



**Misa M Auctioneers & another v Kariuki (Civil Appeal 63 of 2021)
[2024] KEHC 11178 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 63 OF 2021
SM GITHINJI, J
SEPTEMBER 20, 2024**

BETWEEN

MISA M AUCTIONEERS 1ST APPELLANT

PETER JEFWA LEONARD 2ND APPELLANT

AND

CHRISTOPHER NJERU KARIUKI RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrates' Court delivered by Hon. E. K. Usui on the 25th day of June, 2021 at Malindi in CMCC No. 371 of 2018)

JUDGMENT

Representation:

Wambua Kilonzo & Co. Advocates for the Appellants.

Machuka & Company Advocates for the Respondent

1. The Appellant aggrieved by the Ruling of the learned Chief Magistrate in Civil Suit No. 371 of 2018 dated 25th June, 2021 set forth the following grounds in the Memorandum of appeal dated 8th July, 2021;
 1. That the Learned Magistrate erred in law and in fact by treating the auctioneer as a party to the suit where he had not procedurally enjoined.
 2. That the Learned Magistrate erred in law and in fact by condemning the auctioneer without being heard.
 3. That the Learned Magistrate erred in fact and law by ordering a party not privy to the trial to pay costs as loss of business and use.



4. That the Learned Magistrate erred in law and fact by not appreciating that the issues raised in the application could only be ventilated in a full trial with the proper parties.
 5. That the Learned Magistrate erred in fact and law by allowing a claim of loss of users without any assessment of the said claim.
 6. That the Learned Magistrate erred in law and fact by allowing the claimed loss of user without proof and without subjecting the same to the evidentiary rules of procedures.
2. In a nutshell, the facts giving rise to this appeal are that Judgment was delivered against the Respondents and in exercise of the court's decree, the Plaintiff instructed the appellant, the auctioneer, to execute the warrants of attachment and sale which was done but later the trial court set aside the execution process and ordered the auctioneer to pay for the loss of income of the attached m/v.
 3. The execution process was set aside for reason that the Respondent had already deposited the decretal sum. The auctioneer remained in possession of the motor vehicle and the Respondent is executing against the auctioneers for lost income for the period in which the motor vehicle was attached. The Appellants being aggrieved by the ruling which was to the effect that the Interested Party do pay the Respondent a sum of Kshs. 378,000/- in CMCC No. 371 of 2018 MALINDI filed the present appeal.

Analysis and Determination

4. I have considered the appeal in its entirety, the trial court Ruling which is the subject of this appeal and submissions by counsels. In my view, the following issues arise for determination:

“Whether the 1st Appellant was procedurally joined as a party to the suit in the trial court and whether the Claim for loss of user was proved.”
5. Regarding the question of whether or not the auctioneer was properly joined to this case as an interested party, I note that the Interested Party, the auctioneer, was initiated through Notice of Motion dated 11th March, 2020, in which the applicant sought leave to enjoin Misa M. Auctioneers as interested Parties and an Order for the respondent to compensate the Applicant the sum of Kshs. 378,000/- being the equivalent of lost income for the period during which the applicant's Motor Vehicle was illegally proclaimed and attached. The said application was heard and conclusively determined through the ruling delivered on 26th May 2021.
6. It is not in doubt that the Auctioneer under the instructions of the 2nd Appellant attached the suit Motor Vehicle Registration Number KCB 224E, which is the subject of this Appeal following warrants of attachment and sale issued in CMCC Suit No. 371 of 2018 at Malindi Law Courts. It is also not in dispute that despite payment of the decretal sum having been paid, the appellants on or about the 15th day of October, 2019 illegally proclaimed the motor vehicle for which he is now claiming lost income.
7. On the issue of joinder of a party, Order 1 Rule 10(2) of the Civil Procedure Rules provides that:

“...The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added...”



8. The Black's Law Dictionary defines an interested party as "A party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings." Further, it is submitted that Rules 2 and 7(2) of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 define an interested party as follows:

"interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;" He submits that Rule 7(2) provides that:

"A court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for joinder are that the court can, either on an application made by any interested party or on its own motion direct any person as party to be enjoined in the proceedings."

9. In my view, the factual position is that the Respondent and Appellant herein are parties in the primary suit and the Auctioneer was an agent of the Appellant herein when he attached the motor vehicle owned by the Appellant. To this end, I find that the Respondent sought the necessary leave through the application dated 11th March, 2020 and as such the interested party was properly on record.

10. On whether the claim or loss of user was proved, the appellants asserted that the Respondent did not tender any evidence to the effect that he suffered any loss whatsoever or that the loss was equated to Kshs. 378,000/-. The Respondent on the other hand contended that as a consequence of the illegal attachment he lost earnings of Kshs. 6,000/- daily as the said motor vehicle was being used for commercial purposes and was illegally detained for sixty-three (63) days during which period it could not be utilized to transport passengers from Malindi to Mombasa and back. To this effect he attached a copy of tabulation of the costs based on the daily records prior to and after the attachment.

11. I am well guided by the case of Samuel Kariuki Nyangoti v Johaan Distelberger (2017) eKLR, where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

"(16) The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases."

12. Further in Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal No. 23 of 1991), the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.

13. The above decisions are clear that loss of user is in the nature of general damages and is proved on a balance of probabilities. In the above mentioned cases, the courts were unanimous that loss of user is okay and that the court in weighing it should not unduly demand strict proof like in the case of special



damages. From the foregoing, I do not find any reason to deny the Respondent the amount claimed under that heading.

14. In the end, I find that the appeal is in want of merit and the same is hereby dismissed with costs to the Respondents.

JUDGMENT READ AND SIGNED IN COURT VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Firm of Machuka & Co. Advocates are for the Respondent – absent.

2. Ms Nyambuto;-I pray for 30 days stay of execution.

Court;30 days stay of execution is granted.

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S.M. GITHINJI

JUDGE

20/9/2024

