



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 125 OF 2019

CHARLES MUTUMA M'KANAKE.....APPELLANT

VERSUS

DIOCESE OF MERU TRUSTEES REGISTERED.....RESPONDENT

(Being an appeal from the Judgment of the Hon. Oscar Wanyaga (SRM) delivered on 12/09/2019 in Maua CMCC No. 216 of 2015)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 11.09.2016 and subsequently further amended on the 21.2.2018 in which, the appellant sued the respondent seeking damages for detinue, damages for defamation, special damages and costs plus interest. In those proceedings, the appellant pleaded that on or about 10/09/2015, the respondent's agents accompanied by a police officer, stormed into his home and negligently took away his exotic grade Ayrshire cow valued over Kshs 50,000, allegedly for failing to pay water bills. He pleaded that he rushed to the respondent's offices to request them to release the cow, but his request fell on deaf ears. It was further pleaded that the actions of the respondent's agents, employees and/or officials were defamatory, as they referred to him as a **'thief'** in the presence of members of the public. The resultant effect of the respondent's actions was that, he suffered immense mental torture, anguish, public odium, damage and was subjected to ridicule. It was averred that the cow equally sustained serious injuries.

2. In support of his case, the appellant, **PW1** testified that he got back his cow on 25/9/2015, after the court ordered so. He stated that he had been defamed, as the respondent portrayed him as a defaulter, criminal, bad debtor and a crook. When cross examined, he stated that the picture of the cow exhibited in court, did not show any cut wounds. He denied owing the respondent any money. Although he had a veterinary's report, he could not attest to its authenticity. He did not have any receipts for purchase of medicine or one for medical report. In denying ever using the water supplied by the respondent, he confirmed that it was his father, who had connected the water. He concluded that when his father died in 2005, the water was disconnected. During re-examination, he stated that his cow was healthy when it left his premises. He valued its worth at Kshs 50,000. He denied using the respondent's water, because he had a borehole and asserted having not being served with any water bill.

3. The respondent denied the claim by a defence dated 12.10.2015 and later amended on 8/2/2017 and prayed for the appellant's suit to be dismissed. In that defence all the allegation by the plaintiff were denied to include any seizure of the animal by the respondent's agents, the particulars of the alleged defamatory words were equally denied as much as the particulars of illegality and special damages. The appellant was invited to strict proof with an alternative plea that the appellant indeed owed the respondent huge sums of money on account of water bills for which the respondent was yet to institute recovery proceedings.

4. In evidence in resistance to the claim, **DW1 Fredrick Meeme**, asserted that the appellant lived on his father's land where water was connected. The appellant therefore utilized their water, through an account belonging to his father. He hastened to add that, since the appellant's account had a bill, they took his cow in strict compliance with their agreement. The said agreement, the water bill and demand notice were produced as exhibits. He however denied insulting the appellant. He clarified that the borehole referred to by the appellant, was less than 1 year old. During cross examination, he stated that both the customer agreement and the bill were in the name of the appellant's father. He went on to state that, the appellant is the one who utilized the water, prompting them to take his cow. He further stated that it was the appellant who paid for the water, in the name of his father. He denied that the cow was sick, because there was someone to take care of it.

5. After the conclusion of the trial, the trial court found that the appellant had failed to prove his case to the required standard, and went ahead to dismiss it.

6. Aggrieved by the said decision, the appellant filed this Appeal on 15/10/2021 setting out six (6) grounds. He faults the trial court for failing to appreciate that the respondent had no contract with the appellant, and therefore had no right of lien over his property. He complained that the trial court erred in declining to award damages for detinue while it was evident that the respondent had detained his property. The last complaint is that the trial court disregarded the evidence and submissions tendered by the appellant, as a result of which it arrived at a wrong decision.

Submissions

7. Upon the directions by the court, the parties filed their submissions respecting to the appeal on 29/07/2020 and 14/08/2020 respectively. The appellant's submissions were to the effect that, the actions of the respondent to detain his cow were utterly unlawful, because he was not privy to the contract between his deceased father and the respondent. He relied on the case of **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & anor (2015) eKLR** to buttress his submissions that a stranger cannot be made a party to a contract, simply because of his closeness to one of the contracting parties. He maintained that he had proved his case on a balance of probabilities and cited the case of **Eastern Produce (K) Ltd-Chemomi Tea Estate v Bonfas Shoya (2018) eKLR** in support of the principle that when a court is faced with two probabilities, it can only decide the matter if evidence show that one probability is more probable than the other.

8. On his part, the respondent contended that the appellant had failed to demonstrate what damage and/or loss he had suffered, therefore his claim was rightly dismissed. The cases of **Miller v Minister of Pensions (1947)2 ALL ER 372 and ENM v MMN(2020) eKLR** were relied on in support of the submissions that whenever the court is in doubt the burden bearer losses.

Analysis and determination

9. On a first appeal, this court is duty bound to delve at full length into factual details of the evidence availed and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR**.

10. It is clear to me that the determination of this appeal revolves around the question whether the appellant proved his case on the balance of probabilities, and whether he was entitled to the reliefs sought.

11. On the claim for detinue, that tort has been defined by the author of **Black's Law Dictionary 2nd Edition's** as **"a form of action which is a form of recovery in specie, of personal chattels from one who acquired possession of them but retains them without right together with damages for detention"**.

12. In support of his claim for detinue, the appellant established that he owned the cow that had been wrongfully detained by the respondent. It was acceded that the cow was detained for 15 days, and was only released after the court ordered so. I have read through the consumer's agreement and noted that, it was between the respondent and the appellant's father, now deceased. The provision for taking a member's cow in default of payment of water bill, is however not among its clauses.

13. The appellant's testimony on the value of the cow was not controverted even during cross examination. Flowing from the doctrine of privity of contract, it is my considered view that the respondent had no right whatsoever to take and detain the appellant's cow. I say so because it was admitted by DW1 in his evidence that, the contract was between the respondent and the appellant's father. There was clearly no basis for detaining the appellant's cow, and therefore the respondent's actions in that regard were manifestly unlawful.

14. Nonetheless, whereas the appellant established possession of and title to the cow while the respondent made to claim to title save that it took it to enforce payment of water bills, the appellant utterly failed to prove whether he ever made any demand to the respondent for the return of the cow. No evidence of demand for the cow was led by him in his entire testimony. The position of the law is that, detinue is a continuous tort and cause of action accrues on the date of wrongful refusal to deliver the goods.

15. The tort of detinue must however be distinguished from and never confused with the one of conversion. While conversion is the act of taking one's property unlawfully, detinue occurs where the tortfeasor take the chattel lawfully but the permission of the owner gets withdrawn or terminated and a demand is made for the return. See **W V H ROGERS, Winferd & Jolowicz on Tort, 15th Edition**,

16. Here the evidence led could have established the tort of conversion rather than detinue. I return to the author of **Black's Law Dictionary** for the definition of the two torts. The author writes:

Detinue is a common law action to recover personal property wrongfully taken or withheld by another. A claim for detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in actual possession of them and who upon proper demand fails or refuses to deliver them up without lawful excuse.

Conversion is the wrongful possession or disposition of another's property as if it were one's own an act or series of acts of willful interference without lawful justification with an item of property in manner inconsistent with another's right whereby that other person is deprived of the use and possession of the property it is an act that interferes with the dominion of the true owner's right and depriving him of the possession of the goods to an extent as to be inconsistent with the rights of the owner.

17. Moreover, like in all cases the loss must be proved. It is easy to prove the loss where the tortfeasor keep the property in that the claimant only needs to prove the value thereof. However, where the property has been returned on the date of giving evidence and judgment, it becomes a duty of the to prove the loss incurred. In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss. The Court of Appeal in **Patrick Muturi v Kenindia Assurance Company Ltd [1993] eKLR** held: -

In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss.

18. On the evidence on record and without a claim on conversion, I find that, no case was proved and no damages under the tort pleaded could be awarded.

19. On special damages, the law is always that, they must be specifically pleaded with particularity and thereafter strictly proved. No evidence was adduced by the appellant in support of his claim for special damages just as much as no prayer was made for such damages.

20. On damages for defamation, that tort was defined in **Murphy v. Ha March (13 DLR 3d 484)** by the British Columbia Supreme Court thus: -

“defamation is where a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful cause of action (he lives on the avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff in the estimation of right-thinking members of the society generally.”

21. In the case of **John Ward -v- Standard Ltd (2006) eKLR** the ingredients of defamation were summarized by the court as follows: -

“The statement must be defamatory; it must refer to the plaintiff; it must be published by the defendant; and it must be false.”

22. In the record I have reappraised, there was little attempt to prove defamation. As it were the material was largely thrown at the court in the witness statement filed. Granted that the appellant had asserted that the respondent’s agent had called him *mwizi* that by itself cannot qualify as defamatory. The words must be proved to have been published to a third party who must have had his estimation of the appellant’s reputation and character lowered. It is not enough that the claimant feels offended or in deed abused. The assessment of reputation must be by a third party to qualify as defamatory. The author of **Winfield & Jolowicz on Tort (supra)** gives the following definition of defamation: -

“Defamation is the publication of a statement which reflects on the person’s reputation and tends to lower him in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid him.”.

23. I have found that no evidence was led that a third party had the words and had his estimation of the appellant’s character lowered. That was an important ingredient of the tort to be proved and was never proved. Having failed to prove the aforementioned ingredients, the appellant was not entitled to damages under this head.

24. On the complaint about non-consideration of the appellant’s submissions, this court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision. In **Joshua Mung’athia v Evarick Muthuri Ntoiba & another (Suing as the Legal Representatives of the Estate of Fredrick Ntoiba Baraya (Deceased) [2021] eKLR**, the court had this to say of such a ground:

“This grievance, in reality, ought not be taken seriously when regard is taken of the court’s mandate on a first appeal. It bears no premium that the submissions were not regarded when the appellate court is to carry out a re-evaluation in order that it comes to its own conclusions. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellant’s submission. While I consider it important that parties’ industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal.”

25. In the premises, I am unable to find fault with the trial court’s analysis of the evidence on record and the determination it made. The upshot is that the appeal lacks merit and is dismissed with costs.

Dated signed and delivered at Meru, by **MS Team**, this 15th day of July 2021

Patrick J.O Otieno

Judge

In presence of

Miss Karimi for respondent

No appearance for Ngunjiri

Patrick J.O Otieno

Judge