



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL APPEAL NO. 45 OF 2017**

**KWIHOKANA WOMEN SELF HELP GROUP (sued through its officials namely :**

**TABITHA WANJIRU GITONGA - CHAIRLADY**

**IRENE MUTHONI KINYANJUI MAINA -SECRETARY**

**ANN NYAGUTHII MAINA - TREASURER.....1ST APPELLANT**

**KENYA WOMEN FINANCE TRUST LTD .....2ND APPELLANT**

**-VERSUS-**

**MUTITU RURAYA MUCHEMI.....1ST RESPONDENT**

**DAVID GICHUKA KAMANGU.....2ND RESPONDENT**

**JUDGMENT**

The 1st and 2nd appellants, Ann Nyaguthii Maina and Kenya Women Finance Trust Ltd, who were the defendants in CMCC 21/2012, preferred this appeal against the judgment of Hon. J. Wanjala – CM which was delivered on 18.01.2017.

By a plaint dated 13.2.2012, the 1st and 2nd respondents Mutitu Ruraya Muchemi and David Gichuka Kamangu(formerly plaintiffs) sought judgment against the appellants for,

*(a) Special damages of ksh410,000/= together with interest 14% per annum from 22.10.2011 till the date of judgment.*

*(b) Loss of income at ksh16,800/= per month together with interest at 14% per annum from 22.10.2011 until the date of judgment.*

*(c) General damages for illegal attachment and sale of plaintiff's animals.*

*(d) Costs of the suit and interest.*

After hearing the parties, judgment was entered in favour of the respondents in terms of prayer (a),(b) and (d) of the plaint. The appellants are dissatisfied with the said judgment.

The appellants raised 13 grounds of appeal which are as follows:

*1. That the learned trial magistrate erred in law in failing to find that special damages were not proved.*

*2. The learned trial magistrate erred in law and in fact in failing to find that no documents were adduced as evidence to prove ownership of the attached animals.*

*3. The learned trial magistrate erred in law and in fact in failing to find that the plaintiff's claim was prone to allegation with no oomph of proof.*

*4. The learned trial magistrate erred in law and in fact in shifting the burden of proof of ownership of the attached cattle to the*

appellants.

5. The learned trial magistrate erred in law and in fact in shifting the burden of proof of ownership of the attached cattle to the appellants.
6. The learned trial magistrate erred in law in embarking on the duty of assessing damages in a contract contrary to law.
7. The learned trial magistrate erred in law in accepting from the respondents evidence alleging his loss of income was Kenya shillings 16,800/= per month without any proof of payment invoice and receipts and visited injustice upon the appellants disregarding the evidence adduced without any reason.
8. The learned trial magistrate erred in law and fact by contradicting the fact that PW3 who was present at the time of attachment did not protest the attachment.
9. The learned trial magistrate in coming to her judgment relied on unlawful and inadmissible evidence and has thus occasioned great loss and injustice to the appellant.
10. The learned trial magistrate misdirected herself in considering the respondents' evidence without first establishing the ownership of the parcel of land where the cattle was found.
11. The learned trial magistrate erred in law and in fact in dismissing the appellants case against the weight of the evidence adduced.
12. The learned trial magistrate erred in law and in fact in failing to find that the appellant had proved their case on a balance of probabilities.
13. The Judgment entered by the learned trial magistrate was against the weight of evidence adduced, contrary to pleadings and the law.

A brief background to the case is that the 1st respondent resides on Nyandarua/Kanyagia/596 and 597 while the 2nd respondent resides on Nyandarua/Muruai/1259.

Both plaintiffs carry on mixed farming. It was alleged that on 22.10.2011, the appellants through their officials went to the respondents' homes and attached their cattle without justification. It was pleaded that the appellants had purported to recover a loan advanced to one Agnes Wambui, a daughter to the 1st Respondent and sister in law to the 2nd respondent but both respondents denied being guarantors to the loan allegedly advanced to the said Agnes Wambui.

In their defence dated 27.06.2012, the appellants pleaded that Agnes, upon borrowing ksh.100,000/= from the 2nd appellant pledged cows as security for the loan and when she started defaulting, she moved her cows to the respondents' homesteads and that the respondents therefore colluded and connived with the said Agnes Wambui to pretend that the cows belonged to the respondents in order to defeat the course of justice.

This being the first appeal, this court has the duty to examine all the evidence tendered in the trial court afresh, analyse it and arrive at its own conclusions but always bear in mind that it neither saw nor heard the witness testify. I am guided by the decision of Selle & Another Vs Associated Motor boat Co. Ltd.(1968)EA123 where the court said;

*“ This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court.... is by way of retrial and the principles upon which this acts in such appeal are well settled. Briefly put, they are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”*

PW1 Daniel Karanja, the legal representative of Mutitu Muraya Muchemi, the 1st Respondent, testified that on 22.10.2017, his sister Agnes Wambui called to inform him that the applicant's officials had gone to their father's home at Nyandarua/Kanyagia/13 (No.596 & 597), found their father outside the house and demanded from him money owed by Agnes which they did not specify; that their father denied knowledge of the debt but one Michael Nderi pushed the father who was then aged 75 years old to the house, locked him in the house and took two heifers and two bulls which belonged to their father.

PW2 drove home and on the way, realized that the people had gone to his father's other farm, Nyandarua /Muruai/426. He arrived at the said farm at 1.30 a.m. found his brother in law, David Gichuka (2nd respondent) who informed him that his seven milk cows had been taken away.

He followed the appellants' officials and recovered four of the cows from the officials out of the seven and took them to one Henry Njeru, his father's friend, but some women from the 1st appellant Group followed and took the cows away. He denied that the father was party to the agreement between his sister Agnes and the appellants.

According to PW1, the sister Agnes lives in a rented house in Subukia while the 2nd respondent lives next to the father's land which he takes care of and he also had cows.

PW3 David Gichuka Kamangu lives at Muruai, plot 1259. He was away at church on 22.10.2011 when he was informed that people had taken some animals from his home. He rushed home and confirmed that indeed 7 cattle had been taken and had left six. He was informed that those who took the cattle were with Agnes Wambui. He reported to the police. He had been taking care of his father in law's farm and cattle and his own cattle; that some of the cattle that were taken were for milking. He produced evidence that he used to deliver milk at a dairy while some of the animals were in calf. He lost all the cows that were taken away.

PW4 Agnes Wambui testified that she was a member of Kwihokana Self Help Group whose members could borrow money from Kenya Women Finance Trust, 2nd appellant; that she took a loan of ksh.10,000/= which she repaid. She then took a loan of ksh.100,000/= in 2011. She repaid a total of 51,800 and was left with a balance of ksh.125,000 including interest.

PW3 had savings of ksh.10,000/= with the group and could get a loan 10 times your savings. One only needed an Identity card and a guarantor from the group and one outside the group. She got one guarantor from the group and she used her brother's identity card as guarantor though he did not sign for the loan. She gave security of her sewing machine and told the Group that she had five head of cattle at her father's farm which were enough to cater for ksh.100,000. She defaulted in repayment from August upto October when the appellants' officials and about 40 people plus brokers went to the father's home; that Maina Nderi of the 2nd appellant informed her why they had come. He informed her father that they had come for their money but he denied knowledge of the debt. PW3's father was taken into the house and locked up. The brokers took 4 head of cattle, 2 bulls and 2 heifers to the gate where they were sold. The group went to their father's other farm where David Gichuka was taking care. They took 7 cattle and left 6 cattle and sold them at the road.

PW3 said that though she had pledged a sewing machine worth ksh.20,000/= and 5 head of cattle, the officials never went to see them. She denied using her father's cattle as security nor did she use the 2nd respondent's; that the appellants never took the sewing machine. She denied being told how much the cattle were sold for; that two of the cows she pledged as security died whereas she sold three to repay the loan.

Steve Collins Gitonga(DW1) a branch manager of KWFT Bank(2nd appellant) confirmed that they financed Kwihokana Self-Help Group where Agnes was a member; that she borrowed ksh.100,000 from the group which was dispatched in December 2010, payable in 18 monthly installments; that a member of the group had to guarantee the loan; that the borrower had to prove capability to repay and a guarantor who was not a member of the group; that one had to provide a security that was more than the loan; that Agnes was guaranteed the loan by the brother John Muchemi Mutitu; that Agnes' security was household goods and livestock, while the brother also pledged livestock; that Agnes defaulted for five months and members contributed money to assist her repay but gave up; that the bank and Group members visited Agnes to realise the loan and it was settled through sale of Agnes' cattle; that before advancing the loan, members visited Agnes' home to ascertain that the livestock belonged to Agnes and the guarantor.

PW1 noted from the report given to him by a former manager of the area that the sale was regular. He said that both Agnes and the guarantor were given notice. He confirmed that they never went to see the cows but that Agnes pledged 5 mature cows including what the guarantor pledged; that the 11 cows were sold and realized ksh.143,000/=; that no auctioneers were used; He said that Agnes was present when the cattle were impounded in her father's compound where both Agnes and the guarantor lived.

DW2 Mary Wambui Ndungu, the treasurer of Kwihokana Women Group recalled that Agnes applied for a loan of ksh.100,000/=, that the members who lived near her visited her father's home where she lived and saw the cattle; that her brother, the guarantor offered two cows as security; that Agnes paid for some months and defaulted.

Even after she was given time to repay, she was unable and they went to recover the security. At the home, they found Agnes' father whom they informed why they were there. The father started fighting with the auctioneers who had come to take the cattle and when he ran into the house to look for a panga, he was locked there. They took 4 calves, the old animals were not there as Agnes said they had been taken to another farm where Agnes chose for them five head of cattle and two for her brother. They took the cattle to the auctioneers and agreed on the price; that they sold the cattle for 143,000/= which repaid the loan and the incidental costs. She admitted that they were not able to tell which cattle Agnes pledged.

#### The appellants submissions;

On grounds 1 – 7, the appellants' counsel, *Sichangi & Co. Advocate* submitted that the respondents did not prove ownership of the cattle; that proof of ownership of land where the cattle were found is not proof of ownership of the cattle; that one of the parcels was used in grazing land and the burden of proof lay on the respondents to prove ownership; that the Respondents never objected to the impounding of the cattle; that PW3 never objected to the process; that PW2 confirmed that it is PW3 who pointed out the cattle to be impounded. Counsel relied on section 107 and 109 of the Evidence Act; that the respondents did not discharge the burden placed on them to prove on a balance of probabilities that the cattle were theirs and that the court tended to shift the burden on the appellants. Counsel relied on the decision of *Arun C. Sharma V Ashana Raikundalia T/A Raikundalia & Co. Advocates (2014)eKLR*, where Justice Gikonyo dealt with such a case of attachment of cattle.

Whether attachment and sale of cattle was proper and lawful. It was submitted that after the lawful process of attachment, the Respondents laid claim after the cattle were sold; that their claims were belated and that is why they filed the suit for damages, for wrongful attachment of the cattle; that PW3 having defaulted in payment and notice having been issued to PW3, the appellants had a right to attach and that the attachment and sale of the cattle were lawful; that the trial court erred in finding that the attachment and sale were unlawful.

Whether the loss and damage was due to the attachment and sale of the cattle. Having submitted that the attachment was lawful, the appellants added that in fact it is the appellants who have suffered loss when PW3 defaulted; that the respondents should not have used their source of livelihood as security; that the documents used to prove their case were copies and there was therefore no loss proved and that they cannot be compensated for their own neglect; that there was no payment invoice proving loss of ksh.16,800/= per month; that though special damages were pleaded, they were not proved and there was no proof of loss of ksh.410,000/=.

Reliance was made on William Ndinya Omollo V Come Con Africa Ltd(2004)eKLR; Boston Wachira Kamangu V Taifa Society Ltd & Another(2016)eKLR, where courts stressed the fact that special damages must be pleaded and proved.

The Respondents Submissions:

On ground (i) the Respondents' counsel Wahome Ndegwa & Co. Advocate submitted that as regards the allegation that special damages were not proved, it was not denied that 11 cattle were attached, 2 bulls and 2 heifers valued at about Ksh.60,000/= while the 2nd respondent own cattle were attached with each valued at about 50,000/= which totaled 350,000/= and there was no contrary value given by the appellants. Counsel also argued that the 2nd respondent produced evidence to prove that he was selling milk and that two of the cows were in calf and he had receipts to prove it.

On ground 2 it was submitted that the respondents proved that the properties on which the attachment was done belonged to them and not that of PW3, the defaulter; that although PW3's father objected to the attachment, he was locked up in the house and that evidence was corroborated by PW2; that the said act should have prompted the appellants to verify whether or not the said cattle belonged to the debtor; that the appellants did not issue a proclamation to enable the respondents challenge the attachment in court; that since the respondents were in possession of the cattle there was a rebuttable presumption that the cattle belonged to them and it was upon the appellants to prove that the cattle belonged to PW3 and her guarantor; that DW2 even admitted that they never confirmed that what was attached is what had been pledged as security by PW3 and the guarantor .

Further to the above, DW2 admitted that they never confirmed whether the cattle that were attached are those that belonged to PW3. In the second home, they found cows that looked alike and they could not tell which one belonged to PW3. It was also submitted that when PW1 took possession of 4 cattle, they were again taken by the appellants. It was clear that ownership was disputed and the appellants should have made further inquiry. It was submitted that it was the duty of appellants to ascertain ownership of the cattle; that the respondents produced evidence to prove ownership of the cattle( *exhibit 4a&b*) Counsel relied on the decision of Garishon Christopher Usher V James Omari (2014) eKLR a case which involved attachment of cattle. He argued that grounds 2 – 7 must fail.

On ground 8 it was submitted that there was a protest to the attachment. PW3 denied having pointed out the cattle to the appellants because even in the second home they could not tell which were PW3's cattle meaning she did not point them out for the appellants.

Counsel submitted that grounds 9 – 13 were not argued and are deemed to have been abandoned though they had no substance.

I have considered all the grounds of appeal and the submissions of counsel. The first issue I will deal with is whether the attached cattle were proved to belong to Agnes Wambui(PW3)and her guarantor. The attached cattle were found in parcel No. Nyandarua/Kanyagia/13, (Nyandarua/Kanyagia 596 and 597) belonging to the 1st respondent and Nyandarua Muruai/426 belonging to 1st respondent but bordering the 2nd respondent land plot 1259. There is uncontroverted evidence that the said parcels belong to the 1st respondent who occupies them and the appellants admitted to have attached the cattle from both parcels.

According to DW2, the borrower(PW3) had offered 5 cattle as security and her brother had offered two cattle. It was the duty of the appellants to ensure that they attached cattle that had been offered as security. DW2 who was present during the attachment did admit that they did not confirm in the records whether the cattle that were attached were the ones pledged. In fact, there is no evidence that at the time the cattle were offered as security by PW3, that the appellants took note what they looked alike. They could have had them marked for future reference or even noted the colour which they did not do. DW2 further stated that "*cattle look like alike. We could not know the cattle Agnes had pledged*" In the loan agreement, the cattle pledged as security were merely named as 2 Ashers, 1 Jersey and 2 Fresian. The appellants should have been guided by that description but they did not bother.

From the first home, the appellants attached 4 calves aged between 4 – 7months old. PW2 admitted that PW3 had not pledged calves as security. Even as the appellants sold off the calves they were aware that those were not the cattle that were pledged as security.

The appellants contend that it is PW3 who pointed out the said cattle. As regards the calves, PW3 cannot have claimed them to be hers because once the appellants declared that they had gone to claim for a debt, PW3's father objected and resisted until they had to lock him in the house. As for the attachment on the second parcel, although DW2 said they were with PW3 who pointed out the cattle, PW1 later intervened and objected to the attachment and took away four cows drove them away but the appellants followed and took possession of them again. Besides, PW3 cannot have pointed out any cattle to the appellants because DW2 said that the cows looked alike and they could not tell whether they were the ones Agnes pledged. It just means that Agnes did not show the appellants what cattle to attach. Further, DW2 said she was not from the area and therefore could not tell which cattle were whose. In his evidence PW2 had photographs of calves left by their mother which were attached which is further proof that the cattle were his.

There is no evidence that the local administration was consulted as they might have been helpful in identification of PW3's cattle or the guarantor's. I agree with the Respondent's submission that it was the duty of the appellants to establish ownership of the cattle before embarking on attaching them. Since there was objection to the attachment by PW1 and his father, the appellants had a duty to enquire and ascertain whether the cattle actually belonged to Agnes(PW3). I find that grounds 2 – 5, and 8 must fail.

The next issue I will deal with is whether the attachment and sale were lawful and legal:

I have found earlier in this judgment the four calves attached from the PW1's father's home were not part of the security pledged by PW3. The owner protested but was locked up in the house. PW2 also explained that he used to look after his father in law's cattle and lived next door to the father in law's land. PW2 was not at home when the cattle were taken away and could not have objected to their being driven away. PW1 then tried to stop the attachment but the four cattle he had rescued were taken back by the appellants again. As admitted by DW2, as soon as the cattle were taken from the Respondent's home they were sold to brokers or people they called auctioneers.

First of all, for a proper attachment to be undertaken, a notice should have been issued to the debtor(PW3). Although it was alleged that PW3 was given notice of attachment, none was shown to the court. After notice, the appellants should have gone to proclaim the cattle to be attached. The period of proclamation would have enabled the debtor/guarantor to pay up or the owners of the cattle to file an objection to the attachment. Although it was alleged that an auctioneer was involved, it was not disclosed who it was. Whereas DW1 said there was no auction, DW2 said there was but the said auctioneer was not disclosed. I believe they were what PW3 referred to as brokers.

The process of attachment denied PW3 and the guarantor a right to be heard and in my view the process was skewed, very unfair and reckless.

In addition, what was realized from the sale by the 'alleged' auctioneer was not shown to the court. No accounts were rendered by the said auctioneer. It was admitted by DW2 that Agnes had repaid part of the loan and only ksh.68,000/= was outstanding. Yet when the appellants came to attach, they took away 7 grown cows and 4 calves. The security pledged for the whole loan was 7 cows. That goes to confirm how the whole process was unfair and skewed.

The appellants have challenged the award of special damages for loss of the cattle and loss of earnings.

These being special damages, it is trite law that they should be specifically pleaded and proved and proved. This has been stated in many decisions including William Ndinya Omollo... (supra): In Zacharia Waweru Thibu V Samuel Njoroqe Thuku (2016)eKLR.

Court stated

*‘If I were to explain or define special damages to a lay man I would say’ they are a reimbursement to the plaintiff/victim of the tort, for what he has actually spent as a consequence of the torturous act(s) complained of”*

*“This point cannot be overstressed; that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence that he has actually spent the sum claimed.*

*In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt for the payment will meet the test”*

In Cecilia Mwangi & Another V Ruth Mwangi (1997) eKLR, it was held *“Loss of earnings is a special damage claim. It must be specifically proved,”*

The 1st Respondent's 4 calves were attached and sold. According to the appellants, they were sold for ksh.6,000/= totaling ksh.24,000/=. However, as noted the sale was not open or competitive and the appellants never availed evidence to prove the actual sale price.

The 1st Respondent claims that each calf would have cost 15,000/=. The 1st Respondent could not produce documents to support the cost because had the cattle been proclaimed or sold in an open competitive way, they would have known the actual price. The calves were disposed of hurriedly and did not give the 1st Respondent an opportunity to have the calves valued.

The trial court had observed that the appellants did not challenge the Respondent's evidence and I will agree with the Respondent's claim of ksh.15,000/= per calf and hence the 1st Respondent is entitled to a total of ksh.60,000/= for the 4 calves.

In respect of the 7 cattle that belonged to PW2, he valued each at ksh.50,000/=. DW1 said all the 11 cattle were sold for ksh.143,000/=. Since the 4 calves were allegedly sold for ksh.24,000/=. It means that the 7 cattle were sold for 119,000/= meaning that each was sold for about 17,000/=. It was said that the cows were Friesian with some being milked and some in calf. PW2 produced receipts to that effect. As observed above, the appellants hurriedly sold off the cattle without according the Respondents an opportunity to have them valued. I will find like the trial court did, that there is no other evidence to controvert the Respondents as to the value of the cattle, and I would have no reason to interfere with the award.

The 2nd Respondent claimed ksh.16,800/= per month for loss of earnings as he used to sell milk to Nyala Dairy. He produced evidence to support the fact that he delivered milk and had received payments as follows;

June - 14,4458/=

July - 15,905/=

August - 10,735/=

September - 14,733/=

Since the payment was not constant, I would adopt an average figure of 14,000/= per month. The appellants did not avail evidence to the contrary.

The appeal succeeds to that extent. I enter Judgment for the Respondents against the appellants as follows;

1. Special damages of Ksh.410,000/=

2. Loss of income of ksh.14,000/= per month with interest at 14% Per Annum from the date the cattle of the Respondents were attached on 22/10/2011 up to the date of judgment.

3. The Respondents will also have costs and interest at court rates.

**Dated, Signed and Delivered at NYAHURURU this 7th day of October, 2020.**

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms Khalayi for appellant

Mr Maina Kairu for Respondents

Henry Court Assistant