



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 44 of 2005

EDWIN KABARAJI & 10 OTHERS APPELLANTS

VRS

AZAN L'LEMBE RESPONDENT

JUDGEMENT

The appellants were the defendant's in the suit filed by the respondent. In the said suit, the substantive prayer was for the reinstatement to him, of his dairy cow which the appellants are said to have taken unlawfully from the respondent's home.

The respondent also sought special damages, together with costs of the suit and interest on the damages.

In the alternative, the respondent sought to be paid the value of the dairy cow.

Simultaneously with the plaint, the respondent herein filed an application for an interlocutory injunction. The application was filed under a certificate of urgency.

In the first instance the learned Trial Magistrate heard the application *ex parte*, and certified it as urgent. The said learned Trial Magistrate, Hon. Mrs. R.A Oganyo SRM (as she then was) issued an order on 18th March, 2005, requiring the appellants herein to immediately release the cow to the respondent.

The cow was to be released pending the inter - partes hearing, which was scheduled for 22nd March, 2005.

After the application was heard inter-partes, the learned Trial Magistrate ordered as follows;

“On the whole the plaintiff/Applicant’s application seeking injunctive orders hereby succeeds and I grant it as prayed with costs to the plaintiff/Applicant. Given that the cow is already sold, I hereby order that the proceeds be deposited in court in the pendency of the main suit or the equivalent cow be released to the plaintiff/Respondent (Sic!) pending the hearing of the main suit.”

The appellants felt aggrieved, and filed the appeal before the High Court.

When canvassing the appeal, Mrs W. Osodo, the learned advocate for the appellants submitted that the trial court had disregarded the principles for the grant of injunctions. She said that the respondent herein

had failed to prove a prima facie case with a probability of success.

Her said submission was based on the contention that the respondent did not prove that he was the owner of the cow in issue.

Secondly, the respondent is said to have failed to prove that he would suffer irreparable loss, if the injunction was not granted.

In any event, the appellants believe that as the respondent stated expressly that the cow was valued at Kshs.36, 000, the appellants would be capable of compensating the respondent, if he were to ultimately win the case.

As regards the claims for special damages, the appellants submitted that the respondent did not prove the same, even on a prima facie basis. It was argued that the respondent did not prove that he was buying milk worth Kshs. 80 everyday, for use in feeding the calf whose “mother” was taken away by the appellants.

The appellants’ position was that they did not take the cow unlawfully, as it was handed over to them by the respondent’s wife. The respondent’s said wife is called Fedelika Kareha.

It appears to be common ground that Fedelika Kareha was a member of a “self –help group” known as **JITEMEE JUNIOR SELF HELP GROUP, MBALE TOWN.**

It also appears to be common ground that Fedelika Kareha borrowed a loan of Kshs. 30,000/- out of which she had repaid about Kshs. 14,000/-.

The appellants case is that the **JITEMEE GROUP** was given, as a security, the cow which the respondent is claiming. The security was said to have been willingly given out by Fedelika Kareha, who told the group that the cow belonged to her.

Not only did Fedelika give the cow to the appellants, but she signed an Agreement, in which she indicated that she was giving the following item as a security for the loan balance;

“ Aisher – Cow

Colour – Brown

Aged – Six

Named – Rachel

Fedelika Kareha

(Signed).”

Notwithstanding that Agreement, the respondent’s contention was that the appellants knew or ought to have known that the cow belonged to him, not to his wife.

To my mind, there is nothing yet on record to show why or how the appellants can be said to have known, or to have had a good reason for knowing that the cow belonged to the respondent.

Furthermore, it is interesting to note that the description of the cow said to belong to the respondent, matches the description of the cow that Fedelika Kaveha had offered as security.

The appellants also insist that the cow was given to them by Fedelika.

In those circumstances, and as Fedelika did not dispute the contention that it is she who gave out the cow to the appellants, it will be interesting to see the evidence which will be adduced by the respondent, to prove ownership. However, for now, there is as yet no evidence which can be said to prove, on a prima facie basis, that the cow belonged to the respondent.

Meanwhile, the cow has been valued by the respondent, as being worth Kshs. 36,000. That being the position, I am unable to comprehend how the respondent can still argue that he cannot be compensated for the cow.

If anything, the fact that in the plaint, there is an alternative substantive prayer for the value of the cow, implies that the respondent readily appreciated (from the word go) that he can be compensated for the loss of "his cow" if he should win the case.

It is also significant that by the 8th of February 2005, the cow had already been sold to one **MANOAH MFUMBWA CHANGILWA**. That means that by 8th March, 2005, when the plaint was filed in court, the appellants were not in a position to give back the cow to the respondent. Secondly, as the cow had already been sold, the appellants could not be restrained from selling, alienating or otherwise disposing of it.

From the record of the proceedings, it is clear that as early as 26th April, 2005, when the injunction application came up for inter partes hearing, the respondent was well aware that the cow had been sold-off.

In the light of that development, Mr. Musiega, learned advocate for the respondent herein, sought the court's directions for an order that the money be deposited in court. In his view, if the court did give those directions, the main suit could thereafter proceed to hearing.

After the appellants raised an opposition to the directions being sought by the respondent, the trial court directed the respondent to prosecute his application. The parties then made their respective submissions on the applications. Ultimately, the learned Trial Magistrate made a finding that;

"The defendant/Respondents do not refuse taking the cow, but the owner of the cow is an issue that can only be verified at a full hearing herein, and I so find."

To my mind, that can only be understood to mean that the trial court was not satisfied, even on a prima facie basis, that the respondent herein was the owner of the cow. In effect, the plaintiff did not meet the first ingredient in the test for the grant of an injunction.

The learned Trial Magistrate also noted that the cow had already been sold. In those circumstances, the application before the court had already been overtaken by events. It should have been dismissed.

Had the respondent wished to vary the reliefs he was seeking, he ought to have sought to amend the application. However, he did not do so.

In the result, the relief granted was not amongst those that had been sought in the application. That was an error of law in the circumstances prevailing in this case. I say so because the plaintiff had every opportunity to take steps to amend the application, but he chose to prosecute it without amendment.

In the event, the appeal is allowed. The injunctive and other orders granted on 7th June, 2005 are set aside. In their place, I now make an order dismissing the application dated 7th March, 2005, with costs to the appellants. The appellants are also awarded the costs of this appeal.

Before concluding this decision, I wish to point out to the appellants that the execution of Agreements between themselves and their members, may, notwithstanding the success of this appeal, be of doubtful integrity in granting lawful authority to the group, to **"repossess"** and sell such securities as are offered

by defaulting borrowers. I say no more.

Dated, signed and delivered at Kakamega this 30th day of April, 2009.

FRED A. OCHIENG'

JUDGE