



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 70 of 2010

GEORGE NDEGE OKELLO
APPELLANT

AND

K-REP BANK LIMITED **1ST**
RESPONDENT

HENRY OWUOR t/a BOMAS PROPERTY MANAGEMENT SERVICES **2ND**
RESPONDENT

(Being an appeal from the decree of Hon. M.N. Gicheru, CM, dated and delivered
on the 1st April 2010 in the original in Kisii CMCC No.728 of 2008)

JUDGMENT

1. George Ndege Okello, the appellant herein filed plaint dated 10th December 2008 praying for the following:-

(i) *Declaration that the Chattel Mortgage in respect of M/V Reg. No. KAG 131 F Isuzu canter is fraudulent, null and void for want of registration in accordance with the Chattels Transfer Act, Cap 28.*

(ii) *Declaration that the repossession of the same vehicle by the second defendant is illegal, unlawful and otherwise amounts to trespass.*

(iii) *An order compelling the first defendant to unconditionally discharge the log book for the subject vehicle.*

(iv) *A permanent injunction testimony the defendants either by themselves, agents, servants, employees and/or any other person acting on their instructions from further repossession interfering with and/or otherwise dealing with the subject motor vehicle.*

(v) *Costs of the suit.*

(vi) *Any such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.*

2. The case of the appellant was that he obtained two loans from the respondent; the first loan of Kshs. 1 Million was disbursed on 12th August 2007. The appellant's second loan for Kshs.450,000/= was

disbursed on 24th December 2007. The appellant gave his motor vehicle KAG 131 F canter as security and its registration book was still with the bank. On 11th November 2008, the 2nd respondent acting on instructions of the 1st respondent seized the appellant's motor vehicle and that at the time of seizure, the 2nd respondent was not a licensed auctioneer. The plaintiff also later learnt that the 1st respondent did not register the securities belonging to the plaintiff as required by **Cap 28**. By the time of the seizure of the vehicle, the subject matter of this suit, the appellant had a balance of Kshs.450,000/= which is what he said he was holding by the 1st defendant.

3. The 1st defendant filed a defence dated 9th January 2009 and denied liability to the appellant and also made a counterclaim for Kshs.904,478/=. The 1st defendant did not dispute the fact that the plaintiff was advanced two loans amounting to Kshs.1,450,000/=, vied loan account NO.015010000210. Repayment period was 36 months. The monthly installment was Kshs.36,797/=. The plaintiff was to start repayment of the loan within 30 days of the loan being disbursed to him. The 1st respondent testified that the appellant performed his part of the contract until around January 2008 when he started defaulting so that by 26th January 2010 the loan balance was Kshs.662,618.09/=. Interest had risen to 21%. The 1st Respondent explained that reduction from the amount counterclaimed to the current figure was due to realization of some cash and other collaterals pledged by the plaintiff.

4. After carefully analyzing the evidence that was placed before him, the learned trial magistrate concluded that the respondents had proved their counterclaim to the extent of Kshs.662,618.09. He therefore dismissed the plaintiff's suit with costs and allowed the 1st respondent's counter claim with costs against the appellant.

5. Being dissatisfied with the said judgment, the appellant filed a memorandum of appeal dated 15th April 2010 against the above decision on the following grounds:-

1. *The Learned Trial Magistrate erred in law in dismissing the Appellant's suit with costs, when it was apparent and common ground that the 2nd Respondent herein (2nd Defendant in the subordinate court), who was retained by the 1st Respondent, was not a duly authorized and licensed Auctioneer, capable of levying repossession, whatsoever.*

2. *In dismissing the Appellant's suit in the subordinate court, the Learned Trial Magistrate misconceived, misapprehended and misapplied the provisions of the Auctioneers Act, 1996 and the Rules made thereunder. Consequently, the learned Trial Magistrate sanctioned and/or legitimized an illegality.*

3. *The Learned Trial Magistrate misconceived and/or misapprehended the tenor and/or effect of the provisions of sections 6 & 13 of the Chattels Transfer Act, Chapter 28, Laws of Kenya. Consequently, the judgment of the Trial Magistrate is wrought and/or fraught with illegality.*

4. *The Learned Trial Magistrate erred in law in finding and entering judgment in favour of the 1st Respondent, in the sum of Kss.662,618.09 only, when the said sum and/or amount was neither particularly pleaded nor specifically proved, contrary to established and/or trite principles of law regarding Special Damages.*

5. *In finding and entering judgment in favour of the 1st Respondent, the Learned Trial Magistrate, ignored the evidence on record, (both oral and documentary), which showed and/or established that the 1st Respondent had fully recovered the disbursed loan from the various collaterals pledged by the Appellant in favour of the said 1st Respondent. Consequently, the judgment of the Learned Trial Magistrate has occasioned Double jeopardy.*

6. *The Learned Trial Magistrate erred in law in entering judgment in favour of the 1st Respondent, when the 1st Respondent was still seized and/or in possession of the Title Instruments in respect of motor vehicle registration Number KAG 131 P, Isuzu Canter. Consequently, the Learned Trial Magistrate*

conferred collateral advantage and/or mileage to the 1st Respondent.

7. The Learned Trial Magistrate erred in fact and in law in failing to properly or at all, analyze, evaluate and consider, the totality of evidence, adduced by the Appellant. Consequently, the Trial Court arrived at a conclusion contrary to the evidence on record.

8. The Learned Trial Magistrate failed to properly evaluate and/or analyze the submissions tendered by the appellant and the authorities cited thereto. Consequently, the Learned Trial Magistrate misapprehended the crux of the matter before the Court.

9. The Learned Trial Magistrate erred in law in disregarding and/or ignoring relevant and binding decisions of the Superior Court, cited and tendered by the Appellant's counsel. Consequently, the Learned Trial Magistrate disregarded the Doctrine of stare Decisis.

10. The Judgment of the Learned Trial Magistrate, has failed to capture, analyze and/or determine all the issues in controversy in the Subordinate Court. Consequently, the said judgment contravenes the mandatory provisions of Order XX Rule 4 of the Civil Procedure Rules.

11. The judgment of the Learned Trial Magistrate is devoid of legal foundation and hence same is a nullity.

6. This is a first appeal. The duty of this court as a first appellate court was restated by the Court of Appeal in the case of **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123 EA** where it was held that a first appeal is by way of a retrial and the first appellate court is not bound to follow the findings of fact if it appears that the trial court failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally (holding number (i) thereof). All that an appellate court of first instance needs to remember is that it has no opportunity of seeing and hearing witnesses who testified during the trial in the court below.

7. I have now carefully reconsidered and evaluated the evidence afresh. I have also read the proceedings as well as the judgment of the trial court as I am required to do. I have also carefully read and considered the submissions filed by the parties to this appeal alongside the proceedings and the judgment of the trial court.

8. Upon reading the above submissions and the cited authorities, the following are the issues of determination:-

1. Did the trial court error in applying **section 6 and 13** of the **Chattels Transfer Act**?

2. Were the provisions of the **Auctioneers Act 1996** misapplied?

9. With regard to the 1st issue of determination **section 6** of the **Chattels Transfer Act Cap 28** states:-

“6(1) The period within which an instrument may be registered is twenty one days from the day on which it was executed.”

Provided that when the time for registering an instrument expires on a day whereon the Registrar's Office is closed, the registration shall be valid if made on the next following day on which the office is open.

Section 13 of the same Act provides:

“(a) Every instrument unless registered in the manner provided under this part, shall upon the expiration of the time for registration or if the time for registration is extended by the High Court upon the expiration of the extended time be deemed fraudulent and void as against:

(b) The assignee or trustee acting under any assignment for the benefit of the creditors of that person.

10. Page 210 of Principles of Conveyance 2nd Edition Law Africa Publishing Limited Tom Ojienda states that the instrument creating a Chattel Transfer Mortgage must satisfy the provisions of the Act. It must be:-

- a) *Executed.*
 - b) *Attested.*
 - c) *Contain an inventory of the Chattels of more than one, and be*
 - d) *Registered.*
11. The plaintiff testified that:

”we recorded an agreement. It was a Chattel Mortgage. I never got a copy thereof. They said they would register it. They did not say whenI was told that the registration of the Chattel Instrument would be done. I do not know if it was ever registered.”

12. The defendants testified that the Chattel document though not dated was registered. He produced the same as **D. Exhibit 4.**

13. I find that the above Chattel though registered is undated and the fact that it is not dated makes it difficult for this court to decide on whether or not it contravened section 6 and section 13 of Cap 28. Such doubt of course must tilt in favour of the appellant. The respondent had the onus to prove that they registered the Chattel document within the time limit spelt out in the Act. I therefore disagree with the trial magistrate who addressed his mind on the same issue by stating that:-

“We would be missing the point if we were to dwell on in advances like compliance with Cap 28 because the appellant voluntarily executed the loan agreements and pledged his property as security in the event of default”

14. Should we follow the above reasoning by the learned trial magistrate, this court would be disregarding the provisions of **section 6 and 13 of Cap 28.** It is to be noted that the 1st defendant’s omission was not a mere triviality. It went to the root of the defence case. I therefore find that the Chattel document was not registered in accordance with **section 6 and 13 of Cap 28.**

15. Concerning the second issue of the non-registration of the 2nd respondent, as an auctioneer, the appellant testified that the 2nd respondent was not registered in accordance with the Auctioneer’s Act and even produced a letter from the Auctioneers Licensing Board on pg (10) Record of Appeal to support the allegation. The respondents on their part stated in evidence that they could not trace the Auctioneers’ profile.

16. **Section 9 of the Auctioneers Act Cap 326** states:

(1) No person shall in Kenya carry on the business of an auctioneer unless he holds a valid license issued by the Board under this Act. (emphasis mine).

17. I therefore find that the instructions by the 1st respondent to the 2nd respondent for repossession issuing the requisite notice and action on the 1st respondent’s behalf to be null and void as the said 2nd respondent was not a registered auctioneer and their actions were in contravention to **section 9 of the Auctioneers Act.**

18. Although this court notes that the appellant owes money to the respondent such monies cannot be

recovered by an unregistered Chattel instrument nor by an unauthorized person. The respondent needs to go back to the drawing board and find other ways of recovering their monies.

19. In the premises, this court upholds the appeal, sets aside the trial court's judgment and decree dated 1st April 2010. In lieu thereof, enters judgment in favour of the appellant as prayed in the plaint with costs. The 1st respondent's counter claim is dismissed with costs to the appellant.

20. The appellant shall also have the costs of this appeal.

Dated and delivered at Kisii this 22nd day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyagwencha for Oguttu (present) for the Appellant

M/s E. Asati (absent) for the Respondents

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.