



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3174 OF 1985

W.N. KIMANI

T/A KENCITY AUCTIONEERS.....PLAINTIFF

VERSUS

THE CHIEF CITY INSPECTORATES

SUPERITENDENT & ANOTHERS.....DEFENDANT

JUDGEMENT

Plaintiff pleads that he was licenced by second defendant to carry on the business of storage of auction goods and sales went at plot No. 209/940 but the first defendant as agent of the second defendant unlawfully trespassed into the plaintiffs business premises on 2.10.85 and carried away all the goods shown in paragraph 5 of the plaint. Those goods include timber concrete mixer 21 drums of gas oil, five motor vehicles and items of furniture. The Value of the goods is not shown but my rough addition shows that the goods are valued at Kshs 1,903, 309/= loss of user of the five motor vehicles and the concrete mixer on a daily rate is also pleaded. But the reliefs sought in the plaint are:-

- (a) Permanent injunction to restrain defendants from further interfering with or entering into plaintiffs business premises
- (b) Return to plaintiff all the seized goods.
- (c) Damages with interest at court rates.
- (d) Costs of the suit
- (e) Any other or further relief as the court may deem fit.

Plaintiff filed an interlocutory application on 7 .10.85 for release of the seized goods. A consent letter was filed in court on 1.11.85 by which the advocates for the parties agreed that the seized goods be released to the plaintiff.

A consent order then order was recorded to that effect by the Deput Registrar on 7.11.85 but apperents the goods were not released. In answer to a further application defendants contended that the consent order was recorded by error and without their instructions as the goods had already been released to customs and exercise department.

This suit was partly heard by Shields Judge who has now left the Judiciary. Mr. Justice Shiels had heard the plaintiffs case and when the defendant case started, defendants applied 12 adjournments to

amend the defence. The amended defence was filed on 23.2.95. In paragraphs 6 and 7 of the Amended defence defendants plead that most of the items taken away were subsequently released to their lawful owners and that part of the items not claimed by lawful owners were sold by public auction in accordance with General Nuisance - By laws 1961 - The defendants advocates were not however also to get defendants witnesses and therefore no evidence was offered in defence of the plaintiffs claim plaintiff counsel in her submissions states that plaintiff should be awarded shs 3,232,489/70 being the full value of the lost goods and a further shs 500,000 as general damages for convenience and loss of business. Defendants counsel did address the court on the issue of liability - denying liability on the issue of damages she submits that damages should not be allowed awarded because plaintiff had contravened the conditions of his licence by illegally erecting a structure at Kenya Bus Station car park thereby causing obstruction to vehicles and human traffic.

On the issue of liability, plaintiff gave evidence as PW2. He called one witness - Joseph Ngugi (PW1) From their evidence I am satisfied that plaintiff had been licenced by second defendant to operate a temporary storage of auction good and sale of goods. On the premises in accordance with a licence No. 2723 dated 2.5.85 There is also credible evidence that the defendant entered into the premises on 2.10.85 destroyed the structure and seized and carried away the goods in paragraph 5 of the plaint. Although defendants plead in para 4 of the Amended defence that plaintiff was in breach of the conditions of the licence and that defendants action did not amount to trespass no evidence was called to support the defence. I am satisfied that plaintiff has proved on a balance of probability that the defendants action was unlawful and amounted to trespass and wrongful seizure or conversion of the goods stored in the yard. Consequently I find that defendants are liable in damages to plaintiff.

I have problems in assessing damages. As I have already shows the main relief sought in the plaint is the return of goods and general damages. Although plaintiff pleaded the value of goods and the loss of user, the total value of the goods is not shown in the plaint and there is no specific alternative prayer for payment of the value of the goods. Had plaintiffs quantified his claim and asked for shs 3,131,489/70 now claimed as the full value of the goods he would have been required to pay enhanced court fees for that claim. Similarly no loss of user was claimed as such as a relief. As I have shown abovem my addition of the values of the goods shown in paragraph 5 of the plaintiff gives me a total of shs 1.903,309/= I do not know how the figure of shs 3.131,489/70 has been arrived at. The court has not jurisdiction to grant a relief which is not claimed in the plaint.

The claim for the value of the goods is further compounded by the fact that plaintiff was an auctioneer and court broker. It is clear from the evidence of PW1 that some of the goods seized by defendants were goods belonging to other people which plaintiff had attached as court broker in various suits some of the goods like timber belonged to plaintiff. The goods belonging to other people were not specified. Defendant pleads that some of the goods were claimed by owners and released directly to the owners and some goods were released to the Commissioner of Customs and Exercise. Plaintiff admitted that vehicles with Uganda Registration numbers would only have been released to the Commissioner of Customs and Excise I agree with the law as stated that plaintiff as a bailee who is in possession has a right to recover the value of goods taken from his possession. But on the principle of restituo integram plaintiffs is entitled to be compensated for the financial loss that he has actually suffered. He cannot enrich himself consequently in respect of the goods, goods belonging to others which he was holding as a court broker or auctioneer plaintiff should have disclosed whether or not the owner is made a claim to the defendant and the goods directly released to them as claimed by defendant. He should also have disclosed if he has incurred any personal liability in favour of the owners of the seized goods. In the above circumstances I am unable to award special damages in the form of pecuniary loss - that for the value of the goods.

However, one of the reliefs sought in the plaint is general damages in paragraph (C) of the reliefs in the plaint. I have already found defendants liable to pay damages for their unlawful action. They had licensed the plaintiff but then trespassed into his premises demolished then and seized goods. This was a callous act and I would award shs 200,000 as punitive damages.

Consequently, I enter Judgment for plaintiff for shs 200,000 being damages with costs of the suit and interest on damages at court rates from the date hereof.

E. M. Githinji

Judge

10.12.98

Miss Wangari for plaintiff present

Mis Kittony absebt

E. M. Githinji

Judge