



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 137 OF 2016

JACCINTA WANJIRU RAPHAEL T/A JESIMU AGENCIES....APPELLANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

(Being an appeal from the Ruling delivered on 4th March, 2016 by Hon. Rachael Ngetich (Chief Magistrate) Milimani Commercial Courts in CMCC No.345 of 2012)

JUDGMENT

1. Vide a plaint dated 26th January, 2012 the Appellant (Plaintiff) sued the Respondent (Defendant) seeking judgment as follows:

(a) An order compelling the Defendant to immediately return the Plaintiff's goods of trade unconditionally.

(b) Permanent injunction restraining the Defendant by itself, its agents and servants from harassing the Plaintiff and or in any other manner interfering with the Plaintiff's legal business.

(c) General damages

(d) Costs of the suit

(e) Interests on damages and costs,

(f) Any other relief as this honourable court may deem fit to grant.

2. It was pleaded that the Plaintiff had purchased scrap metal sheets from the Defendant and also from Mabati rolling mills. The Plaintiff's complaint was that the Defendant had moved to the Plaintiff's business premises and confiscated the said goods.

3. Simultaneously with the filing of the plaint, the Plaintiff filed the Notice of Motion dated 26th January, 2012 seeking temporary orders seeking stay of sale of the Plaintiff's goods and injunctive orders restraining the Defendant from harassing the Plaintiff or in any other manner interfering with the Plaintiff's business.

4. The application was opposed. It was stated in the replying affidavit that scrap metal sheets worth Ksh.1,572,542/= were removed fraudulently by one Mr. Miano, a business partner of the Plaintiff, without any payment being made. That the case was reported to the police and the goods traced in the Plaintiff's premises. That the goods ended up as exhibits in a criminal case and that therefore the commissioner of police ought to have been enjoined herein.

5. In a ruling dated 9th March, 2012 the lower court held that the Plaintiff had established a *prima facie* case and allowed the application. The Defendant was ordered to release the Plaintiff's goods and not to interfere with the Plaintiff's business.

6. On 9th May, 2012 the Defendant filed a statement of defence and subsequently amended the same on 9th May, 2014. The defence denied the Plaintiff's claim. It was pleaded that the Plaintiff had through fraud obtained the goods from the Defendant's premises. The Defendant stated the particulars of fraud on the Plaintiff's part.

7. The Defendant subsequently filed the Notice of Motion application dated 21st October, 2015 seeking orders that there be an interlocutory

injunction restraining the Plaintiff, its agent, servant and/or any other person from in any way from interfering with the Defendant's possession of the goods subject of this suit pending the hearing and determination of the suit. It was stated in the grounds and the affidavit in support of the application that the goods in question had been held by the police as exhibits in Makadara Criminal Case No. 3282 of 2015 wherein the Plaintiff was the accused. That following the conclusion of the criminal case the Defendant took possession of the said goods in exercise of its right of *lien* since the goods had not been paid for. That the Plaintiff has written to the DCIO Makadara claiming the said goods and demanding the release of the same. That the Defendant also wrote to the DCIO and explained his fears but is apprehensive that the goods may be released to the Plaintiff.

8. The application was opposed. The Plaintiff filed the grounds of opposition dated 27th October, 2015 which states as follows:

“1. That the application has been brought in bad taste to derail and prejudice the due process of this honourable court and further to defeat the cause of justice.

2. That the same is frivolous, vexatious and brought in bad faith, is time buying tactic with the intention of delaying release of goods to the Plaintiff/Respondent which were exhibits in criminal case No. 3282 of 2012 at Makadara law courts.

3. That the application is an abuse of the court process.

4. That the Defendant/Applicant has brought the application solely for the purpose of frustrating the Plaintiff/Respondent by obstructing justice.

5. The application is an afterthought.”

9. The Plaintiff also filed a replying affidavit. It is stated that the application is meant to obstruct the release of the Plaintiff's goods which are in police custody. That the court in the criminal case made orders for the release of the goods to the Plaintiff/Appellant.

10. In a ruling delivered on 4th March, 2016, the lower court made orders for the release of the goods to the Plaintiff on condition that the Plaintiff deposit in court a sum of Ksh.1,462,860/= before the release of the goods in question.

11. The Appellant (Plaintiff) was dissatisfied with the ruling delivered on 4th March, 2016 and appealed to this court on the following grounds:

1. The learned trial chief magistrate erred in law and in fact in assuming appellate jurisdiction by adding a condition for the release of the goods contrary to the Orders sought.

2. The learned trial chief magistrate erred in law and in fact in believing in whole that testimony of the Defendant and disregarding the testimony of the Plaintiff/Appellant.

3. The learned trial magistrate failed to properly and/or at all evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.

4. The trial chief magistrate erred in law and in fact in failing to appreciate that the subject goods were used by the prosecution as court exhibits in criminal case and the Defendant/Respondent could not subsequently claim right of lien over them.

5. The trial chief magistrate erred in law and in fact in failing to appreciate that the Plaintiff/Appellant had been acquitted in criminal case Number 3282 of 2012 a Makadara law courts hence the allegations of fraud could not suffice.

6. The trial chief magistrate erred in law and in fact in failing to appreciate that there was valid order by Makadara criminal courts for the release of the subject goods which were used as exhibits in criminal case No. 3282 of 2012.

7. The trial chief magistrate erred in law and in fact in failing to appreciate that the appeal to wit civil appeal No. 114 of 2014 Milimani had been withdrawn with costs to the Plaintiff.

8. The trial chief magistrate erred in law and in fact in considering extraneous issues which were not placed before her.

9. The trial chief magistrate erred in law and in fact in failing to appreciate that there were valid court orders in place for the release of the goods earlier issued by the honourable court.

10. The trial chief magistrate erred in law and in fact in disregarding the Plaintiff's/Appellant's submissions.

12. The appeal was canvassed by way of written submissions.

13. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

14. The orders given by the lower court for the release of the goods to the Appellant have been exhibited herein. The same clearly reflect that orders were made on 15th August, 2013 for the goods in question to be released to the Appellant. The Respondent ought to have appealed from the said orders if it was dissatisfied.

15. It appears the Appellant’s efforts to have the goods released to her by the DCIO did not succeed, hence the suit herein. In my view, it was correctly held in the ruling of the lower court dated 9th March, 2012 that the goods in question be released to the Appellant unconditionally, taking into account the orders in the criminal case still remain in force.

16. In the upshot, I find that the appeal has merits. Consequently, I allow the appeal with costs.

Dated, signed and delivered at Nairobi this 4th day of Dec., 2018

B. THURANIRA JADEN

JUDGE