REPUBLIC OF KENYA

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IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 212 OF 2004

DANIEL NJOROGE MBUGUA….....……..1ST PLAINTIFF

USHA MORJARIA…….....…….2ND PLAINTIFF

VERSUS

JOHN MUTHEE NGUNJIRI T/A TANGO AUCTIONEERS & GENERAL MERCHANTS.....1ST DEFENDANT

ECTA (K) LIMITED…….....……...…….....……2ND DEFENDANT

JUDGMENT

This action arises from another action in the court below being C. M. (Milimani Commercial Court) civil case No.1283 of 1995 in which ECTA (K) Limited, the 2nd defendant sued the 1st plaintiff (Daniel Njoroge Mbugua – now deceased) and Washington Wangondu Ngatia. In the suit, the 2nd defendant was claiming damages for the repairs of their motor vehicle. Judgment was entered in favour of the 2nd defendant against Washington Wangondu Ngatia while the suit against the 1st plaintiff was dismissed.

Warrants of attachment were issued to John Muthee Ngunjiri t/a Tango Auctioneers & General Merchants. In execution of those warrants, motor vehicle Registration No.KAG 491N belonging to the two plaintiffs was attached and sold in an auction.

The plaintiffs brought this suit claiming from the defendants:

i) Special damages in the sum of Kshs.3,805,400/= plus interest.

ii) Loss of earnings at the rate of Kshs.45,759/= per month from 13th January, 2003 upto the date of judgment.

iii) Costs of the suit and interest

The 1st defendant filed a defence in which he denied the claim and argued that the execution of the decree was procedural; that KAG 491N was properly attached as being the property of the 1st plaintiff and that the plaintiffs' claim ought to have been raised in C.M. Milimani Commercial Court Civil Case No.1283 of 1995 instead of a fresh suit.

The 2nd defendant has similarly denied liability maintaining that it did not commence C.M. Milimani Commercial Court Civil case No.1283 of 1995 and had no knowledge the same had been instituted; that the suit was brought by its insurer, Kenindia Assurance Company Limited under its right of subrogation. A third party notice was issued by the 2nd defendant to the firm of Janet Mulwa and Company Advocates who had instructed the 1st defendant.

At the hearing, Usha Morjaria, the 2nd plaintiff (Usha) explained that she was in partnership with the 1st plaintiff. They purchased KAG 491N (a truck), the motor vehicle in issue, for the partnership business. They were contracted by RIVA Petroleum Company Limited to transport petroleum products. Usha, now a resident of the United Kingdom, learnt from the 1st plaintiff that the truck has been attached and sold in execution of a decree in a suit in which she was not a party and in which the case against the 1st plaintiff has been dismissed. According to Usha, the attachment and sale occasioned their partnership damage, hence this suit. It was her contention that as a result of the attachment, the income derived from the transport business at Kshs.45,789/= per month was lost. The amount was based on an audit report prepared by Patrick Njuguna Ngata.

The 1st defendant while giving his evidence maintained that the warrant of attachment was in the name of the 1st plaintiff and Washington Wangondu Ngatia; that he attached and sold the truck in question because it belonged to the 1st plaintiff.

For the 2nd defendant, Akoth Amos Otieno, an advocate with Kenindia Insurance Company Limited, testified that the company was insurer of the 2nd defendant; that the company instructed Janet Mulwa and Company Advocates who in turn instructed the 1st defendant to execute the decree. After execution, the proceeds were forwarded to the company but the company was unaware that execution was levied against the 1st plaintiff instead of Washington Wangondu Ngatia.

The foregoing constitutes the evidence in this dispute.

I have considered that evidence as well as submissions (including authorities cited) on behalf of the parties. The matter raises fairly straight forward issues. The truck in issue was the property of the two plaintiffs. C.M. Milimani Commercial Court No.1283 of 1995 was against the 1st plaintiff and one Washington Wangondu Ngatia. The claim against the 1st plaintiff having been dismissed, execution was to be levied only against the said Washington Wangondu Ngatia, but was instead levied against the plaintiffs who had nothing to do with it.

The import of the issues framed by the parties can be condensed thus:

i) whether the sale of the truck was wrongful;

ii) whether the defendants are jointly or severally liable, and;

iii) whether the suit is statute-barred.

Application for execution of the decree was clear that execution was to be against Washington Wangondu Ngatia. The warrant of attachment was, however to the effect that it would be against the 1st plaintiff and Washington Wangondu Ngatia. But was that confusion sufficient reason to attach the truck? The truck did not belong to Washington Wangondu Ngatia. It belonged to two persons, the plaintiffs, a fact that a prudent auctioneer would have ascertained with ease. Secondly, the truck had not been proclaimed contrary to **Rule 12(b)** of the **Auctioneers Rules,** 1997, then in force.

See the decision of the Court of Appeal on **Lakeland Motors Limited** V. **Harbhan Singh Semhi**, Civil Application No.NAI.24 of 1998. The testimony of the 1st defendant clearly depicts him, at least in this particular instance, as an officer of the court who does not pay attention to detail although he has long

period of experience, over 20 years, according to him.

For instance he said in his cross-examination that:

"I proclaimed KUY 932 but I attached KAG 491N (not the one proclaimed). I have been an auctioneer for over 20 years. I am required to specify the proclaimed property and its condition. Value given is for KUY 932 and not for KAG 491N. I physically seized KAG 491N. The name of Mbugua was written on the door of the motor vehicle. Because nobody objected, I did not do a search at the Registrar of motor vehicles. Mr. Mbugua did not tell me that the motor vehicle was a partnership motor vehicle……. I am an officer of the court and understand the procedure of execution."

If he understood the procedure, why did he, in this instance, fail to follow the procedure?

For the reasons stated, I find the 1st defendant liable. Turning to the 2nd defendant, it is contended that, although it was the plaintiff in C.M. Milimani Commercial Court Civil Case No1283/1995, the suit was pursued by Kenindia Insurance Company Limited. The pleadings are clear. It is the 2nd defendant that was the plaintiff in the suit in the lower court. The decree and warrant of attachment were issued in its name.

However, that *per se* does not make it liable. It has to be shown that the 1st defendant was acting on its behalf. They have demonstrated that that was not the case by taking out third party notice against Janet Mulwa and Company Advocates. But more fundamentally, the suit against the 2nd defendant was brought on 8th October, 2008 by way of an amendment to the plaint filed on 15th October, 2008. It has been submitted for the 2nd defendant that the cause of action, having arisen on 13th January, 2003 when the truck was attached, the claim, is statute-barred. The plaintiffs' counsel has referred to **Bullen and Leake and Jacob's Precedents of Pleadings,** 12th Edition where it is stated as follows:

"Effect of Amendment,

An amendment of the writ of pleading duly made, with or without leave, takes effect, not from the date when the amendment is made, but from the date of the original document which it amended. Thus, an amendment made to the writ dates back to the date of its original issue and the action continues as though the amendment had been inserted from the beginning."

The 2nd defendant raised the issue of limitation of action against it early enough in its defence but did not apply for the suit against it to be struck out. That aside, the purpose of amendment of pleadings according to **Section 100** of the **Civil Procedure Act** and **Order 1 rules 9** and **10, Order 6A rules 3(1), (2)** and **(3)** of the revoked **Civil Procedure Rules** is to determine the real question in dispute; it is a rule that a suit will not be defeated merely by reason of the misjoinder or non-joinder of parties and that the court may nonetheless allow amendment after the limitation period if the court thinks it just to do so. I find that the action against the 2nd defendant was not statute-barred. But bearing in mind the role of the 2nd defendant in the mater, I find that if there is any liability it is remote. The 2nd defendant did not even know the 1st defendant, who had been engaged by the advocate of their insured. There is a further issue raised by the 1st defendant that the plaintiffs having failed to bring objection proceedings, they were precluded by **Order 21 rule 58** of the **Civil Procedure Rules** from bringing this suit. That rule states that:

"58 (1). Should the objector fail to file proceeding to establish his claim within the time specified in the notice issued under rule 56, his objections shall be deemed to be waived and the attachment and consequential execution shall proceed."

That rule read with **Section 26(1)** of the **Auctioneers Act** leaves no doubt that the plaintiffs are not estopped. **Section 26(1)** aforesaid states that:

"26(1) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action."

That being a substantive provision, the application of **rule 58** cannot displace it. I find no liability against the 2nd defendant and dismiss with costs the suit against it.

Turning to the quantum of the damages sought by the plaintiff, it is noted that the claim of Kshs.3,805,400/= is made up as follows:

i) Purchase price - Kshs.3,700.000

ii) Road licence - Kshs.5,800

iii) Costs of new tyres - Kshs.99,600

Being a claim for special damages, it was incumbent upon the plaintiff to strictly prove the claim. Not a single receipt or documentary evidence was presented in evidence to support the claim in respect of a road licence or tyres. It is indeed doubtful that those claims can be awarded even if they were proved.

Regarding the claim for loss of user, Kshs.3,7000,000/= was the purchase price. The vehicle had been used for over eight years before attachment and sale. It is therefore illogical to claim the price of a new motor vehicle 8 years later. Taking into consideration this fact (age of the motor vehicle), an award of Kshs.1,000,000/= would, in my view, suffice as compensation.

The plaintiffs have deposed and testified without being challenged that the motor vehicle was used to transport petroleum products; that they derived a monthly income of Kshs.45,759/= as shown in the audit report. Again in my view, that figure is modest, and the plaintiffs are seeking payment for only 12 months. I award that claim too. Judgment against the 1st defendant is entered in the sum of Kshs.1,000,000

Kshs. 544,108

Kshs.1,544,108

I award costs of this suit and interest on the above figure at court's rate.

Dated, Signed and Delivered at Nakuru this 31st day of January, 2012.

W. OUKO

JUDGE