



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO.53 OF 2017**

**KENYA WOMEN MICROFINANCE BANK LTD.....APPELLANT**

**VERSUS**

**SELINA WANJIRU MUTHIKE.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the judgment of Hon.Thomas T. Nzioki (PM) delivered on 24/04/2017 in Siakago CMCC No.5 of 2015.
2. The respondent herein filed a suit in the lower court seeking a declaration that the appellant's actions of raiding her house and ferrying an assortment of household goods as being illegal and unconscionable and sought damages in equivalent monetary value; the appellant in turn filed a counterclaim seeking for the sum of Kshs.68,187/-.
3. The trial court entered judgment in favour of the respondent and declared the appellant's actions as unlawful and illegal and awarded the respondent the sum of Kshs.565,098/- together with costs and interest; and dismissed the appellant's counterclaim with costs to the respondent.
4. The appellant being aggrieved by the decision instituted this Appeal and cited four (4) grounds of appeal which are as follows;
  - (i) Special damages were never pleaded and/or particularized,
  - (ii) The respondent's case was not proved to the required standard,
  - (iii) The trial court disregarded the appellants evidence and erred in making a judgment against the weight of the evidence.
5. The parties were directed to canvas the appeal by filing and exchanging written submissions which are summarized hereunder.

**APPELLANT'S SUBMISSIONS**

6. The appellant submitted that the respondent executed a Chattels Mortgage in its favour to secure two (2) loan facilities and offered household items as security for the loans; and contends that when the respondent defaulted in the repayment of the balance it impounded the items so as to recover its monies.
7. The trial court awarded a sum of Kshs.565,098/- as special damages yet the Plaintiff does not disclose a monetary value on the impounded items; special damages should not only be pleaded but be strictly proved; case law relied on **Capital Fish Kenya Limited vs The Kenya Power & Lighting Company (2016) eKLR**; in which the Court of Appeal held that it was trite law that special damages must not only be specifically pleaded but also strictly proved with as much particularity as circumstances allow.
8. On the counterclaim which was for the loan balance in the sum of Kshs.68,187/-; nowhere in the pleadings had the respondent stated that she had cleared the loan facility that had been advanced and any allegation of having cleared the loan was an afterthought; case law relied on **IEBC & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR** where the Court of Appeal cited several authorities from other jurisdictions and the import was that parties are bound by their pleadings and the court sits to hear and determine the issues and not conduct investigations or examination on behalf of the society at large.
9. It was therefore the appellant's contention that having admitted in evidence that she had defaulted in repaying the loan balance it followed that the counterclaim had been proved and the trial court ought to have allowed the prayer; it was clear that the trial court's judgment made in favour of the respondent was not supported by any evidence placed before the court; and the appellants submitted that the appeal had merit and prayed that the appeal be allowed with costs; the judgment delivered on 24/03/2017 be set aside and the suit in the lower court be dismissed with costs.

## **RESPONDENTS' SUBMISSIONS**

10. In response the respondent submitted that the trial courts judgment was sound and made against the weight of the evidence presented to it by the respondent and the appellant; the trial court critically analyzed the evidence of **DW1** who was the appellant's Kiritiri Branch Manager and found that it was an admission of the illegality committed by her; the trial court had the advantage of hearing and seeing the witnesses and also analyzed the law and arrived at a fair conclusion.

11. A member of the Exodus Women Group had cleared the outstanding loan amount of Kshs.68,187/- on behalf of the respondent; therefore allowing the counterclaim would have meant that the appellant would receive payment twice which would amount to unjust enrichment; the respondent reiterated that by carting away prohibited items as per the law and by failing to render a true account the appellant had contravened the law.

12. On the issue of failure to plead and prove special damages the respondent relied on **Kenya Power & Lighting Co. Ltd vs Quentin Wambua Mutisya t/a Bondeni Wholesalers Civil App.No.16 of 2013 Machakos** where Odunga J held that special damages in a material damage claim need not to have actually been incurred. The claimant is only required to show the extent of damages and what it would cost to restore the damaged item to as near as possible condition it was in before it was damaged.

13. The respondent urged the court to dismiss the appeal with costs and order that the decretal sum held in a joint interest earning account be released to the respondent.

## **ISSUES FOR DETERMINATION**

14. After reading the parties respective rival written submissions this court has framed the following issues for determination;

- (i) Whether the respondent pleaded and proved special damages,
- (ii) Whether the appellant unlawfully attached and/or seized the respondents' goods,
- (iii) Whether the appellant sufficiently proved its counterclaim against the respondent.

## **ANALYSIS**

15. The Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; the Court held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent conclusion, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

### **Whether the appellant unlawfully attached and/or seized the respondents goods:**

16. It is not in dispute that the respondent executed a Chattels Mortgage dated the 30/10/2013 and that it was in favour of the appellant in order to secure a loan facility; the trial court noted that pursuant to Section 17 of the Chattels Mortgage Act (**'Act'**)(**now repealed**) the document contained a schedule with specific items which were clearly described therein; it is not disputed that in the event the respondent defaulted in repaying the loan the appellant was empowered under the repealed Act to enter any premises of the respondent and to take possession and sell or dispose of the specified items either by private treaty or public auction; but it must be emphasized that when invoking this right that it does not apply to items/goods that are not part and parcel of the Chattels Mortgage.

17. The court record lists the chattels recorded on the schedule of the Chattels Mortgage (**'DExh.2'**) and these consist of household items and a cow; in her evidence **DW1** admitted that the appellant invoked Clause 7 of the Act and proceeded to seize goods from the respondent and lists the same. After comparing the list of items set out in **'DExh.2'** with the list enumerated in the evidence of **DW1** this court finds no reason to fault the trial court's finding that the section invoked did not apply to items that were not part of the Chattels Mortgage and **'that there was sufficient evidence'** that the appellant through its over-zealous agents **'unlawfully and illegally attached'** the respondents business tools of trade consisting of salon and gym equipment together with essential household goods that were not secured by the Chattels Mortgage.

18. For those reasons this ground of appeal is found lacking in merit and it is hereby disallowed.

### **Whether the trial court erred in awarding special damages that were not pleaded or proved:**

19. It was the Appellant's contention that the Plaintiff did not disclose a monetary value on the impounded items; and that special damages should not only be pleaded but be strictly proved; upon perusal of the Plaintiff it is noted that the Respondent's pleadings actually disclosed a total monetary value for the impounded items and the paragraph containing this plea reads as follows;

**"10. That the total amount of business tools of trade and household goods taken by the defendant are valued at approximately KShs.694,598/-"**

20. The respondent also included and sought the following prayers in her pleadings;

***“(b) An order for restitution ordering the defendant to return the items in the state and conditions they were in or their equivalent monetary value and be ordered to render account for the items already sold.”***

21. At the hearing the respondent led evidence and relied on her witness statement in which she had listed the items and attached a value to each of them; as to whether the respondent had strictly proved her claim this court makes reference to the case of **Kenya Power & Lighting Co. Ltd vs Quentin Wambua Mutisya t/a Bondeni Wholesalers Civil App.No.16 of 2013 Machakos** wherein Odunga J. stated that;

***“Whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances, that is to say, the character of the acts producing damage and the circumstances under which those acts were done.”***

22. The respondent gave evidence on the reasons of her inability to produce the purchase receipts as the same were in the wall unit that had been unlawfully seized by the appellants’ agents; the circumstances and the character of the unlawful acts of the appellant was indeed taken into consideration by the trial court and it was satisfied that the respondent had proved her claim to the desired threshold and the judgment reads as follows;

***“The value given by the plaintiff shall suffice since the defendant’s agents took away the receipts kept in the wall unit.”***

23. It is not disputed that the appellant’s agents unlawfully seized the respondent’s goods and in the ensuing melee the wall unit was one of the items listed as having been seized. The trial court was satisfied that there was sufficient evidence to prove the illegal and unlawful acts of the appellant and its agents that were meted upon the respondent leading to the misplacing of the receipts and with ***‘that strict proof was dependant’*** on these circumstances under which the acts were done and the character of the acts producing the damage(emphasis mine).

24. For the foregoing reasons this court finds no good reason to interfere with the trial courts final orders that the appellant ***‘...shall pay to the plaintiff the sum of Kshs.565,098/-’***; and is satisfied with the trial court’s award for special damages had been pleaded and strictly proved by the respondent.

25. This ground of appeal is found lacking in merit and is disallowed.

**Whether the appellant sufficiently proved its counterclaim against the respondent.**

26. The appellant filed a counterclaim seeking the sum of Kshs.68,187/- which it claimed was the outstanding loan amount that the respondent owed it. The appellant’s contention that the respondent having admitted to having defaulted the counterclaim was proved and the trial court ought to have allowed the counterclaim.

27. The trial court dismissed the counterclaim as there was evidence in the form of Minutes (***‘DExh.4’***) produced by **DW1** and this witness testified that the appellant had zealously pursued the members of the Exodus Womens Group who were the respondent’s 2<sup>nd</sup> guarantors and was able to recover the sum of Kshsh.68,1867/-; the trial court’s judgment reads as follows;

***“Notably, the defendant zealously pursued the matter and was able to recover the outstanding balance of Kshs.68,187/- from members of Exodus Womens Group the 2<sup>nd</sup> guarantors.”***

28. As correctly pointed out by the appellant that a party is bound by their pleadings and it cited and relied on the case of **IEBC & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR** where the Court of Appeal cited several authorities from other jurisdictions and the import of the cases was ***that parties are bound by their pleadings and the court sits to hear and determine the issues and not conduct investigations or examination on behalf of the society at large.***

29. The following is the extract from the appellants’ submissions filed in the lower court in which it admits to having recovered the sums claimed; and it reads as follows;

***“The defendant also stated the money defaulted by the plaintiff was paid by the Exodus Womens Group; After they had threatened to impound some of their items due to the plaintiff’s default.”***

30. Indeed parties are bound by their pleadings and this court finds no good reason to interfere with the trial courts finding that ***‘...It was evident from the testimony of DW1 that KWFT fully recovered the loan amount. This being my view of the matter the counterclaim for Kshs.68,187 by the defendant fails.’***

31. The appellant is found to have failed to have sufficiently proved its counterclaim against the respondent; this ground of appeal is found lacking in merit and it is hereby disallowed.

**FINDINGS & DETERMINATION**

32. From the foregoing reasons this court makes the following findings and determinations;

- (i) This court finds that the appellant unlawfully attached and seized the respondent’s goods.

(ii) This court finds that the trial court correctly awarded the claim for special damages which are found to have been pleaded and strictly proved by the respondent.

(iii) The appellant failed to prove it's counterclaim against the respondent to the desired threshold.

(iv) The appeal is found lacking in merit in its entirety and it is hereby dismissed.

(v) The appellant shall bear the costs of the appeal.

(vi) The respondent is at liberty to apply for the release of the decretal sum held in a joint interest earning account.

Orders Accordingly.

**Dated, Signed and Delivered Electronically at Nyeri this 11<sup>th</sup> day of March, 2021.**

**HON.A.MSHILA**

**JUDGE**