



**Kimani v Mwangi & another (Commercial Appeal E035 of 2023)
[2023] KEHC 19364 (KLR) (Commercial and Tax) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E035 OF 2023
DAS MAJANJA, J
JUNE 30, 2023**

BETWEEN

IAN MUTHUMA KIMANI APPELLANT

AND

LEONARD CHEGE MWANGI 1ST RESPONDENT

BASHY AFRICA CREDIT LIMITED 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. H. M. Ng'ang'a, PM dated 26th January 2023 at the Nairobi Magistrates Court, Milimani in MCMISC No. E1210 of 2023)

JUDGMENT

1. This is an appeal from the ruling and order of the subordinate court dated January 26, 2023 dismissing the appellant's application seeking to set aside an ex-parte order issued on September 1, 2022 ("the ex-parte order") allowing the 1st respondent to gain access and or break into Ruaraka Auto Garage in order to attach the appellant's motor vehicle registration number KCM 751J ("the motor vehicle") with the assistance of police officers and to issue a notification of sale of its sale to recover loan arrears amounting to Kshs 478,980.00 due to the 2nd respondent.
2. The matter in the subordinate court was commenced by the 1st respondent, an auctioneer trading in the name and style of LAAR Auctioneers who filed an ex-parte notice of motion made, *inter alia*, under rule 9 of the [Auctioneers Rules](#), seeking an order authorising him to use police assistance for him to break into the appellant's premises and attach the motor vehicle to sell it on behalf of the 2nd respondent. It is not in dispute that the motor vehicle was registered in the joint names of the appellant and the 2nd respondent as security for advances made to the appellant by the respondent. When the application was filed, the court issued the ex-parte order.



3. When the court issued the ex-parte order, the appellant filed a notice of motion dated October 14, 2022 seeking to set it aside. He also sought an injunction restraining the 2nd respondent from selling the motor vehicle and an order releasing it. He also applied for a permanent injunction restraining the 2nd respondent from auctioning or dealing with the motor vehicle in any manner whatsoever. The application was duly opposed by the 2nd respondent and after considering the parties' written submissions, the trial magistrate dismissed the application by the ruling dated January 26, 2023 ("the ruling") thus precipitating this appeal.
4. In the ruling, the trial magistrate held that the appellant ought to have filed a substantive suit to determine whether the court should issue a permanent injunction in his favour as prayed. The court also held that it could not allow the application and issue the orders sought by the appellant since the motor vehicle had been sold to the third party hence the application had been overtaken by events.
5. The Appellant appeals based on the grounds set out in the Memorandum of Appeal dated February 24, 2023. Both parties have filed written submissions in support of their respective positions. Although he has raised several grounds of appeal, the Appellant has condensed them into three grounds. First, whether the Appellant's application was overtaken by events. Second, whether an application under order 51 rule 15 offends order 3 rule 1 of the Civil Procedure Rules and last, whether the Appellant ought to have commenced a substantive suit to set aside the Ex-parte Order.
6. On the first issue, the 2nd Respondent deponed that the Motor Vehicle has been sold to one KNK who had purchased it at a public auction which took place on October 8, 2022. It produced a Notification of Sale, advertisement for the sale in the Standard Newspaper of September 2, 2022 and the certificate of sale issued by the 1st Respondent. The Appellant disputes this fact and avers that it is still the registered owner of the Motor Vehicle as demonstrated by the copy of the Motor Vehicle Copy of Records issued by the National Transport Safety Authority ("NTSA"). The Appellant also relied on section 9 of the Traffic Act (Chapter 403 of the Laws of Kenya) which requires any transfer of a motor vehicle to be registered and that the transfer shall not be effective until the registration certificate has been surrendered to and re-issued by the Authority.
7. Since this is an appeal attacking the exercise of discretion, the appellate court will only if the trial court considered irrelevant facts or failed to consider relevant matters. It will also interfere if the trial court misapprehended the law or facts before it or came to a decision that was patently or manifestly wrong. Some of the decisions that elucidate this principle include *Mbogo v Shab* [1968] EA 93 and *United India Insurance Company Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co, Ltd v East Africa Underwriters (Kenya) Limited* NRB CA Civil Appeal No 36 of 1983 [1985] eKLR. In this case the court was called upon to set aside the Ex-parte Order and the issue for determination therefore is whether the trial court exercised its discretion in a manner that warrants interference.
8. It must be recalled that the matter before the subordinate court was made under rule 9 of the Auctioneers Rules, 1997. It provides that where an auctioneer has reasonable cause to believe that he may have to break the door of any premises where goods may be seized or repossessed or he may be subject of resistance or intimidation by the debtor or other person or a breach of the peace is likely as a result of seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station to carry out his duties peacefully. Rule 9(2) provides that, "An application under this Rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard ex-parte."
9. It was therefore within the jurisdiction and discretion of the court to grant the order sought ex-parte. It also trite law that the court is entitled to set aside an ex-parte order either on its own motion or upon



application by any party directly affected by the order. Whether the court sets aside the order aside is a matter of discretion. In this case, the court was of the view that the application had been overtaken by events since the Motor Vehicle had been sold to a third party. Based on the evidence on record, I cannot fault the trial magistrate for concluding that the Motor Vehicle had been sold.

10. However, the germane issue is whether the court could set aside the order when a third party had acquired a proprietary interest in the Motor Vehicle whether regularly or irregularly. Even if the trial magistrate was minded to set aside the order, the third party has a right to be heard on the matter. I would therefore decline to set aside the order without joining or taking steps to hear the third party who purchased the Motor Vehicle at the auction.
11. On the whether the Appellant ought to have filed a suit as contemplated in order 3 rule 1 of the Rules, I uphold the decision of the trial magistrate. It provides that, “(1) Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.” The Notice of Motion before the Subordinate Court being an originating application filed in the manner prescribed by the Auctioneers Rules is a suit for purposes of order 3 rule 1 aforesaid. But it is a suit filed for the specific purpose of seeking orders to assist the 1st Respondent attach the Motor Vehicle in terms of rule 9 of the Auctioneers Rules. Thus, the proceedings before the Subordinate Court were for a specific purpose under the aforesaid provision. Once the court granted the order, the application was exhausted, and no further proceedings could be taken by the court. The only application the Appellant could make was to discharge the ex-parte order. It could not apply for further reliefs that called upon the court to determine the substantive rights of the parties under their contractual documents. That is why such issues as to whether the Appellant owes the 2nd Respondent the amount claimed or whether the 2nd Respondent has overcharged interest are matters that can only be determined in a suit and not an application like the one filed before the Subordinate Court.
12. I also find that even if the court declined to set aside the Ex-parte Order, it is still open to the Appellant to file a substantive suit challenging the sale and seeking damages for loss and damage and for any other relief. This is the reason why I have avoided making any findings concerning the sale and transfer of the Motor Vehicle as these issues may come up for resolution in another forum.
13. For the reasons I have set out above, I dismiss the appeal. The Appellant shall pay costs of the appeal assessed at Kshs 20,000.00.

SIGNED AT LONDON, ENGLAND

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Mr M. Onyango.

Ms Kalaine instructed by Onesmus Githinji and Company Advocates for the Appellant.

Mr Thuku instructed by S. N. Thuku and Associates Advocates for the Respondents.

