



**Young Traders Limited v Kule & 2 others (Civil Appeal 554 of 2019)
[2024] KEHC 2496 (KLR) (Civ) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 554 OF 2019

DAS MAJANJA, J

MARCH 12, 2024

BETWEEN

YOUNG TRADERS LIMITED APPELLANT

AND

EVALISTO KULE 1ST RESPONDENT

FANTASY AUCTIONEERS 2ND RESPONDENT

JADIEL GITHINJI MAINA 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M.W. Murage, SRM dated 10th September 2019 at the Commercial Magistrates' Court, Milimani, in Civil Case No.7008 of 2012)

JUDGMENT

Introduction and Background

1. By a plaint dated 26.11.2012 that was amended on 19.07.2013, the 1st Respondent filed suit in the Subordinate Court against the Appellant, 2nd and 3rd Respondents. He claimed that he was the registered owner of motor vehicle registration number KBJ *E Volvo Prime Mover Truck ("the truck") and that at the material time it was parked at the Appellant's premises at an agreed charge of Kshs. 300 per day. That the 1st Respondent learnt that the truck was allegedly sold by the 2nd Respondent to the 3rd Defendant on instructions of the Appellant.
2. It averred that the attachment and subsequent sale was illegal as the 1st Respondent did not owe the Appellant such amount demanded for parking the truck at the Appellant's premises. The 1st Respondent prayed for the return of the truck and a declaration that the said sale was illegal and that the 1st Respondent was the legitimate and rightful beneficiary of the truck to the exclusion of all others.



- In the alternative, the 1st Respondent sought to be compensated for the loss of the truck at the current or last available valuation and that a permanent injunction be issued restraining the Appellant, 2nd and 3rd Respondents from interfering with the 1st Respondent's ownership and control of the truck.
3. In their response, the Appellant and the 2nd Respondent stated that truck had been at the Appellant's yard for a period of 3 years and that the 1st Respondent was in arrears of over Kshs. 648,000.00 in storage charges accumulating at the rate of Kshs. 600.00 per day as per the agreement entered between the parties in 2009. That due to default, the Appellant advertised the truck as unclaimed in the gazette in order to recover the amount due to it. The Appellant further stated that it had a lien over the truck as a result of the unpaid storage charges accrued over a period of over 3 years.
 4. The Appellant denied that the 1st Respondent used to pay parking for the truck at a rate of Kshs. 300.00 per day or that he was up to date with his payment or that he made any payments at all. The Appellant and 2nd Respondent asserted that the sale was legal, lawful and conducted above board. They denied violating the 1st Respondent's rights and since the 1st Respondent was in arrears, it invoked the *Disposal of Uncollected Goods Act* (Chapter 38 of the Laws of Kenya) (the Act") and followed the proper procedure in law. They urged the court to dismiss the claim.
 5. The 3rd Respondent also denied the claim against him. He stated that he purchased the truck at a public auction as advertised in the newspapers. That as the highest bidder, he paid the full purchase price and was thus a purchaser for value without notice of any defects in the procedure adopted by the Appellant under the *Act* hence its title to the truck was indefeasible.
 6. When the matter was set down for hearing, the 1st Respondent testified on his own behalf (PW 1) whereas the Appellant called its accountant, Samuel Kamau (DW 1) and the 2nd Respondent, George Gitonga Muchiri and the 3rd Respondent testified on their own behalf as DW 2 and DW 3 respectively. After considering the testimony and written submissions, the Subordinate Court rendered its judgment on 10.09.2019.
 7. The Subordinate Court determined whether the Appellant was justified in disposing of the truck. It was found that as per the receipts produced by the 1st Respondent, the parking fee per day was Kshs. 200.00 and that if there was any outstanding claim for fees from the 1st Respondent, it was not what was claimed by the Appellant. That the Appellant did not deny payment from the 1st Respondent. Thus, the Subordinate Court held that the Appellant's claim of Kshs. 648,000.00 and the subsequent sale of the truck was unjustified. It however held that the 3rd Respondent was an innocent purchaser while the 2nd Respondent was under the instruction of the Appellant. It found that the 1st Respondent had proved his case on a balance of probability. Having found that the sale of the truck was illegal, it ordered the Appellant to compensate the 1st Respondent for the loss of the truck at the current valuation.
 8. The Appellant has now appealed against this judgment through its memorandum of appeal dated 27.09.2019. The appeal has been canvassed by way of written submissions which more or else reiterate the parties' positions I have already summarized above, thus I do not find it necessary to summarize the same but I will make relevant references in my determination below.

Analysis and Determination

9. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal stated that this court is not bound necessarily to accept the findings of fact by the court below, that the court must



reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in this respect.

10. The appeal raises 8 grounds but it is in essence seeking the court to determine whether the Subordinate Court came to the correct conclusion that the Appellant's sale of the truck was illegal, therefore unjustified. The Appellant's defence was that it was entitled to sell the truck as it was unclaimed by the 1st Respondent and had accrued storage charges at the rate of Kshs. 600.00 per day totaling Kshs. 648,000.00. On his part, the 1st Respondent stated that the truck had no arrears and that he had paid all parking fees for the truck.
11. The determination of this matter rested on the facts and evidence on record. I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107(1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".
12. The 1st Respondent produced receipts to the effect that he had paid all arrears for the parking. While the Appellant stated that parking fee was at a rate of Kshs. 600.00 per day, the rate indicated on the face of the receipts produced by the 1st Respondent was Kshs. 200.00. Therefore, the Subordinate Court was not wrong in finding that the applicable daily rate for parking was Kshs. 200.00 and not Kshs. 600.00 as claimed by the Appellant.
13. Further, while the Appellant claimed that the 1st Respondent had arrears of Kshs. 648,000.00, the instruction letter dated 24.09.2012 produced by the Appellant indicates that the 1st Respondent's arrears were Kshs. 324,000.00. The Subordinate Court was therefore not wrong to state that the claim of Kshs. 648,000.00 from the 1st Respondent was unjustified. The 1st Respondent, having stated that he had paid the entire amount for the parking fees of the truck based on the documentary evidence, the onus shifted to the Appellant to prove and substantiate its claim for the Kshs. 648,000.00 or Kshs. 324,000.00. Save for the instruction letter to the 2nd Respondent, the Appellant did not lay any basis for claiming the sum of Kshs. 648,000.00 or Kshs. 324,000.00.
14. The Appellant had stated that it sold the truck under the provisions of the *Act*. Section 3(1) thereof lists the contracts to which the *Act* applies. It states as follows:
 - 3(1) This Act shall apply to goods in the possession or under the control of a custodian under a contract -
 - a. to repair, treat or work on the goods;
 - b. to value, survey or give an estimate relating to the goods;
 - c. for custody or warehousing of the goods for reward;
 - d. for carriage of the goods;
 - e. for hire of the goods;
 - f. for gratuitous deposit or gratuitous loan of the goods;
 - g. for pawn of the goods, or under any other contract of bailment, express or implied:Provided that the application of the Act may be expressly modified or excluded by the terms of the contract.



15. Assuming that a parking contract could fall under, “... custody or warehousing of the goods for reward”, section 6 provides that a custodian must give notice to the depositor of its intention to sell the goods and that the said notice must be served upon the depositor as follows as set out in the Third Schedule of the *Act*:
1. Subject to paragraph 2, a notice to take delivery or a notice of intention to sell shall be given—
 - a. by delivering it by hand to the depositor;
 - b. by leaving it at the residence or place of business of the depositor; or
 - c. by registered post, addressed to the last known postal address of the depositor.
 2. If a custodian has attempted to give either notice to take delivery or a notice of intention to sell and has been unable to do so because—
 - a. he has been unable to trace the depositor; or
 - b. the notice has been refused or returned undelivered, the may give notice by publishing it, in such form as may be prescribed, once in the Gazette and once in a national daily newspaper.
16. From the above provision, such notice to sell must in the first instance be served upon the depositor and it is only after such attempt has been futile that it can be published in the Gazette. In this case, the Appellant did not demonstrate that it attempted to serve the 1st Respondent this notice to sell. It never produced any invoice, notice or such demand it ever made to the 1st Respondent seeking the claimed sum before publishing it in the Kenya Gazette. It is clear therefore that the Appellant could not fall back to the Act to claim and assert validity of the sale of the truck.
17. Having found that the Appellant had no basis to demand either Kshs. 648,000.00 or Kshs. 324,000.00 from the 1st Respondent and that it never issued or served upon the 1st Respondent a notice of its intention to sell the truck, it follows that the sale of the truck was illegal and unjustified. The Subordinate Court did not err in coming to this conclusion.
18. The Appellant complains that the trial court ordered it to compensate the 1st Respondent based on the current valuation of the truck when in fact there was no valuation to show the current value of the truck. There is merit in this submission. The 1st Respondent had a duty to prove the nature and extent of the Appellant’s wrongful act. In this case, the nature of loss in the form of the truck could be ascertained and quantified in monetary terms. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 stated that, “Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.” It was thus incumbent on the 1st Respondent to plead and prove special damages as was held by the Court of Appeal in *Hahn v Singh* [1985] KLR 716 that, “Special damages must not only be claimed but must also be strictly proved for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particular of proof required depends on the circumstances and nature of the act themselves.”
19. Since the 1st Respondent failed to plead and prove the value of the truck, the trial court therefore erred in allowing his claim to the extent of permitting him to proceed to value the truck after judgment.



Disposition

20. The Appellant's appeal is allowed on terms that judgment against the Appellant is set aside and substituted with a judgment dismissing the suit against it. I make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Mr Karuana instructed by Wachira Maina and Company Advocates for the Appellant

Mr Gikaria instructed by Macharia Gakaria & Associates Advocates for the 1st and 2nd Respondents.

