



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 216 OF 2013

BETWEEN

FAULU KENYA DTM LIMITED..... APPELLANT

AND

JAMES SIMATEI KENDAGOR..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Eldoret (Ngenye-Macharia, J.) dated 6th June 2013

in

ELDORET HCCA NO. 111 OF 2011)

JUDGMENT OF THE COURT

1. The appellant is a financial institution. On a date which is not specified in the record of this appeal, the appellant advanced a sum of Kes.200,000/= to one Emmanuel Kendagor Simatei (the borrower) on the security of a chattels mortgage over two fresian cows.
2. Upon default in the repayment of that loan, on 5th May 2010, the appellant caused the seizure of two fresian cows from the respondent who is the borrower's father. The following day, that is, on 6th May 2010, the respondent filed a suit in the Chief Magistrate's Court at Eldoret and sought an injunction to restrain the appellant from selling those animals and their restitution to him. Despite protestations from the respondent, the appellant caused those animals to be sold. The respondent thereafter amended his plaint and claimed the value of the two cows and loss of income from the milk those animals gave him.
3. After hearing the case, the subordinate court entered judgment for the respondent in the sum of Kes.409,205/= being the values of the two cows of Kes.200,000/= and loss of milk income from those cows for 10 months of Kes.209,205/=. The appellant's appeal to the High Court against that decision was dismissed thus provoking this second appeal.
4. The gravamen of the appellant's 12 grounds of appeal is that the learned Judge of the High Court failed to properly re-evaluate the evidence on record and thus reached an erroneous conclusion. In his submissions before us, Mr. Oribo, learned counsel holding brief for Mr. Omwenga for the appellant,

argued that the learned Judge erred in upholding the trial court's finding that the respondent had proved his case on a balance of probabilities. In his view, the valuation report the respondent tendered in evidence could have been in respect of the respondent's other cows and so could have been the milk records. Counsel also faulted the learned Judge for failing to find that members of the Naiberi Sekemyat Self Help Group to which the borrower belonged and which Group had guaranteed the loan, identified the attached cows which they knew as belonging to the borrower. On those submissions, he urged us to allow this appeal with costs.

5. In response, Mr. Tororei, learned counsel for the respondent, dismissed this appeal as unmeritorious. He submitted that with no proper identification of the attached animals as belonging to the borrower, we have no basis of faulting the findings of the two courts below. He therefore urged us to dismiss this appeal with costs.

6. As pointed out, this is a second appeal. The jurisdiction of a second appellate court is clear. It is limited to points of law only. **Section 72** of the Civil Procedure Act makes that quite clear. What then are the points of law in this appeal? As we have already stated, the appellant's main grievance in this appeal is that the learned Judge of the High Court failed to properly re-evaluate the evidence on record and thus wrongly dismissed the appellant's appeal. Failure to re-evaluate or properly re-evaluate the evidence on record is a legal point for consideration in a second appeal. The issue for our determination is therefore whether or not the learned Judge of the High Court re-evaluated or properly re-evaluated the evidence on record.

7. The main evidence in this case was that of the identification of the attached animals as belonging to the borrower. The appellant claimed that the attached animals are the ones the borrower had mortgaged to it. It further argued that when the borrower defaulted in the loan repayment, fearing that they would be seized, he hid them at his father, the respondent's home.

8. Under **Section 107** of the Evidence Act, the appellant had the burden of proving that allegation. The appellant called only its finance partner, Margaret Jaika, who accompanied the Auctioneers when the latter attached the respondent's two animals. She did not herself know the borrower's animals. She said the animals were identified to the Auctioneers by the members of the Naiberi Sekemyat Self Help Group, including its Chairman, one Philip Simatei. None of those members was called as witnesses. The learned Judge of the High Court lamented that failure and with no identification mark on the animals found that the appellant had failed to discharge the burden of proof upon it. We respectfully agree. All that the appellant needed to do was to call one of the members of that Group who had personal knowledge of the animals and it would have proved its case.

9. We have already shown that the learned Judge considered the evidence on the identification of the attached animals. A perusal of her judgment shows that she also meticulously analyzed all the other evidence in the case. We therefore find no basis for the accusation that she failed to re-evaluate or re-evaluate properly the evidence on record. Consequently, we find no merit in this appeal and we accordingly dismiss it with costs to the respondent.

DATED and delivered this 14th day of June, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR