REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 1098 OF 1999

FREDRICK N. WAMALWA …………..……………….…PLAINTIFF

VERSUS

1. JAMES F.K. NG'ANG'A

T/A NDARUGU MERCHANTS ………………..……1ST DEFENDANT

2. JAMES GITAU SINGH …………………………….2ND DEFENDANT

3. KITE COMMODITIES LIMITED ………………..….3RD DEFENDANT

AND

NATIONAL BANK OF KENYA ………………………..THIRD PARTY

JUDGMENT

1. The plaintiff has brought this suit seeking a declaration that he is the owner of a trailer ZA 8411 complete with a 40 feet tarpaulin, spare tyre and accessories. He also prays for aggravated and punitive damages for unlawful detention or conversion of the trailer and for loss of its use.

2. The plaintiff's case is that on or about 25th March 1997, the 1st defendant, under purported instructions of National Bank of Kenya, took possession of the trailer at Eldoret. The trailer was attached or coupled to a prime mover registration number KAB 510 Z and driven to Nairobi. The 1st defendant advertised the prime mover for sale scheduled for 17th July 1997. It is the plaintiff's case that the 2nd defendant conspired with the 1st defendant to purchase the trailer knowing very well that the 1st defendant had no authority to sell. The trailer was delivered to the 2nd and 3rd defendants without any certificate of sale. The plaintiff testified that in Disciplinary Cause No 11 of 1999, the 1st defendant was fined Kshs 15,000 by the Auctioneers Licensing Board for unlawfully repossessing and selling the trailer. It is the plaintiff's case that he was at all times the owner of the trailer and entitled to possession. The plaintiff testified that he has been denied use of the trailer from 25th March 1997 by the unlawful detention and conversion of the goods by the defendants jointly and severally. The plaintiff claims loss of use of Kshs 30,000/- per day from 25th March 1997 and the cost of tarpaulin and accessories valued at Kshs 1,000,000. At the inception of the suit, the plaintiff had also claimed indemnity under the Insurance (Third Party Motor Insurance Risks) Act. The plaintiff also sought interest and costs.

3. The plaintiff testified that he had leased the trailer to one John Mariara Ongeri for a consideration of Kshs 160,000 per month (exhibit 2). The plaintiff also relied on an old copy of a log book for the trailer (exhibit 1). At the time of conclusion of the suit, the trailer had been transferred to a third party Rangi Mbili Auto Spares Limited as per a copy of records attached to the plaintiff's further list of documents dated 25th November 2010. The plaintiff also testified that the advertisement for sale by the 1st defendant did not make reference to the trailer but to the prime mover. Apparently, National Bank, who have since been joined as third parties, had a hire purchase agreement or chattels mortgage over the prime mover KAB 510 Z. The bank sought to sell the chattels to recover its debt from the mortgagor. It is the plaintiff's case that the 1st defendant did not have instructions from the bank to sell the trailer and hence his conviction by the Auctioneers Licensing Board. It was the plaintiff's evidence that Mr. James Gitau, the 2nd defendant incorporated the 3rd defendant purely to mask the unlawful sale. The plaintiff only became aware of the sale on 24th August 1997.

4. As regards assessment of damages, the plaintiff based his claim on the amounts in the lease hire to Mr. Ongeri of Kshs 160,000 per month. That translated to about Kshs 5000 per day. He also relied on a letter in the 3rd party's bundle dated 16th September 1997 that had valued the trailer and prime mover at Kshs 5,000,000. The plaintiff claimed that Mr. Gitau bought the two at only Kshs 2,800,000. In the plaintiff's letters of demand to Mr. Gitau, he, the plaintiff, had offered to sell the trailer to him for Kshs 1,000,000. In the plaint, the plaintiff claims loss of use at Kshs 30,000 per day from 25th March 1997.

5. The 1st defendant is an auctioneer. He testified that he was instructed on 29th October 1996 by National Bank, Nakuru Branch, to trace and repossess a Volvo prime mover KAB 510 Z. He repossessed it on 25th March 1997. At the time, the Prime Mover was attached to the suit trailer. He did not conduct a search. He issued a notice to the plaintiff, who was jointly registered with Pan African Bank Limited. The information in possession of the 1st defendant was that the trailer belonged to John Mariara Ongeri. As there was no response to the notice, he proceeded to sell. There were two unsuccessful sale auctions in Eldoret. The 1st defendant then moved the chattels to Nairobi and sold them to the 3rd defendant for Kshs 2,800,000 at an auction attended by a Mr. Mutua, a representative of the bank. He testified that he only received a demand from the plaintiff a year later in 1998. He conceded freely that he was fined Kshs 15,000 by the Auctioneers Board for irregularly repossessing and selling the trailer.

6. The 2nd defendant's case is that he was an innocent purchaser for value at an auction. He testified that he saw the advertisement for sale of the prime mover. He found it coupled with the suit trailer. He had no personal dealings with the 1st defendant or the bank. He placed a bid and won. He paid Kshs 2,800,000 in one cheque for both the prime mover and trailer. In all this he acted as a director of the 3rd defendant company which bought the suit trailer. Apparently, there were proceedings brought at Nakuru High Court in a civil suit by John Mariara but no injunction was granted. In the year 2000, the 3rd defendant stopped trading and sold the suit trailer to Rangi Mbili Auto Spares Limited. The plaintiff never stayed the auction. The 2nd defendants case is that he is not a necessary party in this suit and that the 3rd defendant, in the circumstances, cannot be liable to the plaintiff.

7. The last witness was Charles Ouya for the third party bank. He testified that the prime mover and trailer were both valued at Kshs 5,000,000/-. He was not sure if the bank was represented at the auction. He was categorical that the bank's instructions to the 1st defendant were to sell only the prime mover over which the bank had a charge. He testified that the sale amount of Kshs 2,800,000 related to the prime mover only. The witness was shown advertisements at page 12 and 13 of the plaintiff's bundle that referred to both the prime mover and trailer as well as the letter at page 16 that implied both were sold by the auctioneer. He testified that the bank's official position was that only the prime mover was up for sale. He made reference to the chattels mortgage at page 3 of the 3rd party's bundle. Lastly, he testified that the log book and transfer sent to the bank's lawyer, Mereka & Company, were for the prime mover only.

8. I have considered the evidence and the written submissions of all the parties. The 1st defendant

auctioneer was an agent of the 3rd party bank. The latter had a chattels mortgage dated 19th April 1993 (document 3 on third party's list) between the bank and one John Mariara Ongeri. That mortgage was over a prime mover vehicle registration number KAB 510 Z, Volvo which was to be stationed at Kisii township.

9. From a contractual and legal standpoint, the bank could only exercise a right of sale over that vehicle. The bank had no proprietary or legal interest over the suit trailer ZA 8411. I also take judicial notice that the two had distinct and separate registration regimes. The instructions to trace and repossess the chattels issued to the 1st defendant could only extend to the prime mover. I thus find that the 1st defendant had no legal right to sell the suit trailer belonging to a third party over the chattels mortgage. It must follow that the third party in this suit had no legal right to instruct the 1st defendant to trace, repossess or sell the trailer. I also find, that the 1st defendant, in selling the trailer, committed breaches of the Auctioneers Rules and was convicted and fined by the Auctioneers Licensing Board in Disciplinary Case No 11 of 1999.

10. I also find that at the material time of the auction, the suit trailer was registered in the names of Fredrick N. Wamalwa and Pan African Bank Limited. The Co-owner is not a party to this suit. Yet the plaintiff seeks a declaration that he is the exclusive owner of the suit trailer. The plaintiff has not presented evidence to show any subsequent transfer to himself. There is however a further transfer to someone known as Fred W. Nakhulo who is not a party. Under section 8 of the Traffic Act, a person in whose names a motor vehicle is registered in a log book is presumed to be the owner. The 1st defendant did not carry out a reasonable search or at all of the suit trailer but he conceded as follows at paragraph 10 of his witness statement;

"*We then issued a notice dated 2nd June 1997 to the plaintiff and Pan African Bank Limited indicating that the information we had was that though the trailer was registered in their name, it belonged to the debtor John Mariara Ongeri".*

The auctioneer then sold both the prime mover and trailer on 17th July 1997. He knew and ought to have known that the instructing bank had no claim over the trailer. But I find, from his statement above that he knew as early as 2nd June 1997 that the suit trailer was registered in the name of the plaintiff and Pan African Bank. Since the bank had no title over it, its agent, the 1st defendant, could not sell it and could not pass a good title at the purported auction. As a corollary, the 1st defendant could not pass title or a good title at the auction to the 3rd defendant. I was urged by learned counsel for the plaintiff to revoke *suo moto* the auctioneer's licence of the 1st defendant. Reference was made to the decision in *Labhsons Limited Vs Monura Hauliers* HCCC No 204 of 2002 (unreported). But these are not disciplinary proceedings against the auctioneer. He has already been convicted and fined by the relevant Auctioneers Licensing Board.

11. The 2nd defendant is a director of the 3rd defendant. The 3rd defendant is admittedly a limited liability company. It is a distinct legal entity from the 2nd defendant. The plaintiff has not shown why the 2nd defendant should be sued in person. True, the plaintiff has alleged fraud. I was not satisfied that fraud or collusion between the 2nd defendant, 3rd defendant and the 3rd party bank or the 1st defendant auctioneer took place. He who alleges fraud or collusion must prove it. The standard of proof for such fraud is beyond the balance of probability. It is higher and approaches but is below proof beyond reasonable doubt. See *Koinange and 13 others Vs Koinange* [1986] KLR 23. See also *Ratilal Gordhanbhai Vs Lalji Makanji* [1957] E.A. 314 and *Urmilla Mahindra Shah Vs Barclays Bank International and another* [1979] KLR 67. Accordingly, I am not satisfied that I should lift the corporate veil. See *Salomon Vs Salomon* [1897] AC 22, see *Kitchen Vs Royal Air Forces Association* [1958] 2 ALL ER 241, *David Mburu Kamau Vs National Industrial Credit Bank* [2010] e KLR, *Re Patrick & Lyon* [1933] 1 Ch. 786 *Edward Ndungu Vs Patch Osodo* [2006] e KLR and *Re William Leitch Brothers Limited* [1932] 2 Ch. 71. In the end, I find that the 2nd defendant is not a necessary party and is not personally liable for the alleged malfeasances or misconduct of the 3rd defendant. I would dismiss the suit against the 2nd defendant.

12. With regard to liability of the 3rd party bank, I am satisfied from the oral evidence of Charles Ouya and the documentary evidence before the court that the bank did not expressly instruct the 1st defendant to sell the trailer. There is also no clear evidence that there were such implied instructions. I have formed the clear impression that the 1st defendant, as an agent of the bank acted without any express, implied or ostensible authority to sell the suit trailer. Consequently, the 3rd party is not bound and cannot be liable for his misconduct. In *Halsbury's Laws of England*, 5th Edition, LexisNexis 2008 at paragraph 124 appears the following passage;

"Where an act done by an agent is not within the scope of his express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by liable for, that act, even if the opportunity to do it arose out of the agency, and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise. Where the agent obtains the money or property of a third person by means of any act beyond the actual or apparent scope of his authority, the principal is not responsible unless the money or property or the proceeds thereof have been received by him, or have been applied for his benefit, in which case he becomes liable to the extent of the benefit received".

See also *Yonge Vs Toynbee* [1910] 1 KB 215. The bank has clarified that the sum of Kshs 2,800,000 received from the auction related only to the prime mover. It had valued both the prime mover and trailer at Kshs 5,000,000. This is reinforced by the fact that the bank instructed the 1st defendant to sell the prime mover only and that upon receipt of the above sum, it only forwarded the transfer and log book of the prime mover to its lawyers for onward transmission to the 3rd defendant. No cogent evidence was laid to show how the 3rd defendant transferred the trailer to itself or retransferred it to Rangi Mbili Auto Services Limited. There was a deliberate effort to leave the court in a blind spot. I thus find that the persons who would be liable to the plaintiff are the 1st and 3rd defendants. I would for the reasons above also dismiss the case against the 3rd party.

13. The plaintiff says he had leased the trailer to John Mariara Ongeri. The lease exhibited is by the plaintiff as lessor. I entertain doubt that he could do so without concurrence of his co-owner Pan African Bank Limited. But that is besides the point. The said Ongeri is the mortgagor under the chattels mortgage with the 3rd party bank over the prime mover. It is to the prime mover that the suit trailer was coupled to. A lease made on 23rd May 1994 between the plaintiff and the said Ongeri for hire of the suit trailer was produced as exhibit 2. It was for consideration of Kshs 160,000 per month. But the plaintiff testified that he never received this money. He said "that money was not forthcoming. I sought to recover it and it was not easy". There is thus no cogent evidence before the court that the plaintiff was earning Kshs 160,000 per month from the trailer. Equally, no basis was laid for the claim of Kshs 30,000 per day as loss of use. The closest the plaintiff came was in his evidence-in-chief where he said;

"The losses I have suffered are no more and no less than the amount we had agreed with Mr. Ongeri he would pay for the use of the trailer. That was a modest sum for using that trailer as compared to today's rates. It translated to about Kshs 5,000/- per day while today's charges would be about Kshs 100,000/- per day".

Beyond that opinion by the plaintiff there is no cogent evidence for loss of use. Loss of use is a special damage. It must be specifically pleaded and strictly proved. How did the plaintiff arrive at the figure of Kshs 30,000 per day? It is found in a passage of his evidence in chief where he says that he offered Mr. Gitau (the 2nd defendant) the trailer for Kshs 1,000,000. If Mr. Gitau did "not oblige, [he] would sue him for Kshs 30,000 per day". At the end, there was no proof of loss of use at Kshs 30,000 or any other sum considering what I said about the lease agreement with Mr. Ongeri.

14. For some reason, the plaintiff did not enjoin Mr. Ongeri, the Bank's original debtor, to these proceedings or call him as a witness. Even the current owner of the suit trailer Rangi Mbili Auto Services Limited has not been enjoined. As a corollary, and the suit trailer having then been transferred, the prayer in the plaint for indemnity on insurance is on a quicksand. At some point in the evidence in chief, the

plaintiff had even placed the figure for loss of use at Kshs 160,000 per day. The plaintiff had said;

"From this person who has no respect for title, I would ask for Kshs 160,000 per day. The money they were earning was really my money ……"

15. The plaintiff also claimed punitive, aggravated and general damages. No evidence was led to allow the court assess those damages. The plaintiff just stated;

"I also claim damages for retaining my vehicle. I leave interest and costs to the court".

The court must have a basis upon which to assess or grant damages. No evidential foundation has been laid for grant of punitive or aggravated damages. What is not in doubt is that the plaintiffs trailer was lost. For that the court should compensate the plaintiff. But what is the value of the trailer at the material time of sale? The plaintiff has not provided the initial receipts on purchase of the trailer. There is a valuation by National Bank, the 3rd party, who stated that both the prime mover and trailer were valued at Kshs 5,000,000 (as per valuation referred to in the letter from Mereka & Co dated 16th September 1997 in the 3rd party's bundle). Assuming from the evidence and the holding earlier that the prime mover was worth Kshs 2,800,000, it would then be safe to say the trailer was worth Kshs 2,200,000 or thereabout. But we then have the evidence of the plaintiff and the passage I referred to where he said he was ready to sell it to Mr. Gitau, the 2nd defendant for Kshs 1,000,000. That would place the average price for the trailer at approximately Kshs 1,600,000. This is the tragedy. No professional valuation or estimate was placed before the court. There are no purchase receipts tendered. I would have been prepared, in fairness, to take the value of Kshs 1,600,000 and to order restitution and interest on that sum from 25th March 1997 till full payment. I would only have been prepared to award interest at court rates as there is no evidential or contractual basis for the rate claimed of 25% p.a. I have chosen my words very carefully. The reason will become apparent.

16. The plaintiff gave sworn testimony on 28th March 2003 in this suit. He did not disclose that there were other proceedings in HCCC No 2580 of 1995 *Fredrick N. Wamalwa Vs John Ongeri* [2005] e KLR. He had an opportunity to make that disclosure when he was asked in cross-examination by counsel for the 2nd defendant why he had not sued Mr. Ongeri. His answer was evasive and he said "how does that help your client? If he has paid my dues, what is that to you?" That cross-examination took place on 31st March 2011. Those other proceedings were between the current plaintiff and John Ongeri. The latter was the 3rd party bank's debtor and owner of the prime mover under the chattels mortgage I referred to. He was also the person who had hired out the suit trailer from the plaintiff for the consideration of Kshs 160,000 per month. I said earlier that I was surprised the plaintiff did not enjoin him into these proceedings or call him as a witness. After perusing the judgment in the above suit attached to the submissions of the 1st defendant and which decision is now reported in [2005] e KLR, the answers partly emerge. The plaintiff has responded to the production of that judgment in his further reply dated 5th March 2012. He does not deny the judgment was delivered in the earlier suit. He takes up cudgels however on the manner it was introduced from the bar or as an attachment to the written submissions.

17. As the latter decision is a public document the following may be stated. I appreciate the submission by the plaintiff that the introduction of the judgment as an attachment to the submissions of the defendants is awkward. Perhaps even irregular. It is not presented as any other authority, but as an evidential matter to show that this suit is irregular or even *res judicata.* But as I have said, it is a reported decision in the public domain. Under section 84 of the Evidence Act, a reported decision of the court is presumed to be authentic. The litigation was over the trailer ZA 8411. That is the same trailer in this suit. This court cannot ignore the judgment. The Honourable Justice J.B. Ojwang delivered judgment in that suit on 26th September 2005 in the following terms;

"1. Judgment is hereby given in favour of the plaintiff, against the defendant, for delivery up of possession of the suit trailer, Registration No. ZA 8411 complete with tools, accessories and a 40-ft tarpaulin, and in a roadworthy state of repair and condition.

2. In addition, the defendant shall pay damages to the plaintiff for loss of use of the said trailer in the sum of Kshs 15,000,000/-, bearing interest at court rates as from 5th March, 1997 until payment in full.

3. As an alternative to Order No. 1 hereinabove, and subject to a professional valuation of the suit trailer as at 5th March, 1997 effected at the instance of the plaintiff, the defendant shall pay to the plaintiff the full value of the same as at that date, with interest at bank rates with effect from 5th March, 1997 until payment in full.

4. In the event that the defendant shall prefer the alternative mode of recompense set out in Order No.3 above, he shall also pay in full any such costs as the plaintiff shall incur in effecting the valuation of the suit trailer.

5. The defendant shall pay the plaintiff's costs in this suit, the same to carry interest at Court rates with effect from the date of filing suit".

18. That is why the 1st defendant and 2nd defendant have taken up

cudgels on this claim. The plaintiff should not have a second bite at the cherry. I am of the view that it is not just for the plaintiff to claim more damages in this suit when he has already been awarded Kshs 15,000,000 as damages in the other suit. And if the other court has ordered delivery of the trailer or its value to the plaintiff as is clear in that judgment, this court cannot issue a similar order. It would amount to unjustly enriching the plaintiff. True, the defendants here are different but the plaintiff opted to proceed with that other suit during the pendency of this suit over the same trailer. This latter suit ended up splitting the causes of action. In my view, and despite the difference in the defendants, it offended both sections 6 and 7 of the Civil Procedure Act. It is now a clear case of constructive *res judicata.*

20. I stated that I would have been prepared to grant the plaintiff judgment against the 1st and 3rd defendants for loss of the trailer and interest at court rates. I have already held that there is no evidential basis for award of general, punitive or aggravated damages. And I have held that the suit against the 2nd defendant and 3rd party should be dismissed. But in view of the judgment in HCCC No 2580 of 1995 *Fredrick N. Wamalwa Vs John Ongeri* I am disinclined to order any further compensation to the plaintiff. In the result, the only declaration that I can make from the evidence is that the suit trailer ZA 8411, its 40 feet tarpaulin, spare tyres and accessories belong to the plaintiff and his co-owner Pan African Bank Limited. Even that, I declare is with a caveat. No evidence was led to show who Fred W. Nakhulo to whom the vehicle was subsequently transferred to is or his relationship with the plaintiff. The upshot is that the remainder of the suit is thus dismissed.

21. I have agonized over costs in this matter. Costs would ordinarily follow the event. The plaintiff has lost the suit. I have no evidence that execution of judgment in HCCC No 2580 of 1995 has taken place. The plaintiff has partly succeeded in this case by grant of a declaration of co-ownership of the suit trailer, its spare parts and accessories. The 1st and 3rd defendants, as I have held, would have been liable for damages. The 1st defendant in particular was the fulcrum of the unlawful sale of the suit trailer to the 3rd defendant. And the 3rd party initiated the chain of events. Costs are at the discretion of the court. Granted all of those circumstances, it would not be fair or just to visit costs on the plaintiff. The order that then commends itself to me is that each party shall bear its own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 26th day of April 2012.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr. O.P. Ngoge for the Plaintiff.

Mr. Khasiani for Wadabwa for the 1st Defendant.

Mr. L. Karanja for Gitau for the 2nd Defendant.

Mr. L. Karanja for Musangi for the 3rd Defendant.

Mr. Awiti for the 3rd Party.