



**REPUBLIC OF KENYA**

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

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO. 141 OF 2018**

**BHAVIN ASHWIN GUDKA**

**DR. VIJAY KUMAR SAIDHA.....APPELLANTS**

**-VERSUS-**

**JOHN ORURU MACHOKA.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. Wamucii (R.M.) dated and delivered on 7<sup>th</sup> December 2018 in the original Kisii CMCC No. 486 of 2014)**

**JUDGEMENT**

1. The appeal before this court arises from the decision of the trial court in CMCC No. 486 of 2014. In that suit, the respondent claimed that appellants had caused his motor vehicle registration No. KBD 724W Pick-up to be impounded and wrongfully detained in execution of a decree of the Chief Magistrate's Court at Kisii in Civil Case No. 240 of 2013. The respondent averred that he filed objection proceedings and a ruling was entered in his favour. He claimed that by the time his vehicle was released on 12<sup>th</sup> September 2014, he had suffered loss of user of the said vehicle to the tune of Kshs.925,000/= which he claimed against the appellants.

2. The appellants filed a joint statement of defence denying the respondent's claim. They averred that the execution complained of had been carried out by a duly licensed auctioneer who is an officer of the court and they could not be held liable for his actions. They also argued that the detention of the vehicle was anchored upon a lawful court process hence no damages could arise from the attachment complained of. According to the appellants, the claim for damages was a scheme hatched by the respondent's father Shem Thomson Machoka to defraud the cause of justice. The appellants also contended that the suit was bad in law and legally untenable since the court lacked jurisdiction by dint of Section 7 and 34 of the Civil Procedure Act.

3. Having heard the matter, the trial court held that although an auctioneer was an officer of the court, for him to be appointed, the court needed to be moved by the decree holder. The court was of the view that since the appellants had instructed their advocates to commence execution proceedings, they could not feign ignorance of the attachment. The court went on to state that although the execution process in CMCC No. 240 of 2013 was lawful, the appellants illegally attached the property of the respondent rather than the property of the judgment debtor, and were liable to pay the respondent Kshs. 925,000/= being damages for the loss of use of his vehicle.

4. Aggrieved by the trial court's decision, the appellants lodged the instant appeal which was canvassed by way of written submissions.

5. The issues arising for determination from the record of appeal, the parties' submissions and the judgment can be summarized as follows;

- a. Whether the auctioneer was acting as an agent of the decree holder;
- b. Whether the auctioneer was solely liable for the bungled execution and the right party to be sued for damages;
- c. Whether the court contravened the provisions of section 34 of the Civil Procedure Act by adjudicating upon the subject which touched on execution proceedings; and
- d. Whether the trial court erred in granting prayers that were neither pleaded nor proved;

6. Before I delve into the issues enumerated above, I will remind myself of the duty of a first appellate court which is to analyze the evidence afresh and reach its own conclusion bearing in mind that the court did not have the benefit of seeing the witnesses testify. (See *Selle v Associated Motor Boat Company Ltd. [1968] EA 123*).

7. When the matter came up for hearing before the trial court, the respondent, John Oruru Machoka (PW1) reiterated the averments in his plaint and added that when his vehicle got attached, he had to seek an alternative vehicle to conduct his business. He told the court that he had to hire the vehicle at Kshs. 12,500/= for the 74 working days his vehicle had been impounded. During cross examination, the respondent told the trial court that his vehicle had been hired by Hotel Storm Ltd and was being used to ferry tents and food stuffs to a function at the hotel.

8. Enock Chivoli (PW2) who was the Executive Officer at Kisii Law Courts at the time produced the court file relating to proceedings in CMCC No. 240 of 2013.

9. The 2<sup>nd</sup> appellant Vijay Kumar Saidha (DW1) adopted his statement and listed documents as his evidence. He further testified that he was not involved in the attachment of the motor vehicle and also stated that he was unaware that the vehicle had belonged to the plaintiff.

10. Jacob Omogo Oboi (DW2), who had a power of attorney from the 1<sup>st</sup> appellant, testified that the 1<sup>st</sup> appellant and Shem Machoka had a landlord-tenant relationship for Kisii Town/Block/11/126. He stated that while the tenancy was still subsisting, Shem Machoka defaulted in paying rent and the 1<sup>st</sup> appellant had to move the court vide CMCC No. 240 of 2013. The suit was determined in the 1<sup>st</sup> appellant's favour and Shem Machoka was ordered to pay. When Shem failed to settle the judgment debt, warrants of attachment of his property were issued to an auctioneer trading as M/s Odongo Investment Auctioneers. DW2 testified that he had heard that the auctioneer had proceeded to attach the respondent's vehicle, which he kept for a while awaiting payment of the debt.

11. In cross examination, DW 2 stated after the court's final orders for release of the vehicle had been issued, they paid auctioneer's charges for release of the vehicle. He maintained that it was not the appellant's duty to do due diligence and added that they were not under a duty to release the vehicle before the objection proceedings were concluded.

### **ANALYSIS AND DETERMINATION**

12. From the evidence set out above, it is clear that the origin of the dispute between the appellants and the respondent is the wrongful attachment of the respondent's vehicle in the course of execution of the decree issued in Kisii CMCC No. 240 of 2013. The appellants herein successfully sued one Shem Thomson Machoka t/a Gusii Tools & Hardware Limited for rent arrears and instructed M/s Odongo Investment Auctioneers to attach his goods when he failed to settle the decretal sum. The respondent's vehicle registration No. KBD 724W was impounded instead. Having considered the respondent's objection to the attachment of his vehicle, the court ordered its immediate release by a ruling dated 11<sup>th</sup> September 2014.

13. The first and second issues arising in this appeal can be dealt with together as they both involve the question of whether the appellants were culpable for the wrongful attachment of the respondent's vehicle and thus liable to pay damages.

14. The appellants' learned counsel argued that the trial court's finding that the appellants were responsible for the attachment of the vehicle was misconceived and a misapprehension of the Auctioneer's Act. He submitted that the appellants were entitled to commence execution for recovery of the decretal sum and since they could not undertake the exercise themselves, they instructed an auctioneer in accordance with the Auctioneers' Act. He contended that the appellants had no control over the nominated auctioneer and did not accompany him during the proclamation and attachment exercise and thus the auctioneer's actions or omissions could not be attributed to them.

15. Counsel also argued that the trial court failed to appreciate the import of the provisions of **section 26** of the **Auctioneers Act** which provides that any person who suffers any damage as a result of wrongful execution by an auctioneer, is entitled to recover damages from the auctioneer. He submitted that since the auctioneer proceeded to levy execution against a wrong party, he lost statutory protection and was solely liable for the bungled execution.

16. The respondent's counsel countered that the application for execution of decree, the warrants of attachment and sale of property were all applied for by the appellants, who insisted on proceeding with execution despite being served with the notice of objection. The case of ***Kuronya Auctioneers v Maurice O. Odhoch & Anor Civil Appeal 31 of 2002 [2003] eKLR*** was cited in support of the argument that the respondent had a right of recourse against both the auctioneer and the decree holder.

17. **Section 23** of the **Auctioneers Act** demands auctioneers to perform their duties in a manner befitting of an officer of the court. It is also a well settled principle of law that auctioneers while executing decrees of the court do so as agents of the court. (See ***National Bank of Kenya Ltd v Joly Family Stores & another Civil Appeal No 473 of 1999 [2005] eKLR***)

18. Auctioneers are offered protection under **Section 6** of the **Judicature Act** which provides that an officer of the court is not liable to be sued for the execution of a warrant or an order which he would be bound to execute. However, in cases where the auctioneer levies attachment against the assets of the wrong party, he loses the protection of the law. The party against whom the wrongful attachment has been made may sue both the auctioneer and the decree holder. That was the finding of the Court of Appeal in the case of **Kuronya Auctioneers v Maurice (supra)** which held as follows;

*The question that falls for our consideration in this aspect of the appeal is this: "If an auctioneer attaches the goods of a wrong party when he is armed with a warrant to attach the goods of a specified party can he claim the immunity given to him by section 6 of the Judicature Act?"*

*That issue was decided in the case of Simiyu vs. Sinino [1982-88] IKAR 630. That case decided that a party who sets in motions the process of execution against a wrong person, even though not maliciously, becomes liable at common law for damages for trespass and wrongful execution.*

*Hancox, J A (as he then was) stated at page 636:*

*"I would therefore hold that the respondent, as the only party before us on this appeal, is liable to the appellant in damages for trespass for the wrongful attachment of his goods."*

*Chesoni Ag. J.A (as he then was) and Nyarangi, Ag. J.A (as he then was) concurred with the holding of Hancox J A*

*The ratio decidendi of the Simiyu case is that **if the execution is levied against a wrong party that party has a right of recourse against the auctioneer as well as the decree-holder** despite the protection given to the auctioneer by Section 6 of the Judicature Act and that such recourse is at common law. [Emphasis added]*

19. It is evident from the foregoing decision of the Court that the respondent was entitled to institute proceedings against the appellants who issued instructions to the auctioneer who wrongfully attached his vehicle. I do not find anything in Section 26 of the Auctioneers Act to prohibit one from recovering damages from any other person he deems responsible for wrongful execution.

20. The appellants also contended that since this suit touches on execution proceedings, it should have been dealt with in accordance with the provisions of **Section 34** of the **Civil Procedure Act**. The provision stipulates;

*34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*

21. Although the respondent's woes arose out of the execution of the decree in CMCC No. 240 of 2013, it would, in my view, be improper for him to seek damages against the appellants in that suit which related to a separate and distinct cause of action. In the case of **Kuronya Auctioneers v Maurice (supra)** the Court of Appeal held;

*Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree.*

22. It was also the appellant's argument that there was no prayer for payment of Kshs. 925,000/= in the respondent's amended plaint. Counsel argued that the respondent had camouflaged the true nature of the reliefs sought to evade payment of the requisite court fees and therefore the respondent was non-suited and no award could legally be made in his favour. He also argued that the trial court erred in awarding damages on account of hire charges as the respondent had failed to disclose details pertaining to the identity of the vehicle he had hired.

23. Counsel for the respondent insisted that they had pleaded for a sum of Kshs. 925,000/= as loss of user for hiring an alternative vehicle and the same was rightly awarded by the trial court. He also submitted that the trial magistrate had considered the evidence, the law and submissions of the parties before reaching its determination and arrived at a reasonable judgment.

24. The respondent's claim against the appellants was for loss of user of his vehicle. A claim for loss of user is a claim for special damages and it must not only be pleaded but must also be specifically proved. (See **Maritim & Another -v- Anjere (1990-1994) EA 312 at 316**)

25. Contrary to the appellants' contention, a cursory look at the respondent's amended plaint shows that he sought judgment for damages for loss of user and/or profits at the foot of his amended plaint. He also gave details of his claim at paragraph 9 as follows;

*"9. The Plaintiff's motor vehicle registration no. KBD 724W was attached on 20<sup>th</sup> June, 2014 and released on 12<sup>th</sup> September, 2014 by M/s Odongo Auctioneers at the instance of the Defendant, in consequence whereof the plaintiff suffered loss and damage.*

PARTICULARS OF DAMAGES

a) Loss of user of the said motor vehicle at Kshs. 75,000/= per week for 12 weeks and 2 days

(Alternative car hire) – Kshs. 925,000/=

....

Reasons wherefore the Plaintiff prays for judgment against **the Defendant** for:-

- a. Damages for loss of user and/or profits
- b. Interest
- c. Costs
- d. Any other relief

26. In the case of **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd Civil Appeal No. 278 of 2010 [2013] eKLR** where the appellant had similarly set out his claim for special damages in the body of his plaint, the Court of Appeal held that the appellant's claim was specific enough and had been pleaded to the required standard.

27. As a general rule, pleadings should be clear enough to enable the other party know the case he has to meet. It was held in **Bethwell Allan OmondiOkal v Telkom (K) Ltd (Founder) & 9 others Civil Appeal 191 of 2014 [2017] eKLR** that, "Pleadings are not just a formality; they are essential in order to frame issues for the determination by the court and to enable the parties know exactly what case they are expected to meet."

28. The respondent's claim for loss of user was specifically pleaded and explicitly set out in his plaint. I however note that the amended plaint was not clear as to whom between the two defendants the plaintiff was seeking damages. This error was fatal as it rendered the respondent's claim ambiguous.

29. Turning to the issue of whether the respondent proved his claim, the respondent testified that he spent Kshs. 925,000/= for car hire services when his vehicle was illegally impounded. He produced receipts that had been issued to him by Chake Courts & Investment totalling to Kshs. 925,000/= to support his claim. The production of the receipts was not opposed by the appellants. The respondent was however unable to give details of the car he had hired. On being prodded during cross examination, the respondent stated that the registration number of the vehicle was included in his documents. Having perused the documents produced by the respondents before the trial court, I found no details of the vehicle the respondent claimed he had hired. For this reason, I find that the respondent failed to specifically prove his claim for damages.

30. The Law on the need to specifically plead and prove special damages is well settled. In **Richard Okuku Oloo –vs- South Nyanza Sugar Co. Ltd (2013) eKLR** the court stated;

*"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.*

*In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:*

*"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:*

*"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.*

*"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

31. In our instant suit the respondent's case is that he was forced to hire an alternative vehicle for purposes of use during the attachment.

I have perused the evidence and no evidence of the identity of the motor vehicle allegedly hired is tendered.

32. Based on the reasons given, I find that this appeal has merit and the same is allowed. I hereby set aside the judgment and decree of the trial court dated and delivered on 7<sup>th</sup>December 2018 and substitute thereof with an order dismissing the suit. The appellants shall have the costs of this appeal.

**Dated, Signed and Delivered at Kisii this 13<sup>th</sup> day of May, 2020.**

**A. K. NDUNG'U**

**JUDGE**