUP 953 be released to the judgment debtor upon sorting out the issue of the auctioneer's fee with the auctioneer holding the vehicle. (Emphasis added)

The defendant in attaching the subject motor vehicle through an officer of the court was an agent of the plaintiff/judgment creditor in Milimani Civil case No.9965 of 2000 and being an agent of a known principal the plaintiff's suit herein should have been against Habib Bank Ltd who had instructed the defendant. I therefore find that the plaintiff's claim against the defendant is misplaced and therefore bad in law.

The order of R.N. Kimingi which was the only positive order in respect of the release of the motor vehicle to the plaintiff was on condition that the same sort out the auctioneer's fees. The plaintiff in his evidence in chief admitted having only paid part of the agreed auctioneer's fees. Further the order of Lady Justice Ang'awa in Nairobi High Court Misc. Civil Suit No.1345 of 2005 (O.S.) only granted stay of judgment, execution, process, including warrants of attachment and arrest entered against defendants then insured by M/s United Insurance, the order did not direct the release of any attached motor vehicle.

It is therefore clear from the evidence tendered on record that the defendant's action of attaching and holding the motor vehicle was lawful having acted on a warrant of attachment issued by the Chief Magistrate's Court. The defendant could have only released the said motor vehicle to the plaintiff upon payment of her charges.

The plaintiff was also under a duty to mitigate his losses by paying the auctioneer's charges to secure the release of the said motor vehicle and thereafter lodge his claim with the Statutory Manager of his insurers M/s United Insurance Co. Ltd which he failed to do. He further did not at the trial tender in any evidence to support his claim for loss of income at Kshs.2000/= per day.

The plaintiff therefore failed to prove his case against the defendant and I therefore dismiss the suit herein but having taken into account the fact that the plaintiff was a victim of an insurance company which was placed in liquidation each party should bear their own cost.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE.

In the presence of:

----- for Plaintiff

----- for Defendant