REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 7 OF 2020

C.K. BETT TRADERS LIMITED .....1ST APPELLANT

JANE NAISHULU NDINDA.....2ND APPELLANT

MALAWANZA LIMITED.....3RD APPELLANT

VERSUS

KENNEDY MWANGI .....1ST RESPONDENT

BEALINE KENYA AUCTIONEERS.....2ND RESPONDENT

(Appeal from judgment and decree of (Hon. S. M. Shitubi, CM) delivered on 6th day of February, 2020 in

CMCC No. 140 of 2019 at the Chief Magistrate's Court, Kajiado).

JUDGMENT

1. The suit before the trial court was triggered by the ruling delivered by the High court delivered on 16th April, 2018 from objection proceedings filed in Nairobi High Court Commercial Suit No. 399 of 2011, **Kennedy Njuguna Mwangi v Collins Kiprono Bett**, challenging the execution proceedings. In that ruling, the High Court ordered that the goods attached by auctioneers, including motor vehicle registration No. KCF 834 V, were not available for attachment in satisfaction of the decree made in favor of the 1st respondent. The respondents did not comply with those orders leading to the institution of the suit before the trial court.

2. In that suit, the appellants claimed for both general and punitive damages, special damages and loss of user. In the alternative, they sought an order for unconditional release of the attached goods, subject to inspection on their current condition. They also sought costs of the suit and interest at 14% p.a. The respondents had attached the 2nd appellant's household goods, and motor vehicle registration Nos. KAW 836 G and KCF 834 V belonging to the 1st and 3rd appellants respectively, which had been parked in the 2nd appellants compound at the material time.

3. The respondents did not enter appearance or file defence. An interlocutory judgment was entered and the matter proceeded for formal proof.

4. In its judgment delivered on 6th February, 2020, the trial court dismissed the appellants' suit with costs. In the view of the trial court, the suit was a replica of objection proceedings in High Court Civil Case No. 399 of 2011 and was, therefore, *res judicata*.

5. Aggrieved with that judgment, the appellants filed a memorandum of appeal dated 4th March, 2020, and raised the following grounds, namely:

> (a) ***THAT*** ***the learned magistrate erred in law and fact in misapprehending the nature of the proceedings in the lower court in Civil Suit No. 140 of 2019 vis-a-vis the objection proceedings in the Superior Court in Civil Suit No. 399 of 2011.***
>
> (b) ***THAT*** ***the learned magistrate erred in law and in fact in failing to find that the Appellants were well within their rights under the law to pursue an independent suit for damages occasioned by the Respondents herein in light of the circumstances of the case.***
>
> (c) ***THAT*** ***the learned magistrate erred in law and in fact in finding that the lower court suit no. 140 of 2019 was res judicata without appreciating its nature and the remedies sought vis-à-vis the Superior Court Suit No. 399 of 2011 and the Objection***

Proceedings thereto.

(d) ***THAT the learned magistrate erred in law and in fact in holding that it was for the Appellants to follow up and execute the order in the Superior Court by having their goods released without appreciating the fact that the Appellants as owners of the goods did follow up on the issue to have their goods released and it was only upon the failure of the Respondents to do so that the suit was filed in the lower court.***

(e) ***THAT the learned magistrate erred in law and fact by misapprehending the material evidence which was adduced during hearing for formal proof and bearing in mind that interlocutory judgment had already been entered in favor of the Appellants herein thus it was not open for the suit to be dismissed proof having already been tendered in evidence adduced in the lower court.***

(f) ***THAT the learned magistrate erred in law and in fact in dismissing the Appellants suit in the lower court with costs and even proceeding to deliver judgment in the absence of parties and without notice.***

(g) ***THAT the learned magistrate erred in law and fact and misdirected herself in taking into account irrelevant consideration and failed to take into account relevant consideration.***

(h) ***In all the circumstances of the case, the findings of the learned magistrate are unsupportable in Law or on the basis of the evidence adduced and the circumstances of the case.***

6. The appellants submitted through their written submissions dated 15th March 2021 and filed on 16 March 2021, that the trial court misapprehending the nature of the proceedings before it in Civil Suit No. 140 of 2019 vis-à-vis the objection proceedings before the High Court Civil Suit No. 399 of 2011. They also faulted the trial court for failing to find that they were entitled under the law to pursue an independent suit for damages occasioned by the Respondents. They relied on Section 26 of the Auctioneers Act No. 5 of 1996.

7. They again faulted the trial court for finding that the suit was *res judicata*, given that they could maintain an independent suit under section 26 of the Auctioneers Act. They relied on ***David Njuguna Ngotho v Family Bank & Another*** (2018) eKLR. According to the appellants, they were not parties in Nairobi High Court Civil Suit No. 399 of 2011, Kennedy Mwangi v Collins Kiprono Bett and there was need to distinguish between the parties to the suit vis- a-vis the objectors in the objection proceedings brought to forestall illegal execution process.

8. The appellants argued that the doctrine of *res judicata* was not applicable as the parties were completely different in High Court Civil Suit No. 399 of 2011 from those and before the trial court Civil Case No. 140 of 2019; the remedies sought and the subject matter were also different. They relied on ***Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others*** [2017] eKLR where the court reiterated the elements to be met for the doctrine to be upheld.

9. They faulted the trial court for failing to appreciate the fact that they did follow up with the respondents to adhere to the High Court orders in vain and that it was such failure that made them to file the suit before the trial court.

10. According to the appellants, interlocutory judgment having been entered in their favor and the matter having proceeded for formal proof, it was not open for the trial court to dismiss their suit without valid reasons for doing so.

11. They further faulted the trial court for dismissing the suit with costs and delivering judgment in the absence of parties and without notice. They argued that judgement was set to be delivered on 5th December, 2019 but was not because the court was not sitting and judgment was not delivered as scheduled. They only discovered vide letter dated 18th February, 2020 addressed to the Executive officer that the same had been delivered on 6th February, 2020.

12. The appellant contended that the judgment was not signed hence it was invalid within the meaning of the law. They relied on Order 21, rule 1 of the Civil Procedure Rules, 2010. They prayed that their appeal be allowed.

13. The respondents did not take part in this appeal despite being served.

14. I have considered the appeal, submissions and the authorities relied on. I have also considered the impugned judgment and read the trial court's record. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

15. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated that;

> ***[A]n appeal to this Court from a trial….is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect.***

16. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court held that;

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.

17. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR, the same stated with regard to the duty of the first appellate court;

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

18. PW1 **Moses Malakwen Arap Rotich** testified relying on his witness statement dated 23rd July, 2019, that he was the owner of motor vehicle registration No. KCF 834 V, a Mitsubishi Tipper which he bought through financing by Chase Bank Limited. He leased the truck to the 1st and 2nd appellants at Kshs. 15,000/- per day for 3 years. He stated that he knew the 1st respondent and confirmed there had been objection proceedings in Nairobi where the High Court, (**Nzioka J),** held that his truck was not part of what was to be attached for execution and ordered it to be released which had yet to happen. He asserted that the respondents had continued to hold his truck which he had purchased through a loan which made him default in loan repayment. He also stated that the truck was just parked and was therefore depreciating and risked being vandalized.

19. He produced a copy of the log book in the names of Chase Bank and his Company- Malawanza Limited, Approval letter by Chase Bank dated 29th October, 2015, A release letter by Chase Bank to Multiline Motors (K) Limited, a copy of receipts for total amount of Kshs. 520,000 paid to Multiline Motors (K) Limited, Agreement for leasing the truck to the 1st and 2nd Appellants dated 15th December, 2015, Copy of the Objection proceedings, a copy of the ruling dated 16th April, 2018, and Demand letters addressed to the Auctioneers dated 7th September, 2018 and 23rd February, 2019 as exhibits 1to 8 respectively)**.**

20. **Jane Nashilu Ndinda (PW2)** the 2nd appellant also testified adopting her witness statement dated 22nd July, 2019, that she knew the 1st respondent through his sister but had never done any business with him. She had hired his truck through the 1st appellant (CK Bett Traders Ltd) where she was a director for 3 years and was to pay Kshs. 15,000. The truck was attached while she was away in China and as a result, she was unable to do business. When she returned it, the two vehicles had been and all her household goods. She was not served with any document by the auctioneer. Her brother had been given her a document from Bealine Kenya Auctioneers. She stated that she was aware of the High Court ruling in the objection proceedings which ordered that the attached goods be returned but they had not been returned. She wanted the items returned in good condition or their value. She produced a copy of her Passport, copy of the document from Bealine Kenya Auctioneers and receipts for the household goods as exhibits 9 to11 respectively.

21. The trial court considered the evidence presented before it by way of formal proof and stated:

I have heard the evidence and perused the supporting documents. Indeed, the High court…appears to have upheld objection proceedings in respect of some of the attached goods and ordered them released.

The issue of wrongful attachment of the goods was therefore settled. It was for the owners to follow–up and execute the order by having th goods released. Instead they chose to file this suit which is in all aspects a replica of the objection proceedings and therefore a matter in (sic) res judicata having been decided by a competent court.

22. The appellants have faulted the trial court on various grounds as can be seen from their grounds of appeal. In my view, only two issues arise for determination in this appeal, namely; whether appellants had a right to institute the suit before the trial court and, if so, whether that suit was ***res judicata.***

Whether the appellants could institute a suit

23. The appellants' good were attached by the 1st respondent through the 2nd respondent an auctioneer who was executing a decree issued by the High Court at Milimani against **Collins Kiprono Bett**. The appellants filed objection proceedings and in a ruling delivered on 16th April 2018, the High court partially allowed the objection and ordered release of some of the goods belonging to the appellants that had been attached. Thereafter, the appellants filed the suit before the trial court claiming damages suffered due to the unlawful attachment and failure to release the goods. The trial court dismissed that suit holding that the appellants could only executed the order issued by the High court.

24. The trial court was wrong on this. The appellants were not primary parties before the High court. They were only objectors who had objected to attachment of their goods in execution of a decree they were not party to. That is, the decree that was issued against them and therefore, they were not liable to satisfy that decree. For that reason, attaching their goods to satisfy a decree not directed at them was wrongful. The High Court made a finding of fact the goods were not attachable and ordered their release.

25. The order to release the attached goods was directed at the respondents. Continued holding of those goods after the court release ordered was unlawful and gave rise to a cause of action to the appellants to sue the respondents for any injury or damages they may have suffered due to the illegal attachment and failure to release the goods. Since the respondents never filed a defence, it is not clear whether the goods had been sold or not.

26. Order 22 rule 65 of the Civil Procedure, 2010 provides:

> ***No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.*** (Emphasis)

27. Rule 65 protects both the person whose goods may have been irregularly attached, such as the appellants, and the one who may have purchased the irregularly attached property.

28. In ***Brar v Wareng Quarry & another*** [1978] eKLR, the Court of Appeal, (**Wambuzi. JA,)** while dealing with the same issue stated:

> ***[I]t is my view that as rule 53 stands, the court must at least say whether or not the property in question was or was not liable to attachment. If the court finds that the property was not liable to attachment it would then be open to the aggrieved party to seek the appropriate remedy which may be an action to recover damages against those concerned.***

29. The objection proceedings before the High court at Nairobi had been taken pursuant to rule 51 and 53. The court made a finding of fact that some of the goods were not liable to attachment and ordered their release which the appellants stated was not done. It was, therefore, open to the appellants as aggrieved parties to seek appropriate remedy before the trial court which would include an action to recover damages against the respondents as the people responsible for the injury or loss.

30. The answer to the first issue is, therefore, in the affirmative, that yes, the appellants had a right to sue and had a new cause of action against the respondents.

Whether the suit before the trial court was *res judicata*

31. The second issue question is whether the suit before the trial court was ***res judicata.*** Section 7 of the Civil Procedure Act on ***res judicata,*** reads as follows:

> ***No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.***

32. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of ***res judicata*** exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

33. ***Res judicata*** is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, ***res judicata*** will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

34. In that respect, the Court of Appeal held in ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*****,** [2017] eKLR)**,** that:

> ***[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;***
>
> **a)** ***The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b) That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c) Those parties were litigating under the same title.***
>
> ***d) The issue was heard and finally determined in the former suit.***
>
> ***e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***

35. The Court went on to state on the role of the doctrine:

> ***The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain***

justice.

36. The suit before the trial court was for special and general damages arising from attachment of the appellants' goods/properties by the 1st respondent through the 2nd respondent. The suit before the trial court was instituted followed a ruling in the High court that allowed the objection proceedings by the appellants before that court. The High court ordered that certain goods and motor vehicle that had been attached be released to the appellants since they ought not to have been attached. The goods were not released leading to the filing of the suit before the trial court whose decision is the subject of this appeal.

37. The proceedings before the High court were objection proceedings instituted by the appellants as objectors to challenge attachment of their goods in execution of a decree. They were not plaintiffs in that suit and had filed the application pursuant to Order 22 rules 51 and 53 of the Civil Procedure Rules. They were not principal parties to that suit. It was for that reason that the High court delivered a ruling determining the objection as opposed to a judgment. That is a clear distinction between the appellants as objectors before the High court and their position before the trial court as plaintiffs.

38. Although the parties before the High court were the same as those before the trial court and this appeal, the issues were not the same. The issue before the High court was whether the appellants' goods could be attached, the issue before the trial court was whether the appellants suffered loss and whether they were entitled to compensation. In the circumstanced, the suit did not fit the criteria for holding the suit ***res judicata.*** The answer to the second issue is that the suit was not ***res judicata.***

39. Having considered the appeal submissions and the law, the conclusion I come to is that the appeal has merit and must succeed. Consequently, this appeal is allowed and the trial court's decision dismissing the appellant's suit set aside.

40. As the trial court did not make a decision on whether the appellants proved their case on a balance of probabilities, the suit is hereby remitted for fresh hearing before any other magistrate other than **Susan Shitubi, (CM).** Costs of this appeal to the appellants.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH DAY OF JULY 2021.

E C MWITA

JUDGE