



Kalungo v Chap Chap Solutions Company Limited & another (Civil Appeal E068 of 2024) [2024] KEHC 15594 (KLR) (4 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E068 OF 2024
RE ABURILI, J
DECEMBER 4, 2024**

BETWEEN

LILLIAN NGUMA KALUNGO APPELLANT

AND

CHAP CHAP SOLUTIONS COMPANY LIMITED 1ST RESPONDENT

YOMUKO AUCTIONEERS 2ND RESPONDENT

(Appeal from the judgment and decree in Kisumu CMCC No. 185 of 2017 rendered on 6/3/2024 by Hon. G. Barassah, Senior Resident magistrate)

JUDGMENT

Introduction

1. The appellant sued the respondents vide an amended plaint dated 26th September 2022 for breach of contract and malice seeking the following orders;
 - a. A declaration that the attachment and sale of the plaintiff's motor vehicle was unlawful and illegal.
 - b. General damages against the 2nd respondent for illegal and unlawful attachment and sale of the plaintiff's suit motor vehicle.
 - c. An order of injunction to issue to compel the defendant to release and surrender the suit motor vehicle.
 - d. Damages for such breach of contract and loss of income and earning capacity
2. It was the appellant's case that the 1st respondent lent her Kshs. 95,000 and held her logbook for motor vehicle registration No. KAQ 853E as lien. The appellant further averred that she complied with



- the terms of the lending agreement and despite paying Kshs. 35,000, on the 12th April 2016, the 2nd respondent's unlawfully and illegally repossessed the suit vehicle from her husband without serving the mandatory statutory notice or proclamation thus a breach of contract.
3. The appellant averred that the suit vehicle was valued at Kshs. 780,000 and was used as a carrier contracted to Daima Milk Company and bringing in Kshs. 65,000 monthly.
 4. In her judgement, the trial magistrate held that the appellant was bound by the contract which she had entered into and as such she proceeded to dismiss her suit with no orders as to costs.
 5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 3rd April 2024 raising the following grounds of appeal;
 - a. That the learned magistrate erred in dismissing the appellant's suit.
 - b. That the learned magistrate erred in dismissing the case against the 2nd respondent when interlocutory judgement had already been entered against it and matter was for formal proof against it.
 - c. That the learned magistrate erred in failing to adjudicate on the facts and law in issue from the pleadings.
 - d. That the learned magistrate erred in failing to determine whether the attachment of the suit motor vehicle was unlawful and illegal.
 - e. That the learned magistrate failed to address the issues of facts and law that were for determination before her.
 - f. That the learned magistrate's judgement, with profound respect, is disjointed, muddled up, quite incomprehensible, illogical and erratic.
 - g. That the learned magistrate failed to consider the issues raised by the plaintiff or appraise or analyze any of the documents filed by the plaintiff.
 - h. That the learned failed to address the issue if the irregularity of the sale of the suit motor vehicle and whether the plaintiff was entitled to a statement of accounts after the sale from the respondent.
 - i. That the learned magistrate failed to consider the matters raised in the plaintiff's filed submissions despite having ordered that they be filed.
 6. The parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that the judgement fell short of the mandatory requirements relating to judgements as contained in Order 21 rule 4 as it left out very pertinent and relevant facts especially those advanced by the Plaintiff.
8. It was further submitted that the learned magistrate failed to consider the matters raised in the Plaintiff's filed submissions despite having ordered that they be filed.
9. It was thus submitted that the judgement was haphazard and erratic and resulted in miscarriage of justice.



The Respondent's Submissions

10. The respondent submitted that the appellant obligated to abide by the terms of the lending agreement and repay the loan lent to her which upon default the suit vehicle used as collateral for the loan could be used and/or sold to recover the outstanding balance.
11. It was submitted that having admitted to being indebted to the 1st respondent the appellant had clearly not made out a prima facie case with a probability of success that they suffered loss as the 1st respondent exercised its legal right of sale as contracted with the appellant.
12. It was further submitted that the claimed damages cannot be legally granted where there is a breach of contract as in this case. Reliance was placed on the case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] e KLR where it was held inter alia that general damages are not recoverable in cases of alleged breach of contract.
13. It was further submitted that the valuation report on record that showed the value of the suit vehicle as Kshs. 660,000 was not produced in court.
14. The 1st respondent submitted that the instant appeal is not merited and ought to be dismissed with costs.

Analysis and Determination

15. This being a first appeal the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
16. I have carefully considered the grounds of appeal, the evidence adduced before the learned trial magistrate as well as the parties’ rival written submissions. I have also read the Judgment of the trial court. I find that the issues for determination are whether the judgement complies with the provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010 and whether appellant proved her case before the trial court on a balance of probabilities.
17. It is true that judgment must comply with Order 21 Rule 4 of the Civil Procedure Rules which provides that:

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons thereof.”
18. Examining the judgement as impugned, it is my view that the same complied with the provisions of Order 21 Rule 4. It was contained a concise statement of the case, the points for determination, the decision thereon and the reasons thereof. The reasons given by the trial magistrate need not be agreeable with the appellant as these would be reasons for appeal.
19. I therefore find that this limb of the appeal thus lacks merit and is dismissed.



20. As to whether the appellant proved her case before the trial court on a balance of probabilities, it is worth noting that though no written contract was produced before court, there was an agreement between the Appellant and 1st respondent in January 2016 wherein the 1st respondent agreed to loan the appellant Kshs. 100,000 which sums of money were to be repaid with interest of 30% per month. The appellant offered the suit vehicle KAQ 853E as collateral for the loan and the loan was to be paid up within a month.
21. The evidence on the record shows that the appellant only paid Kshs. 35,000
22. There is a disagreement on how the suit vehicle was repossessed with the 1st appellant stating that the vehicle was recovered from her husband without notice or a proclamation while her husband, PW2 testified that he was confronted by officers alleging to be from the 2nd respondent after which he drove the suit vehicle into their car yard.
23. The 1st respondent's witness also testified that PW2 drove the car into their yard willingly and even signed the delivery note acknowledging the same, which delivery note was produced as an exhibit.
24. Having admitted that she was in default of the loan advanced to her, it is clear that the 1st respondent was not in breach of the agreement between itself and the appellant.
25. That being said, it was stated by the appellant that the repossession and sale of the suit motor vehicle was unlawful and illegal as it was pursued by the respondents in bad faith in so far as no service of notification of sale or proclamation was effected upon appellant.
26. The applicable law then was Section 6 of the Chattels Transfer Act Cap 28(Now repealed) which provided that:
 - 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.
27. Section 13 of the same Act provided that:
 - (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.
 - (c) any person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any court authorizing the seizure of the chattels of the person by whom or concerning whose chattels the instrument was made, and against every person on whose behalf the process was issued.
28. Further, section 17 of the Act was in the following words:

“An instrument shall contain or shall have endorsed thereto a schedule of the chattels comprised therein, and, save as otherwise expressly provided by this Act, shall give a good



title only to the chattels described in that schedule, and shall be void as against the persons mentioned in sections 13 and 14 in respect of any chattels not so described.”

29. I have deliberately referred to and reproduced the above provisions of the repealed Act for their relevance to the suit before the learned magistrate and the issues raised before him. There was no evidence presented before the trial court and this court that showed that the chattel mortgage had been registered.
30. Accordingly, I find that the repossession and subsequent sale of the suit motor vehicle was unlawful.
31. On whether general damages are available to the appellant, in *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also *Provincial Insurance Co. EA Ltd v Mordechai Mwanga Nandwa*, (KSM Civil Appeal No 179 of 1995,)
32. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.
33. Flowing from the above principles of law, the respondent was not entitled to damages for breach of contractual obligations, having raised a specific claim for special damages for loss of income.
34. What about damages for loss of income? The appellant sought for damages for loss of income and earning capacity. In the case of *Beatrice Anyango Okoth v Rift Valley Railways (Kenya) Limited & another* [2018] eKLR, the Judge posited as follows regarding loss of earning capacity or diminished capacity as follows: -
 - “69. In *Alpharama Limited v Joseph Kariuki Cebon* [2017] eKLR the court said of assessment of damages for diminished earning capacity:-“To assess loss of earning capacity in the future, the court must consider to what extent the claimant’s ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the “multiplicand”), which is the annual loss of earnings. The multiplicand will then be multiplied by a “multiplier”. The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired”.
35. On loss of income or earnings, loss of earnings is a special damage claim which must be strictly pleaded and proved. See the cases of *Cecilia W. Mwangi & another vs Ruth W. Mwangi* [1997] eKLR and *Douglas Kalafa Ombeva vs David Ngama* [2013] eKLR



36. In *SJ v Francesco Di Nello & another* (2015) eKLR the principles of loss of income were explained thus:

“claims under this heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award of general damages once proved.....”

37. The appellant testified and proved by production of documents that she had a contract for supplying milk and earning Kshs. 65,000 per month from services rendered to Sameer Agriculture & Livestock (Kenya) Ltd for the distribution of the company’s product. The contract was for 2 years. It was uncontroverted that the contract was terminated as there was no vehicle to fulfil the contract and transport the products.

38. I find and hold that the appellant proved the special damages and is entitled to Kshs. 65,000 x 48 (months) = 3,120,000. Accordingly, the trial Magistrate erred in dismissing the appellants’ claim under loss of income.

39. As the motor vehicle was sold as at the time the suit was being heard and as the amendments to the plaint never sought for the value of the motor vehicle, I would not order for surrender of the motor vehicle as the order would be in vain.

40. The upshot of the above is that I hereby allow this appeal to the extent that I set aside the trial court’s judgement dismissing the appellant’s suit with no orders as to costs and I substitute it with an order entering judgment for the plaintiff against the 1st defendant declaring the attachment and sale of the appellant’s motor vehicle unlawful I further enter judgment for the appellant in the sum of Kshs 3,120,000 being loss of income pleaded and proved.

41. As the 1st respondent is the one who instructed the 2nd respondent to attach and sell the appellant’s motor vehicle, which attachment and sale I have found to be unlawful, the judgment shall not apply to the 2nd respondent who has not participated in this appeal.

42. The appellant will also have costs of this appeal to be assessed.

43. Decree to issue.

44. Mention before the Deputy Registrar on 27th January, 2025

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF DECEMBER, 2024.

R.E. ABURILI

JUDGE

