



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 111 OF 2011**

**FAULU KENYA DTM LIMITED ..... APPELLANT**

**VERSUS**

**JAMES SIMATEI KENDAGOR ..... RESPONDENT**

***(Being and Appeal from the Judgment and/or Decree of Hon. Mr. Innocent Maisiba (Resident Magistrate) in Eldoret Chief Magistrate's Civil Case No. 434 of 2010 delivered on 15th June, 2011)***

**JUDGMENT**

The appeal is from Judgment of Eldoret Resident Magistrate Hon. Innocent Maisiba delivered on 15th June, 2011 in Civil Suit No. 434 of 2010.

The Appellant was the Defendant whereas the Respondent was the Plaintiff in the said suit.

The claim arose from a seizure by the Appellant of the Respondent's two Fresian cows on or about 5th day of May, 2010 through its agents and Igare Auctioneers in payment of an alleged debt owed by one Emmanuel Kendagor Simatei, the Respondent's son.

According to the Respondent, he was neither his son's guarantor nor co-loanee.

It was his (Respondent) case that, both cows at the time of seizure, produced 21 litres of milk daily, and each litre of milk was sold at Ksh. 23/=.

As per the amended plaint dated 21st May, 2010, the Respondent prayed for the following orders.

(i) A permanent injunction restraining the Defendant, its agents or servants from attaching and seizing any of the Plaintiff's property for recovery of debt owed by Emmanuel Kendagor Simatei and the release of the Plaintiff's two Fresian cows to the Plaintiff or payment of the value being Ksh. 100,000/=.

(ii) Ksh. 966/= daily till date of release of the cows of the Plaintiff or until date of payment.

(iii) Cost of the suit and any other relief the court may deem fit to grant.

In his Judgment, the learned Magistrate arrived at a finding in favour of the Respondent. He found that the Appellant should have pursued Emmanuel Kendagor Simatei for its debt owed by him as opposed to the Plaintiff as provided under the Chattels Transfer Act, Cap 28, Laws of Kenya.

He entered judgment in favour of the Respondent as follows:-

(a) Ksh. 200,000/= being value of the animals.

(b) Ksh. 209,205/= being income for 10 months, plus costs of the suit and interests at court rates until payment in full.

The Defendant appealed against this Judgment, citing seventeen (17) grounds of appeal as contained in the Memorandum of Appeal dated 23rd June, 2011 which can be summarized as under:-

(a) That the trial court failed to appreciate the fact that the repossessed cows were the very ones that had been mortgaged by the borrower, Emmanuel Kendagor. (See Grounds 1,2,4,5 and 8 of the Memorandum of Appeal).

(b) That the trial court ignored the documentary and the *viva voce* evidence on record (See Grounds 3, 6 and 10 of the Memorandum of Appeal).

(c) That the plaintiff/Respondent failed to call an independent witness. (See Ground 7 of the Memorandum of Appeal).

(d) That the Plaintiff/Respondent had no cause of action and that he filed the suit in the trial court on behalf his son the borrower, Emmanuel Kendagor Simatei. (Ground No. 9 of the Memorandum of Appeal).

(e) That the trial court failed to consider the submissions made on 27<sup>th</sup> of April 2011 to the effect that the Appellant's witness, Philip Simatei be served with witness summons. (See Grounds, 11,12,13 and 14 of the Memorandum of Appeal).

(f) That the trial court erred in awarding the Plaintiff/Respondent damages for loss of user which was contrary to established principles of law (Ground No. 15 of the Memorandum of Appeal).

(g) That the plaintiff's/Respondent's case had not been proved on balance of probability (Ground No. 16 of the Memorandum of Appeal).

(h) That the trial court was biased. (Ground No. 17).

It is now settled principle that the duty of the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions.

Again an appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the trial court acts on wrong principles in arriving at its findings – See **SUMARIA & ANOTHER AND ALLIED INDUSTRIAL LIMITED (2007) 2 KLR, PAGES 1-9 AT PAGE 8**, the Honourable Judges of Appeal had this to say:-

***“This being a first appeal we are obliged to consider the evidence, reevaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor***

*heard the witnesses- see Peters vs Sunday Post Ltd[1958]EA 424, Selle & Another vs Associated Motor Board Co Ltd & Others [1968]EA 123 and Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982] 1 KAR 278. In the last case Hancox JA (as he then was) put it thus at pg 292 of the Report:- ‘A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did’. The first holding in that case is also relevant namely that:- ‘The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appears that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally” (See Sumaria & Another vs. Allied Industrial Limited [2007] 2 KLR, pg 1-9, at pg 8)*

Each of the parties called only one witness. The Plaintiff was the sole witness in his case while one Margaret Jaika, a finance partner with the Defendant company testified for the defence.

On his part the Plaintiff (PW1) stated that the Defendant illegally, unlawfully and wrongly seized his two fresian cows and sold them to recover an unpaid loan borrowed by his son, Emmanuel Kendagor Simatei from the Defendant Company. His testimony was that he had bought each of the cows at Ksh. 80,000/= and produced purchase receipts at as P.exhibits 6 and 7 respectively. He said that Defendant while seizing them, valued each of them at Ksh. 50,000/=.

He said that he would sell his milk at Kenya Co-operative Creameries (KCC), Eldoret, currently known as New Kenya Co-operative Creameries Ltd. He produced statement of sale of the milk as P. Ex. 8.

He also produced a record of each of the cows as P. Exhibits 3 and 4 respectively and a valuation report from the Ministry of Agriculture showing what each of the cows produced 21 litres of milk on a daily basis giving a total of 42 litres per day.

PW1 also denied that he was a member of Naiberi Self Help Group which guaranteed his son to secure the loan. His evidence was that the Defendant should have pursued his son to recover money owed to it by him.

According to Defence Witness 1 (DW1) the two cows seized were identified to her by the Chairman of Naiberi Self Help Group of which Emmanuel was a member. Her testimony was that there were other members of the group who knew that the two cows belonged to Emmanuel. That Emmanuel had hidden the two cows in his father's farm as he went into hiding upon realizing that the Defendant was intent on recovering the unpaid loan.

According to DW1 the cows were sold on 7th May, 2010 at Ksh. 30,000/=. That out of Ksh. 60,000/= realized, Ksh. 44,000/= was used to pay the auctioneer's charges while the balance was credited into the loan account. As at the time she testified, Emmanuel still owed the Defendant Ksh. 113,700/=. That later on, a person further paid Ksh. 73,280/= and the balance of the loan was cleared through recovery of the savings.

She stated that the animals were properly repossessed as they had been used as the security by the borrower.

Parties filed written submissions. I have considered them carefully in arriving at the findings I will in this Judgment.

With respect to ground 1, 5, 7 and 9, the Appellant submits that the Respondent colluded with his son, who is the principal debtor to conceal the securities for the loan. That the Respondent failed to

enjoin the principal debtor Emmanuel Simatei and members of Naiberi Self Help Group as parties to the suit. In response, the Respondent states that the Appellant ought to have sued the principal debtor in his individual capacity.

On the part of the court, the argument advanced by the Appellant cannot hold. First, it is the Respondent's son who borrowed the money. No iota of evidence has been adduced that he borrowed it with the authority of the Respondent.

Second, joinder of party is done for a particular purpose. The Appellant has not demonstrated what purpose the joinder of the Respondent and Naiberi Self Help Group would have served.

Under grounds 2, 3, 4, 5 and 8, the Appellant argues that the cows which it seized were the only cows which had been mortgaged by Emmanuel. It also contends that the Respondent only called his youngest son to witness what security he offered for the loan as opposed to an independent witness.

On his part the Respondent argues that no proper identification was done of the seized cows.

The Third Schedule, in particular Rule 9 of the Chattels Transfer Act, Cap 28 of Laws of Kenya provides:-

***“...and that the guarantor will, during the continuance of this security, at the usual and convenient season far so doing, well and properly brand, earmark and mark with the brand, earmark and mark herein specified, all stock for the time being subject to this security, so that all such stock shall bear the brands, earmarks and marks herein specified...”***

In the instance, the two seized cows had not been earmarked and no evidence was produced on how the Appellant specifically settled on the two cows it seized.

On submissions under grounds 10, 11, 12, 13 and 14, the Appellant argues that the identification of the two cows by members of Naiberi Self Help Group was proper. In this regard DW1 had this to say; **“I was led by the Chairman Philip Simatei ....., we found many cows but members identified two cows that belonged to the borrower Emmanuel which were repossessed ....”**

To counter this submission, the Respondent insists that the cows which were repossessed did not belong to the loanee and that such repossession was unlawful.

I reiterate my above view, that only valid identification of the secured livestock under the Chattels Transfer Act by earmarking can warrant a repossession.

The Appellant did also submit, under grounds 15, 16 and 17 that an award for loss of user of Ksh. 209,000/= was inappropriate, bad in law and based on the wrong principles, and that the Respondent did not only fail to mitigate the same, but that the amount awarded was manifestly high. That the trial magistrate manifested bias in the case by issuing injunctive orders and that the Respondent did not prove his case on a balance of probabilities.

The Respondent did not make submissions on these grounds, save to say that the appeal should fail.

My view on these submissions is as follows:-

First, evidence was adduced and exhibited in prove of the nature of the cows and the earning fetched from the proceeds of the sale of the milk.

In his evidence in chief, the Plaintiff testified thus;

**“I was milking the cow. I used to get 42 litres of milk per day, 21litres from each cow. I have a valuation report from the Ministry of Agriculture on my sales – Exhibit 5 per month. I was earning Ksh. 24,540/=. When I bought the cows each was worth Ksh.80,000/=. These are the receipts, Exhibits 6 and 7 respectively.”**

Pursuant to the above evidence, the learned Magistrate awarded the Plaintiff Ksh. 200,000/= being the value of the animals and Ksh. 209,200/= for loss of income for 10 months.

The expert's Valuation Report (P.Exhibit 5) valued the two cows at Ksh. 200,000/= and assessed the income from milk at Ksh. 24,540/= per month. My calculation of income does however give me the figure of Ksh. 24,540/= x 10 months = Ksh. 245,400/= as opposed to Ksh. 209,200/= awarded by court. What is not clear is what formular was used to reduce the figure to Ksh. 209,200/=. But since this is what was proved, I will not disturb the figure.

In the premises, I find that the trial magistrate awarded the figures above based on solid evidence adduced before him. Moreover, these figures were specifically pleaded and proved. The Appellant's contention that they were awarded based on no evidence, or were manifestly high has no basis at all.

On the issue of bias by the trial court, I find it without basis for the following reasons:-

First, on 6th May, 2010 the matter was before Hon. Mbogo, the Chief Magistrate, who heard the application for injunction and he granted the same in favour of the Respondent. He then directed that the application be heard inter parties before court No. 7 on 14th May, 2010.

Second, on 7th May, 2010, the file was placed before Hon. Onginjo, Senior Principal Magistrate who directed that the OCS Eldoret Police Station do assist the Plaintiff execute the order issued on 6th May, 2010 by having the cows released.

Third, on 14th May, 2010 the application was argued before Hon. I. Maisiba (trial court). He extended the interim orders and confirmed them in his ruling of 19th June, 2010, upon confirming that the seizure of the cows was irregular. He then ruled that, **“I order the application as prayed in terms of prayer (b) and (c) of the application.”**

Fourth, Hon. Maisiba was the third Magistrate to handle the matter after injunction orders had been issued by his preceding magistrates. He did not demonstrate any bias towards the Appellant or any party. He acted within the law and gave appropriate orders as he deemed necessary.

It was also the Appellant's assertion that the trial court did not take seriously the allegation that the Defendant's witness had been threatened by the plaintiff.

Far from this. In his ruling of 27th April, 2011 he said as follows:-

**“I have considered the application for adjournment. I gave defence a last adjournment on 19th April, 2011. No evidence of threats having been made has been shown to me. I refuse to give adjournment and the case to proceed .....**

Such assertion was not substantiated and is meant to depict the tiral magistrate in bad light.

In conclusion, I dismiss the Appellant's submission that the case was not proved on a balance of probabilities. To the contrary the Respondent proved without a doubt that the two Fresian cows were seized improperly and in contravention of the Chattels Transfer Act.

In the result, this appeal must fail. I dismiss it in its entirety with costs to the Respondent.

**DATED and DELIVERED at ELDORET this 6th day of June, 2013.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Bundi holding brief for Kraido for the Appellant

Mbeja holding brief for Cheluget for the Respondent