Atogo v Agricultural Finance Corporation & another

Court of Appeal at Nakuru

October 23, 1991

Hancox CJ, Masime JA & Omolo Ag JA

Civil Appeal No 165 of 1989

(Appeal from the judgment of the High Court at Eldoret (Aganyanya J)

dated 11th August 1989 in Civil case No 163 of 1987)

October 23, 1991 the following Judgments were delivered.

Hancox CJ. On the 15th October, 1987, Regent Auctioneers who are official court brokers, seized a Datsun pick-up vehicle no KLR 903 belonging to the appellant, who was the plaintiff in the High Court. They did so on the instructions of the Agricultural Finance Corporation (the AFC) who are the first respondents to the appeal. They are a statutory corporation with a separate corporate existence established the Agricultural Finance Corporation Act Cap 323. Under section 19 of the Act the AFC is empowered to make loans to farmers, subject to section 14(3) (which is not material here) upon such terms, *inter alia*, as to security or otherwise, as the board shall think fit.

According to their only witness, David Kirwa Murei, who was the Branch Manager at Turbo, one Ojwang Atogo Hawala, said to be the stepbrother of the plaintiff, was their "loanee", meaning the borrower in ordinary parlance, who had defaulted on his loans, so he sent their loans officer, a Mr Obot, to go and inspect the stock on the farm in question, where the appellant's car happened to be on that day. Mr Obot completed an "Arrears follow-up report", which purported to show the various debit balances on the borrower's accounts with the AFC, and identified certain assets, including that which was described as

> "1 Farm Pick-up KLR 903"

which the appellant had said was so profitably employed by him as to produce a return of shs 90,000/- per month in hire income. The list of assets is headed by the remark

> "All loans unsecured"

and yet, in his evidence the manager said that AFC had registered a chattels mortgage over the loose assets, including this pick-up. This was one of many inconsistencies in the respondent's case to which Mr Onyinkwa, appearing on behalf of the appellant, pointed in the course of his submissions.

Mr Njuguna, on behalf of the respondents, equally drew attention to several differences in the other side's case, notably that under cross-examination the plaintiff said first that he had received the log book from Nairobi two weeks after he had sent the transfer documents, namely 25th May, 1987, and yet in the next breath said that it was delivered to him in 1988. Moreover, said Mr Njuguna, how could it be that this agreement of sale, Ex 3, dated 25th May, 1987, showed the vehicle was purchased from one Kiptum

Kipchumba David, who did not otherwise feature in the proceedings and whose name does not appear anywhere on the Log Book, which had been provided by the appellant himself?

Again Mr Njuguna asked why did the Insurance Renewal note, Ex 6, not mention the pick-up, and, even if it did, the premium cover to which it referred related to the year 1989/1990; and why was there no indication as to the insurance cover for it for the intervening period? Finally it was a surprising coincidence that the vehicle happened to be on the "loanee's" farm at the time of the attachment.

All these matters Mr Njuguna argued, led the judge to the justifiable suspicion that both Hawala and the appellant knew that there was an impending attachment against Hawala, and had concocted the arrangement that the pick-up nominally belonged to the appellant so as to frustrate it, and to conclude that there had been collusion between the two. A further suspicious circumstance was that the vehicle was initially insured in Hawala's name, for which the appellant had given a palpably false explanation.

This might have been all very well if the case for the defence had been pleaded or put forward in this way. But from the outset the AFC maintained that the plaintiff, that is, the appellant, was its "loanee", that the appellant was in default and that the AFC was fully justified in seizing the pick-up, and (in the Notice of Objection to the injunction application of 2nd November, 1977) that the AFC was justified:

> "both in equity and at law to seize the assets of (the appellant) as (the AFC) holds a first charge on the assets of (the appellant) who has defaulted in payment of (AFC's) loan, vide Account No 013896.

It is manifest that this statement must have been wholly wrong, because the details of all the account numbers commencing 013896 in Ex D1 relate to Hawala and not to the appellant; even superficial checking would surely have revealed that fact before the defence was filed. Thus the case for the AFC proceeded on a wholly false premise, one which, indeed, was belied by their own evidence. Neither was it ever put to the appellant in cross-examination that he and Hawala had acted in collusion so as to deprive the AFC of its security.

While, therefore, the judge, who saw and heard the witnesses, may, on his own evaluation of the evidence, have formed certain suspicions that the appellant and Hawala had so organized their affairs that the vehicle could be passed from one to the other as it suited them, I do not think, with respect, that on the pleading and evidence as they stood, he was entitled to non-suit the appellant on this ground. Up to the very last moment the AFC was maintaining that it was entitled to attach the appellant's car as he was the defaulting loanee, when the evidence in their possession, showed that this was not so.

In those circumstances I would hold, so far as the AFC is concerned, that they were not entitled in law to attach the appellant's vehicle for Hawala's debt and that they wrongfully instructed the brokers to do so. It follows that in my judgment the appellant should have the declaration claimed in paragraphs 8 and 9 of the plaint and in prayers (a) and (b) thereof respectively. I respectfully disagree with the learned judge that the appellant had failed, in effect, to get to first base, and was thereby disentitled to the reliefs he claimed.

What are the legal consequences of that finding? There can be no doubt that a wrongful taking of another person's goods constitutes the tort of conversion. It is analogous to the series of cases, which occur with disturbing frequency and with which this Court is becoming increasingly concerned, where the wrong person's goods are attached in execution of a court warrant. It may now be taken as settled law, laid down by this Court, that it is an actionable trespass wrongfully to set the law in motion so that the wrong goods are seized, or the wrong person is arrested, see *Blassio Simiyu v Vincent Sinino* [1984] 1 KAR 630 at p 633 and *Aroni Sure v Gesare Nyamaiko* [1984] 1 KAR 1145 at p 1151. The only difference (on this aspect) between the two cases was that in the former malice was stated to be an ingredient of the action, whereas in the latter wrongfulness was sufficient. In the instant case Mr Onyinkwa has submitted that negligence, in the sense that the instigator or the broker failed to check up and take ordinary precautions to ensure that the item attached was that of the debtor of loanee is sufficient for the tort to be committed. He referred to certain portions of his cross-examination of the manager which, he said, showed, despite

being mislead by the loanee, that Mr Obot was not careless and acted in good faith.

As this Court said in *Zablon Mariga v Morris Musila* [1984] 1 KAR 507 at p 512 Kenya is developing its own common law, independently of other jurisdictions, and its rules will be made, and developed according to the circumstances and the interests of its inhabitants. For my part I consider that it is actionable to set in motion a process of attachment (even though it is seizure under the provisions of a loan agreement and not under an execution warrant issued as a result of an order or a decree of the Court), without observing rules of ordinary prudence by ascertaining the true identity and ownership of the property to be seized, without the necessity for proof of express malice.

In my judgment in the instant case there was extreme and actionable negligence exhibited by the AFC in ordering the seizure of the vehicle KLR 903, which did not belong to its loanee. Under the Traffic Act, cap 403 a log book is evidence of ownership unless the contrary is proved, and ordinary prudence would dictate that the log book should at least be inspected, a fact admitted by Murei in cross-examination.

What, then, of the second respondents, Regent Auctioneers? Ought they to be condemned in the same way, since it can be said on their behalf, as indeed it was, in paragraph 6 and 7 of the joint defence, that they were only obeying instructions: that they were bound to carry out those instructions and that the vehicle was indicted to them by the loanee as his property. The answer is, I think, that they, too, did not check up on the ownership of the vehicle and accepted the word of Hawala, (if that hearsay evidence is to be accepted) at face value. They are not protected as they would be if they were executing court process by virtue of section 6 of the Judicature Act Cap 8. The reason for that degree of protection is that the sheriff or bailiff is bound to execute a court order. He has no option but to do so. Therefore, he has to have protection. But that does not apply, in my judgment, to the same extent where the attachment is, if I may so call it, a voluntary one. I say this despite the wrong indication in the proclamation, Ex 4, which would mislead the reader into thinking that there had, indeed, been an order of the Court. In such a case the duty to take ordinary care and to exercise ordinary prudence applies and if the brokers attach the wrong goods they do so at their peril: the act of the agent is, in this sense, the act of the master and vice versa. I would therefore also hold that the second respondents are liable for wrongful attachment. But for what are the respondents, the AFC and Regent Auctioneers liable? There is a claim for special damages as well as general damages. The appellant in evidence gave the grotesque figure of 1,500/- to 3000/- per day that he had lost as a result of not being able to hire out the vehicle for seven months. That comes to between 45,000/- and 90,000/- per month. There was nothing in the plaint to suggest that these were the kind of special damages envisaged. If there had been perhaps the respondents would have been more careful in their defence.

This Court has said again and again that special damages must be pleaded and proved with particularity. See *Idi Ayub Omar Shabani v Nairobi City Council & Another* [1985] 1 KAR 681 Special damages are those ascertainable and quantifiable at the date of the action. Despite the line of authority, notably the recent case of *Kenya Bus Services & Another v Frederick Mayende* [1990] Civil Appeal No 34. Mr Onyinkwa insisted that the item for the loss of hire which the appellant claimed fell into the category of general damages. I say unhesitatingly that he was wrong in his submission. Apart from anything else it is unlikely that a farm pickup, as it is described in the Arrears Report, could have such a colossal earning capacity.

In these circumstances I would hold that the appellant has failed to prove anything in the nature of special damages. He is in judgment entitled to damages by way of general damages only. As I am not persuaded that in this case he should receive substantial damages, I think he should be entitled to nominal damages only. Nominal damages used to be assessed at around 40/-. I think that is unrealistic today. I would award him shs 2000/- by way of general damages jointly and severally against both respondents.

I would make no order for costs.

Masime JA. I have had the advantage of reading in draft the judgment of the Honourable Chief Justice and I agree that this appeal ought to be allowed with costs.

The learned trial judge clearly misapprehended various aspects of the evidence before him and consequently made wrong findings thereon. There was no evidence to support the judge's findings that

> (1) the loanee included the vehicle KLR 903 as security for loans he had taken from the defendant AFC;
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> (2) the log book contains (sic) that the vehicle belongs to Thomas Okwany Atogo and only have issued after Hawala knew the impending attachment and I am satisfied previous to this attachment this vehicle was owned by the said Hawala;
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> (3) the vehicle was not in his (the plaintiff's) name prior to the institution of the suit;
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> (4) there has been a collusion between the loanee and his brother the plaintiff to deprive the AFC the security properly given to it by the loanee.

On the contrary there was evidence

> (1) that the appellant was registered as owner of the vehicle with effect from 27th April, 1987 long before the attachment thereof on 15th October, 1987;
>
> (2) that the AFC loan had been given to a third party as an unsecured loan and that the first time the motor vehicle featured was when the AFC loans officer, Mr Obot went to the loanees farm on 25th August, 1987 to take stock of the loanees assets;
>
> (3) that the suit was instituted in November 1987 long after the vehicle had been registered in the appellant's name in April 1987.

Further there was no allegation whatsoever and no evidence adduced about any collusion between the appellant and the loanee to deprive the AFC of the vehicle.

The AFC in its defence contended that the appellant was its loanee and that the loan was secured by a charge over all the moveable assets of the plaintiff. This was not borne out by the evidence adduced at the trial. There was therefore no way the AFC could justify its alleged right in equity and at law to realize the non-existent security. The AFC's line of defence was abandoned during the trial when it's witness acknowledged failure to verify ownership of the vehicle, that the vehicle was registered in the name of the appellant at the time it was attached and that the AFC was misled by their loanee.

It is for the above reasons and those stated by the Honourable Chief Justice that I am of the view that the learned judge's findings must be faulted and the appeal be allowed. I would also agree that on the material available nominal damages only can be awarded to the appellant and I would concur in the award of the sum of shs 2,000/-.

Omolo Ag JA. I have had the advantage of reading in draft the judgment of my Lord the Chief Justice and I agree with him that this appeal must be allowed. I particularly agree with the view that it is an actionable trespass to negligently set in motion the process of attaching the goods of an innocent party, just as it is to do so maliciously. As my Lord Masime also agrees, there shall be orders proposed by the Chief Justice.

Dated and delivered at Nakuru this 23rd day of October, 1991.

ALAN ROBIN WINSTON HANCOX

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CHIEF JUSTICE

JOSEPH RAYMOND MASIME

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JUDGE OF APPEAL

RIAGA SAMUEL OMOLO

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AG. JUDGE OF APPEAL