



**Nganga & another v Odawa (Commercial Case E031 of 2023)
[2024] KEHC 9905 (KLR) (Commercial and Tax) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E031 OF 2023
DKN MAGARE, J
JULY 29, 2024**

BETWEEN

KARONGO JAMES NGANGA 1ST APPELLANT

EXECUTIVE SUPER RIDES LIMITED 2ND APPELLANT

AND

VIOLET AKINYI ODAWA RESPONDENT

*(Being an appeal from the orders of Hon. B.M. Cheloti (SRM) in Nairobi
MCCOMMSU No. E4697 of 2022, dated on 9th February, 2023)*

JUDGMENT

1. This is an appeal from the order given on 9/2/2023. There was an order hitherto given on 27/1/2023.
2. There appears to have been contempt proceedings arising from the order of 9/2/2023. The Appellant sought that order to be stayed. The same was delivered by the late Justice D.S.A. Majanja J, as then he was.
3. The order of 9/2/2023 ordered release of the subject motor vehicle to the Respondent.
4. An application was filed on 7/2/2023 seeking the following orders:-
 - a. Spent.
 - b. That this Honourable court be and is hereby pleased to issue an order directed to the OCS Kilimani Police Station or any other OCS within the local jurisdiction where motor vehicle KCG 002C Toyota Land Cruiser V8 will be traced to impound, detain and transit to the



Plaintiff/Applicant in enforcement of the court orders issued on 27th January, 2023 by Hon. E. M. Kagoni (Mr.).

- c. Any other orders that this Honourable court may deem fit to grant in the circumstances.
 - d. Costs of the application.
5. The Respondents stated that once they got an order they were unable to enforce the same. The court issued another order on 9/2/2023. The order was in enforcement of the first order. There is no appeal from the first order. This was also issued by Majanja J. There was no challenge to that order.
 6. Parties appeared before me and sought to file affidavits. The question related to the propriety of the order of 27/1/2023 which is not before the court. The order issued on 9/2/2023 was not an order in review. It was an enforcement order. This appeal is a round about way of appealing the order of 27/1/2023 that is not in court.
 7. The matter is active in the court below. There was no review of the same, as it still had an interpartes date. The appeal in the circumstances is untenable and is dismissed.
 8. The suit that caused attachment was that the possession was commenced fraudulently against a deceased person. There has been no answer to the question that Antipas O. Oketch Nyanjwa was dead and buried as at 21/2/2022. The orders obtained in Misc. E240 of 2022 were clearly a nullity.
 9. In *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
 10. The court had real no option other than order the impounding of the motor vehicle. The only error was placing conditions for release. The said motor vehicle should be impounded and placed in the custody of the Respondent without cavil or argument. The claims by the Appellants may not be sustainable.
 11. According to *Black's Law Dictionary*, 11th edition.

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.
 12. In *Athi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the court of appeal stated as follows: -
 48. The case was akin to *Ruben & Another v Great Fingall Consolidated*(1906) A.C 439 where Ruben and another person advanced money to the company secretary for his own purposes on



the security of a share certificate issued by the secretary certifying that they were registered in the companies register of shareholders as transferees of shares. The secretary forged the signatures of the company Directors and affixed the company seal on the certificate without authority, but otherwise the certificate was in accord with the Memorandum and Articles of Association of the company. The company refused to register Ruben and his friend as owners of the shares and they sued the company. The dispute went all the way to the House of Lords which decided, affirming the Court of Appeal, that the company was not estopped by the forged certificate from disputing the claim of the appellants and it was not responsible for the wrongful actions of the secretary.

49. Lord MacNaghten was forthright in his exposition of the matter:-

“The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company’s seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or find or affect the company in any way. It is not the company’s deed, and there is nothing to prevent the company from saying so.

Then how can the company be bound or affected by it. The directors have never said or done anything to represent to lead to the belief that this thing was the company’s deed. Without such a representation there can be no estoppel.

The fact that this fraudulent certificate was concocted in the company’s office and was uttered and sent forth by its author from the place of its origin cannot give it any efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company.”

So was Lord Loreburn L.C, who stated:-

“I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.”

Lord Daveytoo, stating thus;

“The appellants have no doubt been grossly defrauded, but the question is whether they can shift the loss on to the shoulders of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the transaction did it come before the board of directors, which alone was entitled to speak and act for it.”



50. And so it is in the matter before us. The documents which perpetrated the fraud of share transfer were not even presented to the Company Registry by the real company secretary of West End.

They were all forgeries. They never bound West End in any way. The Registrar of Companies failed in his statutory duty to West End and members of the public who rely on the authenticity of documents entrusted to that office. The Registrar easily allowed the perpetration of the fraud and was complicit in it as he allowed the disappearance of annual returns filed by West End and copies of official receipts issued to it.

13. The order issued was a mandatory injunction in its nature. In the locus classicus case of *Kamau Mucuba v The Ripples Ltd.* Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:

“...A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction.”

14. The same is issued sparingly. In the end I find the appeal lacks merit. It is dismissed with costs of Kshs. 135,000/=.

Determination

15. The upshot of the foregoing is that I make the following orders:

- a. The appeal lacks merit and the same is dismissed with costs of Kshs. 135,000/= payable within 30 days.
- b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Odawa present for both parties

Court Assistant – Jedidah

