



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
HIGH COURT CIVIL APPEAL 14 OF 2018
(CIVIL CASE NO 4759 OF 2016)

JITEGEMEA CREDIT SCHEMEAPPELLANT

VERSUS

NAOMI WANJIRU NJOROGE.....RESPONDENT

JUDGMENT

APPEAL

The Appellant filed the memorandum of appeal on 5th September 2018 seeking that the judgment and orders of 13th September, 2017 be vacated/set aside and the order be substituted with dismissal of the suit. The Appeal is based on the following condensed grounds;

- a. The Trial Court erred in law and fact and held that the Appellant's seizure of motor vehicle Reg KAT 035C was unlawful despite clear uncontroverted evidence presented in Court that the Respondent voluntarily substituted the security to the 2nd loan advanced of Ksh 250,000/- from household goods to her motor vehicle.
- b. The Trial Court erred in law and fact by awarding general damages to the Respondent Ksh 5, 000,000/- and failed to give the basis and/or criteria used to calculate general damages and even after the Court found that the Respondent retained part of proceeds from the sale of motor vehicle Reg KAT 035 C and caused serious miscarriage of justice.
- c. The Trial Court erred in law and fact by reasoning that the Appellant effected seizure of motor vehicle Reg. KAT 035C to arm twist the Respondent to pay outstanding loan balance yet the Respondent voluntarily released the vehicle instead of household goods.

EVIDENCE ON RECORD

The brief evidentiary facts leading up to the present appeal were as follows;

The Plaintiff/ Respondent and Defendant/Appellant entered into a hire purchase Agreement on 22nd May 2007 and the Defendant advanced the Plaintiff Ksh 2,844,140/= inclusive of interest payable for 3 years. The Plaintiff remitted the instalments until December 2008 when the motor vehicle Reg KAY 713F was involved in a road accident and Plaintiff/Respondent was unable to service the facility.

The Plaintiff informed the Defendant of the accident and was advanced Ksh 250,000/- to repair the said vehicle and to repay the loan in 1½ years. According to the Plaintiff on 22nd March 2009 without any regard to the explanation given for the delay in repaying the 2nd loan, the Defendant impounded the Plaintiff's motor vehicle Reg KAT 035C and demanded full payment of Ksh 250,000/- with interest of Ksh 67,500/-. The attachment was by Trade Point Auctioneers.

The Plaintiff/Respondent contended that motor vehicle Reg KAT 035C was not a security in the Loan of Ksh 250,000/-. The loan was advanced with securities as household goods and Motor Vehicle Reg KAL 185X.

The Defendant contended that out of the loan advanced in 2007, the outstanding amount due and owing was Ksh1,293,100.00. On 30th

January 2009, the Defendant advanced the Plaintiff an Individual Loan of Ksh 250,000/- as Plaintiff's working capital and it was secured by household items under a Chattels Mortgage. When the Plaintiff again defaulted in payment of the 2nd Loan, the Defendant exercised its right under the contract to attach /impound the Plaintiff's chattels. The Plaintiff voluntarily surrendered motor vehicle KAT 035C in lieu of carting away household goods which the Defendant was about to impound to avoid embarrassment. The Defendant was uncomfortable with the arrangement and advised the Plaintiff to sell her vehicle which she did, paid off the outstanding amount of 2nd loan Ksh 317,500/- and retained balance of the sale proceeds.

With regard to the 1st loan, the Plaintiff defaulted and pursued successive applications of injunction the last one was compromised by a Consent order of 18th August 2009. In default of compliance of the Consent and contract, the Defendant seized Motor Vehicle Reg KAY 713F on 13th May 2011. After another unsuccessful application for injunction, it was disposed off to realise the outstanding debt.

The dispute remained only with regard to the attachment of the motor vehicle; Reg KAT 035C which upon hearing and determination culminated to judgment of 13th September 2017.

DETERMINATION

From the record and submissions the issue for determination is whether the award of Ksh 5 million as general damages to the Plaintiff/Respondent is upheld or the suit ought to have been dismissed.

The Trial Court's relevant parts of the Judgment are as follows;

“It is clear that on the 2nd loan facility a chattels mortgage was executed where the Plaintiff offered her house hold goods were offered as collateral.

There is nowhere in the document where motor vehicle KAT 035C is mentioned and it follows therefore that it was never used as security. It is my humble view that in as much as the Defendant had a right to realize the loan it had an obligation to abide by the chattels mortgage agreement.

The Defendant held onto the motor vehicle for over 1 and ½ months. The said attachment was unlawful in my view. The continued holding onto the vehicle for that period was not only unlawful but malicious. It was a way to arm twist the Plaintiff to pay up. There was no document that was executed when the Defendant's Auctioneers took away the said motor vehicle.

Plaintiff Counsel prayed for Ksh 20 million as general damages.

Taking into account that the Plaintiff conceded to have retained the balance of sale after paying off the loan....I hold Ksh 5 million will adequately compensate her for the breach.”

The parties through respective Counsel exchanged and filed written submissions on the issues raised in the instant appeal.

RESPONDENT'S SUBMISSIONS

The Respondent submitted that an Appellate Court was/is limited to only certain parameters of the Trial Court's decision as outlined in

Susan Munyi vs Keshar Shiani (2013) eKLR (NRB CIV APP 38 of 2002)

“where the Court held, whereas the Appellate Court is to re-evaluate the evidence on recordand arrive at their own independent conclusions, [the Court] should bear in mind unlike the [Trial Court] that had the advantage of hearing and observing witnesses, we make our conclusion from the evidence as captured in the cold letter of the record.”

See also Makube vs Nyamiro (1983) KLR 403 on the same point.

The Plaintiff/Respondent opposed any intervention by this Court on the Appeal on the instant decision as the Trial Court did not misapprehend the law and the finding of the Court was on sound legal basis and evaluation of the facts/evidence presented.

The Respondent relied on the case of **David Njuguna Ngotto vs Family Bank Limited & Anor (2018) e KLR** where the Court awarded general damages of Ksh 7 Million against the Defendants. In that case cited above, the Defendants, Bank and Auctioneer respectively caused wrongful and unlawful proclamation on attachment of goods. The Bank failed to conduct due diligence and could not confirm that the Plaintiff was not privy to the contract. The Plaintiff therein was not treated with human dignity as an innocent party.

The Respondent relied on this case to fortify the Plaintiff's claim that impounding motor vehicle Reg KAT 035C was illegal as it was not registered in the Chattels Mortgage Agreement between the parties.

The Plaintiff/Respondent submitted that the law grants the Court the right based on relevant circumstances to award General damages. In the case of **Great Lakes Transport Co Ltd vs Kenya Revenue Authority (2009) eKLR**; The Court noted;

“The Superior Court was sitting both as a Court of law and a Court of Equity, and noting that equity would not allow a wrong to be suffered without a remedy, we hold that the Appellant was entitled to an award of general damages.”

APPELLANT’S SUBMISSIONS

The Appellant pursued the appeal on the following submissions; relying on the case of *Kiruga vs Kiruga & Anor (1988) KLR 348*; that the Appellate Court’s jurisdiction entails revisit and/or re - evaluation of the evidence on record to reach its own conclusions. The Court should not interfere with findings of fact unless they were based on no evidence or on a misapprehension or if the Court acted on wrong principles in reaching the findings.

Secondly, parties are bound by pleadings and evidence on record. The Plaintiff sought in the Amended Plaintiff general damages for unlawful seizure of KAT 035C and not for breach of contract. The Appellant was of the view that the Trial Court misdirected itself on the applicable law and delved into matters that were neither pleaded or canvassed before the Court. The Appellant relied on the cases; *Nairobi City Council vs Thabiti Enterpriss Ltd (1995) 2 EA Pg 231 & CA in Thika Coffee Mills vs Mikiki Farmers Coop Society & Anor (2013) eKLR.*

The import of these cases is that the Judge/Court has no power to decide an issue not raised before the Court and the only way to raise an issue is through pleadings. It is dangerous for a Court to canvass matters in its judgment and rely on evidence that was not canvassed before the Court by parties.

The Appellant submitted that general damages could not legally be granted for breach of contract. The Appellant relied on the case of *Kenya Tourist Development Corporation vs Sundowner Lodge Limited (2018) e KLR*, the C.A. held;

“...the opposite is in fact the case; as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason....”

The Appellant submitted that the Respondent was/is not entitled to the award of general damages because the conflicting evidence adduced in Court was not resolved. The evidence was whether the motor vehicle **Reg KAT 035C** was impounded by the Defendant or it was surrendered voluntarily by the Plaintiff to the Defendant. This impasse was not resolved.

The Plaintiff could have claimed damages for loss of user of the motor vehicle for 1½ months as special damages which was not pleaded in the pleadings.

The Appellant referred to the case of; *RR Siree & AG vs Lake Turkana EL Molo Lodges Ltd (1998) & Coast Bus Services vs Sisco where the Court of Appeal* stated that when damages can be calculated to a cent then they cease to be general and must be claimed as special damages which must be specifically pleaded before they can be strictly proved.

The Appellant seeks the Court to intervene and contests the award of Ksh 5,000,000/- on the basis of the amount being in excessive. More so, as the motor vehicle in question was sold by the Plaintiff at Ksh 850,000/- which is way below the Ksh 5,000,000/ general damages award.

ANALYSIS

Section 78 of CPA defines powers of appellate court as follows;

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- (a) to determine a case finally;**
- (b) to remand a case;**
- (c) to frame issues and refer them for trial;**
- (d) to take additional evidence or to require the evidence to be taken;**
- (e) to order a new trial.**

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

In exercising the stated jurisdiction, this Court evaluated the evidence on record and found that parties; Appellant and Respondent entered into a contract voluntarily and executed the contract giving rise to the instant appeal. The individual loan agreement of 30th January 2009 between the Appellant who advanced the Respondent loan facility of Ksh 250,000/- to assist in working capital. The Respondent contracted to repay the debt that included 18% interest per annum in monthly instalments of Ksh 17,000/-.

The Respondent admitted both in her Witness Statement and during cross examination in Court proceedings that she spent Ksh 150,000/- on repairing motor vehicle KAY 713F that was involved in an accident. She later encountered a problem which she explained to the Defendant

and thus defaulted repayments for 2 months. On 22nd March 2009, without any regard to the explanation for delay in remittance, the Defendant decided to impound the personal car KAT 035C.

The contract between the parties prescribed in **Clause 8 (iv)** among other conditions any borrower's indebtedness if not paid on its due date would constitute default. **Clause 9** of the Contract on repossession stipulates; ***"in case of 2 months default the Appellant (JCS) will recall the entire loan balance at the Borrower's cost."***

From these terms of the contract and the Respondent's admission of indebtedness, it cannot be logically and reasonably said that the attachment of motor vehicle of KAT 035C was unlawful in the circumstances. The Appellant exercised its legal right of attachment as contracted with the Respondent in the contract and specifically as per **Clause 9** of the said contract. The Court cannot rewrite the terms of the Contract by parties, they are duly bound by terms of the Contract, voluntarily entered into and the contract was duly executed by parties as the individual Loan agreement confirms. The said contract was duly executed by parties and validity of the contract was not raised as depicted by pleadings and proceedings on record.

The other ground the Respondent relied on, is that the claim for damages is that the contract for loan of Ksh 250,000/- was secured by items pledged in chattel mortgage wherein the Respondent pledged assorted household goods as security. The Respondent deemed the attachment of the motor vehicle KAT 035 C unlawful as it was not pledged as security of the loan. The Auctioneer, the Appellant's agent failed to attach the household goods pledged as security and instead took the motor vehicle in question. The Respondent asserted that despite demands to have the Appellant release the motor vehicle, they refused and/or neglected to do so and persisted in such refusal. This forced the Respondent to sell the said motor vehicle and paid balance of the loan and retained the balance of the sale proceeds. Hence the Respondent sought damages for unlawful seizure of KAT 035C.

The Court confirms from the Chattel Mortgage documents, it is true, the Respondent pledged household goods as security for the loan of Ksh 250,000/-.

The Trial Court in summary of the Respondent's evidence in the judgment at pg 19 provides as follows;

"She had given the motor vehicle as security for 1st Loan and her household goods for the 2nd loan. That she got problems and when the defendant sought to attach household goods she opted to take away her other motor vehicle KAT 035C....."

This summary in the Judgment confirms that the Auctioneer went to attach household goods as per the Chattels mortgage and the Respondent voluntarily offered the motor vehicle Reg. KAT 035C herself instead and/or in lieu of the household goods.

Contrary to the Respondent's claim that motor vehicle Reg. KAT 035C was never released to her and she had to sell it, there is (at Pg34) letter of 7th May 2009 addressed by the Appellant to Leakey Storage Ltd to release the motor vehicle KAT 035C to the Respondent after the outstanding amount was paid to the Appellant. This was as per the Individual loan agreement, that in default for 2 months the Appellant could recall the whole loan at the Borrower's cost.

The record confirms the Respondent admitted that she opted to have the motor vehicle attached instead of the household goods, she cannot turnaround and lawfully claim damages for unlawful seizure of the motor vehicle which she acquiesced to and voluntarily agreed to the motor vehicle being attached as an alternative to attachment of household goods.

As to holding the motor vehicle for 1 ½ months, the Appellant attached the said motor vehicle as a result of the Plaintiff/ Respondent's voluntary surrender of motor vehicle reg KAT 035C in a bid to substitute security of household goods which the Defendant/Appellant was about to impound to avoid embarrassment.

The Defendant/Appellant was uncomfortable with the substitution arrangement and advised the Plaintiff to sell the motor vehicle which she did and repaid the loan and kept the balance of the proceeds.

If the Respondent/Plaintiff felt that this was not the true position, that she did not voluntarily surrender and substitute the security for the individual loan that had arrears, then the question/issue ought to have been raised during case management process. At the time, parties through Counsel would have agreed on issues for determination by the Court. This would have made the Appellant avail the Auctioneer as a witness to testify by direct evidence on what transpired during the attachment process. The Respondent would have exercised her right to have the witness cross-examined, thereby facilitating the Trial Court an opportunity of arriving at an informed decision on the issue; whether the attachment of the motor vehicle was contrary to the Chattel Mortgage Agreement or the Respondent voluntarily gave motor vehicle in lieu of household goods. As it is, the issue of whether The Respondent voluntarily surrendered and substituted the attachment of the motor vehicle with household goods or the Auctioneer contrary to the Chattels mortgage opted/chose the motor vehicle over the household goods remains unresolved. As such in the absence of conclusive finding, liability was not determined by the Trial Court so as to pursue damages for the breach of contract and hence not the basis of award of damages.

The Trial Court noted in the Trial Court's judgment that it was indicated that there was no document that was executed when the Defendant's Auctioneers took away the said motor vehicle. However, at Pg 32 of the Record of Appeal there is a notification of sale of movable property, 'where it is recorded ***"motor vehicle Reg No KAT 035C make Isuzu Matatu, body with dents & scratches; battery 2 red 1 black (sparewheel)"***

From the above evidence from the Court record, the totality of the pleadings and proceedings, they do not confirm the conclusion drawn by the Trial Court herein below;

"It is my humble view that in as much as the Defendant had a right to realize the loan it had an obligation to abide by the

chattels mortgage agreement.

The Defendant held onto the motor vehicle for over 1 and ½ months. The said attachment was unlawful in my view. The continued holding onto the vehicle for that period was not only unlawful but malicious. It was a way to arm twist the Plaintiff to pay up.”

With greatest respect, there is no evidence to support unlawful seizure of Motor vehicle KAT 035C. At Trial, it was not contested that the Respondent defaulted in repayments of the loan. It is also conceded that household goods were offered as security for the 2nd loan; the chattel mortgage was duly executed. The Trial Court confirmed that evidence by Respondent during Trial is that she volunteered her vehicle to be attached to substitute the hauling away of household goods. Therefore there is no evidence on record of unlawful attachment of the motor vehicle KAT 035C instead of the secured chattel for the loan.

On the issue regarding award general damages, the authorities cited are relevant on this point. The Plaintiff in Amended Plaintiff filed on 13th February 2013, sought general damages for unlawful seizure of KAT 035C costs and interest. In the case of *Kenya Tourist Development Corporation vs Sundowner Lodge Limited (2018) eKLR* it was held as a general rule general damages are not recoverable in cases of alleged breach of contract.

In the case of *David Njuguna Ngotto vs Family Bank & Anor (2018) eKLR* the Trial Court took the view that award of general damages is discretionary and each case is considered with its circumstances. In the cited case, the Plaintiff sued the Defendant for wrongful proclamation and attachment of goods by the Auctioneer acting under instructions from the Defendant bank. The bank failed to conduct due diligence as the Plaintiff was never involved in any way in application of a loan facility from the 1st Defendant bank nor did the Plaintiff authorise anyone to secure any loan facility and use his business as security for a loan facility. There was no privity of contract between the Plaintiff and Defendant.

Therefore, although the Plaintiff in the cited case was awarded Ksh 7 million for wrongful and illegal attachment, loss of business opportunities and substantial loss occasioned as a result of acts of negligence by the defendant, with respect, the situation is different from the circumstances in the instant case. Herein, the cause of action arises from performance of a valid contract between the Appellant and Respondent and there was privity of contract between parties. Secondly, in the instant case the evidence on record did not disclose unlawful seizure of the motor vehicle KAT 035C, as there is also evidence that the Plaintiff voluntarily offered the said vehicle for attachment instead of household goods that were security of the individual loan of Ksh 250,000/- the case cited is not applicable herein.

The judgment entered on behalf of the Plaintiff against the Appellant for unlawful attachment of the motor vehicle KAT 035C which was not security in loan facility contract was not rightfully entered as the liability was not determined first, that is determination of the question whether motor vehicle KAT 035C unlawfully seized. Quantum could not have followed while liability had not been conclusively determined. The court has interfered with the award of damages as the Trial Court acted under a mistake of law; liability was not conclusively determined in light of rival evidence/submissions on record. The legal issue is whether the Plaintiff voluntarily substituted the motor vehicle which was not security for the loan; for household goods for attachment and/or the Auctioneer on instructions of the Defendant attached unlawfully the motor vehicle and not the household goods. Of importance, this was/is a critical issue for determination and ought to have been raised during framing of issues in case management process by parties so that the Auctioneer could have been possibly availed in the proceedings for conclusive determination.

For these reasons, the Court finds the judgment on liability and quantum of Kshs 5 million was not legally justified in the circumstances.

DISPOSITION

- 1. The appeal is allowed**
- 2. The Judgment and award are set aside**
- 3. The Plaintiff's suit is dismissed with costs**

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH APRIL 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

NJUGUNA KAHARI & KIAI ADVOCATES FOR APPELLANT

MOGENI & CO ADVOCATES FOR RESPONDENT