



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. 29 OF 2000

(From original record No. 858 of 1996 before W.O. Okutta DM II.)

BUSIA MUNICIPAL COUNCIL APPELLANT

VS

GABRIEL OUNDI RESPONDENT

J U D G M E N T

The appellant is challenging the decision of Mr. W.O. Okutta DM II in which the learned magistrate awarded the Respondent Judgment in the sum of Ksh.20,000 being general damages for loss of user of his radio cassette which was attached pursuant to a decree issued in Busia S.R.M.C.C. No. 180 of 1996 upon the instructions of the appellant. The Respondent was also awarded Kshs.2,918 being special damages.

The first ground raised on appeal is that trial magistrate erred in awarding an excessive amount for general damages without reasonable cause or any tangible proof of loss.

Secondly that the trial magistrate erred in not putting into account all pertinent facts or circumstances of this case.

The brief facts of this case are that the Respondent was sued by the appellant, Busia Municipal Council for the recovery of rates vide Busia S.R.M. C.C. No. 180 of 1996. The appellant obtained Judgment and execution proceeded against the Respondent which culminated to the attachment of his radio which appears was released to the Respondent when he settled the decretal sum. The radio is said to have been held on attachment for 7 days. The Respondent then commenced a suit against the appellant vide Busia S.R.M.C.C. No. 858 of 1996 seeking damages for loss of user for 7 days and special damages in the sum of Ksh.2,918 being auctioneer's fees which was settled by the Respondent before the release of the radio. Judgment was awarded as earlier stated. The appellant being aggrieved now appeals to this court to have the Judgment upset.

The appellant's submission is that the award given was not backed by the evidence of loss. I have perused the record of appeal. The trial magistrate said at page 2 of his Judgment :

“The defendant did not offer any evidence to the court's satisfaction that the plaintiff had arrears of rates for the year 1995 for which he was sued. In the totality I find that the plaintiff has proved his case on a balance of probability and I award him Judgment as prayed..... For general damages, I award the plaintiff a sum of Ksh.20,000/= for the inconvenience and embarrassment caused.”

From the above passage it is clear that the learned trial magistrate did not address his mind to the fact that attachment was carried out pursuant to a decree issued vide Busia S.R.M.C.C.No. 180 of 1996 which

decree has not been set aside or varied. He therefore sat as if he was an appellate court. Of course this is not allowed by law. The Respondent could only file a fresh suit to pray for the orders he sought after he has upset the aforesaid Judgment. It should be noted that the basis of the Respondent's case before the trial court was that the attachment was wrongful in view of the fact that he was not in arrears of rates. It is clear that he was challenging the ex parte Judgment in Busia S.R.M.C.C. No. 180 of 1996 through a fresh action which I have stated that it is not available.

The second matter which the above passage discloses is that the trial court did not give the basis of the award of Ksh.20,000/= being damages for loss of user, embarrassment and inconvenience. There was no evidence proving the damage suffered. This must always be suggested and established on a balance of probabilities.

The Respondent's advocate Mr. Ongechi, conceded that the Respondent did not appeal against or set aside the Judgment which led to the attachment. He however was of the view that the award of Ksh.20,000 for general damages was properly founded and that it should not be disturbed.

I have considered the submissions of the advocates for both parties. I have also taken into account the material placed before me. I have come to the conclusion that this appeal has merit. The same is allowed with the consequential order that the Judgment of the lower court is set aside and substituted with an order dismissing the suit. The appellant shall have costs on the appeal and for the suit before the lower court.

DATED THIS 4th DAY OF June 2004

J.K. SERGON

JUDGE