



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 114 OF 2018

KENNEDY ONGIRO MOGIRE.....1ST APPELLANT

DAVID OMBIRO.....2ND APPELLANT

BONARINDO CONSTRUCTION LTD.....3RD APPELLANT

VERSUS

GEORGE MORARA NYANGATE

JAMES SOKARI

MORAA MBAKA T/A MUFANGANO SELF HELP GROUP.....RESPONDENT

(Appeal from judgment and decree of the subordinate court at Kisii

(Hon. P. Wamuci Nyotah – Resident Magistrate) delivered on 19th October 2018

in Kisii CMCC No 473 of 2013)

JUDGMENT

1. The appellant before the subordinate court claimed for an unconditional release of 2 Friesian cows and motor vehicle registration number KBD 479 W Pajero belonging to the 2nd and 3rd appellants; general damages for the illegal attachment, refund of taxi expenses and cost. The subordinate court dismissed their claim in its entirety hence this appeal.

2. In the memorandum of appeal dated 7th November 2018, the appellant contested that judgment on the following grounds:

- 1. That the learned magistrate erred in law and in fact in not holding that the interest charged on the borrowed sum by the respondents was in breach of the agreement, illegal, oppressive and unconscionable.*
- 2. The learned magistrate erred in law and in fact in not holding that the 1st appellant had paid the respondents a sum of Kshs 640,000/- based on the respondents evidence (DW1) instead of legally owing a sum of Kshs 500,000/-.*
- 3. The learned trial magistrate erred in fact and in law in not holding that the seizure of the appellant's property was illegal null and void.*

3. At the trial court, the 1st appellant claimed to have obtained Kshs 500,000/- from the respondents while the 2nd and 3rd appellants stood as surety to pay the friendly loan. The respondent through use of force and coercion forced the 1st appellant repay the loan to a tune of Kshs 1,100,000/-. On 14th December the respondents, without any notification to the appellants, unlawfully attached 2 cows and a motor vehicle registration number KBD 479W belonging to the 2nd and 3rd appellants respectively. As a result of the attachment of motor vehicle registration number KBD 479W the appellant suffered loss and damage by particularly hiring a taxi at Kshs 3,000/- per day. They advanced that the respondents are not sanctioned by the central bank of Kenya to trade with money nor charge interest rates which exceeds the principal amount.

4. The respondents filed their written statement of defense on 20th January 2014 denying the allegations made by the appellants. They pleaded the 2 grade cows and motor vehicle registration number KBD 479W were voluntarily surrendered by the 2nd and 3rd appellants in lieu of the securities that had been initially given by the appellants, that is, motor vehicle registration number KAN 930V and KYT 419. They advanced that they were not required to issue any notification of sale to the appellants and that their actions did not amount to trespass.
5. The duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co. [1968] EA 123*).
6. **Kennedy Ongiro Mogiro** (Pw1) recalled that around the month of July 2012 he obtained a loan of Kshs 400,000/- and was to pay a fixed interest of Kshs 100,000/- bringing the overall total to Kshs 500,000/-. As security he presented logbook for Mercedes Benz KAN 930B and Datsun Pickup registration number KUT 419. After he received the money, he began making repayments through the 1st respondent for over Kshs 500,000/-. Through a letter the respondents demanded from him Kshs 570,000/-. They stormed his house and was asked to sign a document admitting that he owed Kshs 570,000/-. They subsequently returned asking him to pay Kshs 260,000/- and thereafter bundled him in a car and took away the 2 cows and a vehicle registration number KBD 479W. He also produced his M-pesa statement as proof of payments made to the respondents.
7. **David Geoffrey Ombiro** (Pw2) adopted his statement dated 20th February 2018 as his evidence in chief. On cross examination he told court that the cows were returned on 13th January 2014, a month after they had been attached.
8. **George Morara Nyangate** (Dw1) testified that he was the chairman of the Muungano self-group, while the 2nd and 3rd respondents were secretary and treasurer respectively. They lent the 1st appellant Kshs 500,000/- and he defaulted on making repayments to satisfy the loan. On cross examination he testified that the 1st appellant had to pay Kshs 900,000/- but only paid Kshs 640,000/- leaving a balance of Kshs 260,000/-. He confirmed that the cows and the motor vehicle were returned after one month.
9. The appellants in their submission argued that the Muungano self-help group conducted the business of lending money contrary to **section 3 of the Banking Act, Cap 488 of the Laws of Kenya**. They cited the case of **Samwel Bosire v Gladys Monanyi Omosa & Another (2010)** to fortify their argument. He submitted that by admission of Dw1, the 1st appellant had paid Kshs 640,000/- and the trial court erred in holding that there was no basis that the plaintiff had paid the sums owed. They contend that the respondents unlawfully attached the property and their actions amounts to trespass to goods. They further contend that they were entitled to special damages in terms of the hired taxi at the rate of Kshs 3,000/- per day for 68 days when the vehicle was held and detained by the respondent.
10. The respondents filed their written submissions on 6th November 2019. They submitted that the evidence by the 1st appellant only proved that he had made payments totaling to Kshs 79,500/- and thus his indebtedness to the respondent stands. They also submitted that the pleadings before the lower court did not seek for refund of the overpayment and that the second ground in the memorandum of appeal should thus fail.
- DETERMINATION**
11. The appellant's cited **section 3 (1) (a) of the Banking Act Cap 488** which provides that no person in Kenya shall transact any banking business or financial business or the business of a mortgage finance company unless it is an institution which holds a valid license. **In the case of Samwel Bosire V Gladys Monyangi Omosa supra** the court held as follows;
- “Members of a self-help group cannot lawfully pool together their resources for the core purpose of lending the same to members of the public at exorbitant rates of interest, even way beyond the rates charged by banks and other licensed financial institutions. Loans made by moneylenders in contravention of statutory provisions are irrecoverable.*
12. In light of the above I find that the contract between the parties to have been illegal and thus cannot be enforced by the court and the loan therefore irrecoverable.
13. I am further constrained to agree with the trial court's finding that both parties did not provide conclusive evidence on the amount repaid towards settling the loan. The appellant in his claim alleged that he made repayments of Kshs 1,100,000/- but did not provide evidence to back up his assertions and prove his case on a balance of probabilities. The M-pesa statements provided did not for a fact cover the loan amount. On the other hand Dw1 testified that he could not tell how they arrived at the sum of Kshs 900,000/- as sums owing by the 1st appellant and it was thus not clear how much had been paid by the 1st appellant.
14. It was undisputed that both 2 Friesian cows and motor vehicle registration number KBD 479 W Pajero had been returned to the appellants and thus the first prayer in the plaint was spent. The only issue for determination was whether the attachment of 2 Friesian cows and motor vehicle registration number KBD 479W Pajero belonging to the 2nd and 3rd appellants respectively amounts to trespass to goods.
15. The parties had agreed that the security for the loan was motor vehicle registration number KAN 930V and KYT 419. The appellant gave out 2 Friesian cows and motor vehicle registration number KBD 479 W Pajero which according to him belonged to the 2nd and 3rd appellants and argued that this was unlawful and constitutes trespass. However the appellant failed to show that the said animals and vehicle belonged to the 3rd parties, the appellant also failed to explain why the 2 vehicles offered as security were not availed. I find that the trial court did not err in dismissing this claim.
16. I now turn to whether the 3rd appellants proved its claim to the taxi expenses. The motor vehicle registration number KBD 479W

belonged to the 3rd defendant as per the averment in the plaint. The Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716 held that:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

17. In this case no oral testimony tendered by the 3rd appellant who was the owner that he had to incur Kshs 3,000/- per day because of the unlawful attachments. The receipts were thus not properly produced as evidence and thus the 3rd appellant’s claim to special damages thus fail.

18. I find that the appeal has no merit and is dismissed with costs

Dated, signed and delivered at KISII this 13th day of February, 2020.

R. E. OUGO

JUDGE

In the presence of;

Miss Nyandoro h/b Mr. Bosire For the Appellant

Respondent

Absent

Ms. Rael

Court Assistant