



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 1 OF 2019

CONSOLIDATED WITH

CIVIL APPEAL NO. 3 OF 2019

HEZRON OTOCHI NYAMBANE.....APPELLANT

VERSUS

ALFRED MUDEIZI SAGWA T/A

PAVE AUCTIONEERS.....1ST RESPONDENT

AFRICAN MERCHANT ASSURANCE LTD.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. P. Wamucii Nyotah (R.M.) delivered on 7th December 2018 at the Chief Magistrates Court at Kisii in CMCC No. 238 of 2009)

JUDGMENT

1. The plaintiff was in the suit before the trial court, whereas the defendants were the 1st and 2nd respondents respectively. Being aggrieved by the decision of the trial court, the plaintiff filed Civil Appeal No. 1 of 2019 and the 1st respondent filed Civil Appeal No. 3 of 2019. Since the appeals were based on the same decision, they were consolidated, with Civil Appeal No. 1 of 2019 being the lead file. I will refer to the parties in their respective titles before the trial court for ease of reference.

2. As a starting point, I will remind myself of the duty of a first appellate court which is to review the evidence afresh in order to determine whether the conclusion reached upon that evidence should stand; all the while being mindful that it did not see or hear the witnesses testify. (See *Kiruga vs. Kiruga & Another* [1988] KLR 348)

3. A summary of the case before the trial court is as follows; The plaintiff was sued by the owner of motor vehicle registration number KAU 333B vide Kisii CMCC No. 88 of 2007 following a road traffic accident involving his vehicle registration number KAA 041R and motor vehicle registration number KAU 333B on 22nd July 2006. In his plaint dated 27th March 2009, the plaintiff averred that at the time of the accident, his vehicle was insured by the 2nd defendant against third party claims and the 2nd defendant was aware of the suit against him. The owner of motor vehicle KAU 333B obtained judgment against the plaintiff which resulted in his vehicle KAA 041R being attached and sold off by the 1st defendant for a meager KShs. 100,000/=. The plaintiff claimed that the 1st defendant sold off his vehicle without issuing notice of the intended attachment as required by law. He thus sought the return of motor vehicle registration number KAA 041R or its value together with costs and interest at court rates from the defendants.

4. Subsequently, the plaintiff amended his plaint to indicate that in addition to motor vehicle registration number KAA 041R, the 1st defendant had also illegally attached and sold off his motor vehicle registration number KAH 242.

5. In opposition to the claim, the 1st defendant filed a statement of defence in which he averred that he received warrants of attachment and sale in Kisii CMCC No. 88 of 2007 to attach the plaintiff's goods. He asserted that it was through the warrants of attachment that he proclaimed the plaintiff's motor vehicle KAA 041R and later on attached the vehicle when the plaintiff neglected to pay the decretal sum. He insisted that the proclamation, attachment and sale of motor vehicle KAA 041R were done pursuant to lawful court orders and in accordance with the procedures laid out in the Auctioneers Act thus the plaintiff's suit did not disclose a cause of action against the 1st defendant and was ripe for dismissal.

6. The 2nd plaintiff entered appearance but did not file a defence to the plaintiff's claim.

7. When the matter came up for hearing before the trial court the plaintiff, Hezron Otochi Nyambane, testified that in 2006 he had 2 motor vehicles to wit motor vehicle registration number KAA 041R a Toyota Pickup and motor vehicle registration number KAH 242 L a Mitsubishi Lorry. Motor vehicle KAA 041R was involved in a road traffic accident in 2006 when it crushed with motor vehicle KAU 338B belonging to one Julius Momanyi Ndege. He testified that when he was sued in CMCC No. 88 of 2007, he reported the matter to his insurer, but the insurer did not defend the suit.

8. The plaintiff testified that he once again communicated with the 2nd defendant when the court entered judgment against him for Kshs. 130,000/=, but it did not pay the decretal sum. The 1st defendant then proceeded to attach his vehicles and sold them off without giving him any notice. The plaintiff stated that the value of the lorry was about Kshs. 1 million and the value of motor vehicle KAA 041R was Kshs. 5.5 million. He testified that motor vehicle KAA 041R used to earn him Kshs. 182,000/= per year and the lorry would bring in a net profit of Kshs. 182,000/=. He prayed for the return of his vehicles or the value of the vehicles together with costs.

9. Henry Nyakundi (PW2), an accountant working under the name of Nyakundi Mwencha and Associates, testified that the plaintiff had contacted him to prepare financial statements for the year 2012. He produced the statements he had authored and testified that the income lost by the plaintiff was Kshs. 7,826,761.

10. The 1st defendant, Alfred Mudezi (DW1) adopted his statement and listed documents as his evidence before the trial court. In cross examination, he testified that he had not been served with an order restraining the attachment of the 2 vehicles he had attached. He stated that the value of the 1st vehicle was Kshs. 70,000/= and the sum in the warrants was Kshs. 93,000/=.

11. The 2nd defendant closed its case without calling any witnesses.

12. The trial court, upon considering the foregoing evidence, found that the plaintiff had not proved that there existed a contract of insurance between him and the 2nd defendant and thus dismissed the claim against the insurer. The court also expunged from the record the amended plaint which had included motor vehicle KAH 242L for failure to indicate when the plaint had been amended and for lack of a signature. It went on to find that the 1st defendant illegally attached the plaintiff's motor vehicle KAA 041R and entered judgment for the plaintiff for a sum of Kshs. 400,000/= for the value of the vehicle.

13. The parties took directions to canvass the appeal by way of written submissions. Mr. Masese learned counsel for the plaintiff argued that given the totality of the evidence on record, the 1st defendant is liable to the plaintiff. He urged this court to find the 1st defendant and the 2nd defendant liable jointly and severally to the plaintiff.

14. For his part, Mr. Nyatundo, learned counsel for the 1st defendant raised four issues for determination by this court. His first contention with the trial court's decision was the court's expunction of the amended plaint from the record. Counsel argued that the parties went to trial based on the amended plaint which was duly signed, dated and not only filed but also served upon the 1st defendant. He submitted that the 1st defendant defended the suit against him as pleaded in the amended plaint and that expunging the amended plaint from the record at judgment stage amounted to condemning the 1st defendant without giving him an opportunity to be heard on the original plaint.

15. Secondly, counsel argued that the plaintiff failed to plead the value of vehicles registration numbers KAA 041R and KAH 241L or prove their value contrary to the principle that special damages must not only be pleaded but must also be proven to be awarded by the court. He submitted that the onus was always upon the plaintiff to prove his case but he failed to discharge that burden.

16. He also contended that there was no basis for the trial magistrate to enter judgment against the 1st defendant yet the plaintiff had stated that he had no claim against the Auctioneer during cross examination. He argued that the trial court did not give reasons for absolving the 2nd defendant thus its decision was arbitrary and a travesty of justice.

17. Lastly, counsel submitted that the 2nd plaintiff is cushioned by **Section 6** of the **Judicature Act** as read with **Section 34** of the **Civil Procedure Act** from liability as he was a duly licensed auctioneer executing a lawful decree of a competent court in accordance with the Auctioneers Act and Rules. He urged the court to set aside the judgment of the lower court and substitute it with a finding dismissing the case against the 1st defendant with costs.

18. The 2nd defendant's counsel submitted that the plaintiff had failed to show that he had notified the 2nd defendant of the occurrence of the accident or the institution of the suit against him. He also argued that the letter produced by the plaintiff during trial did not suffice to demonstrate that there had been a contractual relationship between him and the 2nd defendant and therefore his claim against the 2nd defendant was not proved. Counsel also supported the decision of the trial court to expunge the amended plaint for lack of a signature and a date. He submitted that the claim against the 2nd defendant was a declaratory suit and the requirements for proving his claim had not been met by the plaintiff.

ISSUES

- a. Whether the plaintiff proved his case against the 2nd defendant;
- b. Whether the trial magistrate erred in expunging the amended plaint from the record;
- c. Whether the trial court erred by finding that the plaintiff had proved his case against the 1st defendant; and

d. Whether the plaintiff was entitled to special damages.

ANALYSIS AND DETERMINATION

19. The cause of action in the suit before the trial court arose out of the execution of a decree issued by the court in CMCC No. 88 of 2007. It is common ground that the plaintiff had been sued in that matter following a road traffic accident and judgment had been entered against him. The plaintiff claims that at the material time he had taken out a 3rd party insurance cover with the 2nd defendant over motor vehicle KAA 041R which was involved in the accident. He claims that he informed his insurer about the accident but the 2nd defendant failed to indemnify him against the claim which resulted in his vehicles being attached and sold off by the 1st defendant.

20. The plaintiff is aggrieved by the trial court's failure to find the 2nd defendant liable. To prove that the defendant had insured its vehicle, the plaintiff produced a copy of a receipt for Kshs. 10,000/= and letter from the 2nd defendant's claim department dated 29th March 2007, which acknowledged receipt of the money from the plaintiff with respect to a policy cover issued for motor vehicle KAA 041R. The 2nd defendant entered appearance but did not file a defence against the claim and failed to adduce evidence to rebut the plaintiff's evidence that it had insured motor vehicle KAA 041R.

21. Be that as it may, the plaintiff was required to satisfy the court that he had notified the 2nd defendant of the claim against him for the court to compel the 2nd defendant to pay the decretal amount. This obligation is imposed upon the insured by **Section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act** which stipulates;

10. (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;[Emphasis added]

22. The burden to prove the claim against the 2nd defendant was always upon the plaintiff regardless of whether the defendant filed a defence or not. The failure by the 2nd defendant to contest the case did not absolve the plaintiff of the duty to prove his case to the required standard. (See *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347)

23. The plaintiff claimed that he had notified the 2nd defendant of the claim against him but no evidence was placed before the trial court to prove that he issued the notice of the claim as provided in the foregoing provision of the **Insurance (Motor Vehicles Third Party Risks) Act**. I therefore decline to disturb the trial court's finding that the 2nd defendant was not liable in damages to the plaintiff.

24. The second issue for determination is whether the trial magistrate erred in expunging the amended plaint from the record. The plaintiff filed his amended plaint pursuant to a consent reached by the parties in compromise of an application he had made to amend the plaint. The consent was adopted as the order of the court on 18th September 2012.

25. In its judgment, the trial court expunged the amended plaint from the record for the reason that it was not signed and there was no indication of the date when it had been amended. The 1st defendant claims that he based his defence on the amended plaint. He argues that he was served with an amended plaint which was duly signed and dated and the trial court erred in expunging the amended plaint from the record at judgment state.

26. A court is empowered under **Order 2, rule 15** of the **Civil Procedure Rules** to order that pleadings be struck out at any stage of the proceedings. **Order 2 rule 16** of the **Civil Procedure Rules** provides that every pleading should be signed by an advocate, or recognised agent or the partying the cases of *Cheriak Management Limited v National Social Security Services Fund board of Trustees & Anor Civil Case 102 of 2012[2012] eKLR* which were cited by the plaintiff the court was emphatic that unsigned pleadings have no validity in law.

27. The 1st defendant claims he was prejudiced by the trial court's decision to expunge the amended plaint from the record. It was submitted that though the amended plaint prayed for the return of both motor vehicles KAA 041R and KAH 242L, there was no claim relating to motor vehicle KAA 041R in the body of the amended plaint which formed the basis of the 1st defendant's case.

28. With respect, a look at the amended plaint shows that is not the case. It is clear that the plaintiff referred to motor vehicle KAA 041R in the body of his amended plaint. The plaintiff pleaded as follows at paragraph 5 of the amended plaint;

“5. The owner of motor vehicle KAU 338B filed suit against the plaintiff vide KISII CMCC NO. 88 OF 2007 and obtained judgment against the plaintiff resulting in the plaintiff's motor vehicle KAA 041R a Toyota pickup and thereafter purported to sell it at only Kshs. 100,000/= without first serving the plaintiff with the notice of intended attachment as required by law.”

29. Although not elegantly drawn, it is evident from the above averment in the plaintiff's amended plaint that he was dissatisfied by the lack of notice prior to the sale of his motor vehicle KAA 041R in satisfaction of the decree in KISII CMCC No. 88 of 2007. The 2nd plaintiff cannot claim that he was prejudiced by the expunction of the amended plaint from the record by the trial court as he had fair opportunity to address the issue concerning the sale of motor vehicle KAA 041R which was raised in the amended plaint. The second issue is thus answered in the negative.

30. This leads me to the third issue which is whether the trial court erred by finding that the plaintiff had proved his case against the 1st defendant. In his written submissions, counsel for the 1st defendant contended that the auctioneer was shielded from legal action by **section 6** of the **Judicature Act** as he had discharged his duty in accordance with the law.

31. **Section 6** of the **Judicature Act** provides as follows;

6. No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.

32. He also argued that the 1st defendant was executing the decree in his capacity as a representative in the suit therefore **section 34** of the **Civil Procedure Act** was applicable. **Section 34** of the **Civil Procedure Act** provides as follows;

34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

33. The 2nd plaintiff was sued by the plaintiff for selling his vehicles without notice of their intended attachment as required by the law. In my view, Section 6 of the Judicature Act and Section 34 of the Civil Procedure Act do not prohibit suits against auctioneers for damage in the event that they exercise their powers in contravention of the law. I am guided by the decision of the Court of Appeal in **Kuronya Auctioneers v Maurice O. Odhoch & Anor Civil Appeal 31 of 2002 [2003] eKLR** where the Court held;

Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree.

34. In addition, **Section 26** of the **Auctioneers Act** permits any person to institute an action against an auctioneer who exercises his powers without following the law. The provision stipulates;

26. (1) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action:

Provided that nothing in this section shall—

(a) prevent the auctioneer from claiming contribution or indemnity from any other person;

(b) limit the damages recoverable under any other written law.

35. The 1st defendant was called upon to justify his attachment of motor vehicles KAA 041R and KAH 242L in the suit filed against him by the plaintiff. He was required to show that he had exercised his powers within the confines of the law, failure to which he would be liable to compensate the plaintiff in damages. In the course of the trial, the 1st defendant produced documentation with respect to motor vehicle KAH 242L but failed to adduce evidence to show that the attachment and sale of motor vehicle KAA 041R was done in accordance with the law. Consequently, the trial court's finding that the attachment of motor vehicle KAA 041R was illegal cannot be faulted.

36. The last question for determination relates to the award of Kshs. 400,000/= in special damages to the plaintiff as compensation for the sale of his motor vehicle KAA 041R. The 1st defendant contends that the value of the vehicle was neither pleaded nor proved, contrary to the principle that special damages must not only be pleaded but must also be proved to be awarded. This legal principle has been restated in numerous cases among them **Caltex Oil (Kenya) Limited vs. Rono Limited Civil Appeal No 97 of 2008[2016] eKLR**, where the Court of Appeal held;

“... It is trite law that special damages must be pleaded and proved. See Mohamed Ali & another vs. Sagoo Radiators Limited [2013] eKLR (Civil Appeal No. 231 of 2005) wherein the Court adopted the holding of the Court in Hahn vs. Singh (1985) KLR 716 that:

“... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and

particularity of proof required depends on the circumstances and the nature of the act themselves.”

37. To support his claim for damages the plaintiff testified as follows;

“I was told KAA had been sold at Kshs. 10,000/=. The lorry was to be released but it was not released. Motor vehicle KAA was in alarming condition. I bought it in 1999 as a used motor vehicle. The year is 1995. The value would be Kshs. 1.0 million. KAH 242L was valued at about 5.5 million as I had bought it at Kshs. 7.0 million.”

38. The plaintiff did not provide any documentation to support his claim for the value of his confiscated vehicles. Furthermore, no mention was made of the values of motor vehicles KAA 041R and KAH 242L in the pleadings lodged by the plaintiff. Evidently, the trial court’s finding that the plaintiff was entitled to a sum of Kshs. 400,000/= in damages was erroneous as the claim was not specifically claimed in the pleadings or supported by evidence. In view of this, I find the 1st defendant’s appeal merited.

39. I allow Civil Appeal No. 3 of 2019 with costs to the 1st respondent. The judgment and decree of the trial court dated 7th December 2018 is hereby set aside and substituted with an order dismissing the claim against the respondents. Civil Appeal No. 1 of 2019 is dismissed with costs to the respondents.

Dated, signed and delivered at KISII this 15th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Mr. Oyugi For the 1st Appellant

Respondents Absent

Ms. Rael Court Assistant