



**Tahmeed Coach Limited v Maburuki Mwaguta & Luvuno Chimera Mwachidudu (Suing
Legal Representatives of the Estate of Mwanakombo Omari, Deceased) & 5 others
(Civil Appeal E089 of 2021) [2023] KEHC 21857 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E089 OF 2021
OA SEWE, J
AUGUST 23, 2023**

BETWEEN

TAHMEED COACH LIMITED APPELLANT

AND

**MABURUKI MWAGUTA & LUVUNO CHIMERA MWACHIDUDU (SUING
LEGAL REPRESENTATIVES OF THE ESTATE OF MWANAKOMBO OMARI,
DECEASED) 1ST RESPONDENT
SEIF HEMEDI MOHAMED 2ND RESPONDENT
STANBIC BANK KENYA LIMITED 3RD RESPONDENT
KIRIIYU MERCHANTS AUCTIONEERS 4TH RESPONDENT
EVALINE NJERI MUTURI 5TH RESPONDENT
ASAFA LUKO AILA 6TH RESPONDENT**

*((Being an appeal from the Ruling and Order of Hon. P. Wambugu, Senior
Resident Magistrate, delivered on 9th June, 2021 in Kwale PMCC No. 470 of 2016))*

JUDGMENT

1. This is an appeal arising from the ruling dated 9th June 2021 delivered by Hon. Wambugu in Kwale Civil Suit No. 470 of 2016. In that suit the 1st respondent claimed general and special damages, interest and costs on behalf of the estate of Mwanakombo Omari, deceased, who died in a road accident on or about 22 May 2016. The 1st respondent had contended that the deceased's death was attributable to the negligence of Seif Hemedi Mohamed (the 2nd respondent herein) and Tahmeed Coach Ltd (the appellant).



2. Judgment was delivered on 10 July 2019 by the lower court whereby the appellant and the 2nd respondent were found 100% liable for the accident and an award of Kshs. 2,150,000/= made to the 1st respondent as compensation for loss of dependency, pain and suffering and loss of expectation of life, together with interest and costs. Thereafter 1st respondent filed an application for execution of the ensuing Decree; whereupon Warrants of Attachment and Sale of the movable property of the appellant and 2nd respondent were issued authorizing the 4th respondent to attach and sell the property. Accordingly, the 4th respondent served a Proclamation of Attachment in respect of Motor Vehicles Registration Nos. KCP 733W, KCN 075X and KBM 596P together with office furniture and equipment.
3. It was in response to the Proclamation that a Notice of Objection dated 29th July 2020, was filed by Tahmeed Express Ltd, objecting wholly to the attachment levied by M/s Kiiriyu Merchants Auctioneers, the 4th respondent herein. The Notice of Objection was accompanied by an application dated 29th July 2020. The same was heard and a determination made in that regard on 23rd September 2020 in which the objection to the sale of Motor Vehicles Registration Nos. KCP 733W and KCN 075X was upheld and the motor vehicles released to the objector. The application was however dismissed as regards Motor Vehicle Registration No. KBM 596P as well as the office equipment and furniture.
4. The 4th defendant then seized the attached property with a view of sale, and in the process impounded the appellant's Motor Vehicle Registration No. KCV 296R which was not the subject of its Proclamation. Thus, the appellant approached the lower court vide an application dated 8th October 2020 contending that the 4th respondent had acted illegally in impounded Motor Vehicle Registration No. KCV 296R because it was jointly owned by the appellant and Stanbic Bank Kenya Limited, the 3rd respondent herein.
5. The appellant further deposed before the lower court that, while it was awaiting the ruling of the lower court, which had been slated for 10 March 2021, it got to learn, upon checking the appellant's NTSA-TIMS Account, that ownership of the subject motor vehicle had been transferred to the 5th respondent. The appellant then sought a reversal of that transfer vide an application under Certificate of Urgency dated 27th January 2021. The objector likewise filed another application on 16 February 2021, for contempt of court, among other prayers. Both applications were the subject of the ruling on 9 June 2021 by which they were both dismissed with costs. It was that dismissal that triggered the instant appeal.
6. According to the Amended Memorandum of Appeal, the appellant, as the 2nd defendant before the lower court, contended that:
 - (a) The learned Senior Resident Magistrate erred in dismissing the 2nd defendant's Notice of Motion dated 27th January 2021.
 - (b) The learned Senior Resident Magistrate erred in failing
 - (i) to appreciate the significance of various facts and documents referred to in the affidavit evidence placed before him;
 - (ii) to consider or consider properly any of the substantive submissions made by counsel for the four parties before him;
 - (iii) to make any or any proper findings on the affidavit evidence placed before him;
 - (vi) to give proper reasons for his ruling delivered on 9th June 2021.



- (c) The learned Senior Resident magistrate erred
- (i) in holding that the 5th respondent was issued with proper documents for the transfer of motor vehicle registration No. KCV 296R to her and that the 5th respondent cannot be faulted for the transfer of the said motor vehicle to her;
 - (ii) in failing to appreciate that the sale by public auction of the said motor vehicle on 7th October 2020 was illegal and a nullity and that therefore Order 22 Rule 65 of the *Civil Procedure Rules* was not “succinct” on the point relating to the order sought in the said application for the reversal of the transfer of the said motor vehicle;
 - (iii) in failing to hold that the alleged sale by public auction of the said motor vehicle was not a sale in fact and in law;
 - (iv) in failing to hold that the documentary evidence placed before him showed that there were two certificates of sale issued by the 4th respondent to the 5th respondent in respect of the alleged sale by public auction of the said motor vehicle, one for Kshs. 3,500,000/= and the other for Kshs. 4,800,000/= and that therefore the alleged sale of the said motor vehicle was false and fraudulent;
 - (v) in failing to appreciate that there was affidavit evidence placed before him to show that the transfer of ownership form issued by the 4th respondent to the 5th respondent was inconsequential as, since the year 2018, motor vehicles are only transferred through the Transport Integrated Management System (TIMS) and not through the transfer form and therefore the transfer of the said motor vehicle in favour of the 5th respondent effected by use of the transfer form was done illegally;
 - (vi) in failing to appreciate that the 4th respondent had not produced his bank account statement in respect of their clients’ account showing that they had paid into the said account the cash proceeds of the alleged sale by public auction of the said motor vehicle received by them;
 - (vii) in failing to appreciate that:
 - a. The 1st respondent had participated fully in the objection proceedings filed by the 3rd respondent vide its Notice of Motion dated 8th October 2020 from which the Court’s Order of 9th October 2020 ensued and therefore the 1st respondent could not feign ignorance of the said objection proceedings;
 - b. The alleged sale by public auction of the said motor vehicle by the 4th respondent was in essence an attempt to defeat the objection proceedings filed by the 3rd respondent and to assist the 1st respondent to recover the decretal amount in the suit in the court below by illegally transferring the said motor vehicle to the 5th respondent;
 - [viii] in relying wholly on the affidavit of the 5th respondent even though the same was inadmissible;
 - (ix) in failing to appreciate that pursuant to the Warrants of Attachment and Sale issued by the Court to the 4th respondent on 20th July 2020, the 4th respondent had not made due proclamation of the said motor vehicle and that therefore the impoundment of the said motor vehicle by the 4th respondent was illegal and its subsequent alleged sale by public auction was a nullity;



- (x) in failing to appreciate that there was no evidence adduced by the 4th respondent to show that the Court directed him as to the manner in which the public notice and advertisement of the intended sale by public auction of the said motor vehicle should be given;
- (xi) in failing to appreciate that there was no evidence adduced by the 4th respondent to show that a copy of a public notice had been fixed in the precincts of the court or at least 15 days had elapsed from the date on which a copy of such notice had been affixed in the precincts of the court;
- (xii) in failing to appreciate that by his ruling delivered on 23rd September 2020 in respect of the Objector's (Tahmeed Express Limited) Notice of Motion dated 29th July 2020 and filed on the same day the said motor vehicle was not the subject matter of the Proclamation of Attachment levied by the 4th respondent on 27th July 2020 and that therefore the alleged sale by public auction of the said motor vehicle was a nullity;
- [xiii] in failing to appreciate that there was clear evidence adduced by the appellant and the 3rd respondent to show that the 3rd respondent was the joint registered owner of the said motor vehicle and that therefore any notification of sale by public auction of the said motor vehicle as well as any advertisement of the intended sale thereof were required to specify that the said motor vehicle was encumbered;
- (xiv) in not holding that the 5th respondent could not have acquired a legal or equitable interest in the said motor vehicle without the consent of the 3rd respondent;
- (xv) in failing to hold that the 4th respondent was under a duty to notify the 3rd respondent of the alleged attachment and sale of the said motor vehicle;
- (xvi) in failing to appreciate that the said motor vehicle allegedly attached by the 4th respondent belonged to the appellant and the 3rd respondent and that therefore the interest of the appellant was only available for attachment by way of notice prohibiting alienation of the same to third parties;
- (xvii) in failing to hold that the 4th respondent could not have transferred the said motor vehicle to the 5th respondent without obtaining an order from the court effecting such transfer;
- (xviii) in failing to hold that the 4th respondent could not have attached the said motor vehicle without first obtaining an order from the court allowing such attachment.

7. Accordingly, the appellant prayed that:

- (a) the appeal be allowed with costs;
- (b) that the ruling and order of the learned Senior Resident Magistrate be set aside;
- (c) the 1st, 4th and 5th respondents be committed to prison for a maximum period provided by law for disobeying the court's order of the 9th October 2020;
- (d) a reversal of the transfer of the said motor vehicle effected on 22nd January 2021;
- (e) Costs of and occasioned by the said application be awarded to the 2nd defendant.

8. The appeal was urged by way of written submissions, pursuant to the directions given herein on 19th September 2022. To that end, counsel for the appellant, Mr. Nanji, relied on his written submissions



dated 17th October 2022 in which he provided a detailed background of the matter. He proposed the following issues for determination:

- (a) Whether the learned trial magistrate misapprehended both the law and the facts when he found that there was no recourse in reversal of the consequential transfer of the subject motor vehicle registration number KCV 296R without appreciating that the execution process in connection with the attachment and alleged sale by public auction of the same was illegal and rendered the entire process a nullity; and,
 - (b) Whether the learned magistrate misdirected himself when he refused to find the 1st, 4th and 5th respondents in contempt by his finding that the court order issued on 9th October 2020 was belated and overtaken by events and thus could not be enforced.
9. Counsel faulted the learned magistrate for simply accepting the allegations of the 1st and the 4th respondents that the public auction of the subject motor vehicle took place on 7th October 2020 and the 5th respondent was the highest bidder and that she paid the purchase price and was issued with a receipt, a Certificate of Sale and documents of transfer for the motor vehicle. According to him, the learned magistrate made orders without appreciating that the alleged sale by public auction was illegal and a nullity. In this regard, counsel contended that:
- (a) The 4th respondent did not make due proclamation of the subject motor vehicle Registration No. KCV 296R as required by Rule 129(b) of the *Auctioneers Rules*, 1997;
 - (b) The registration certificate of the subject motor vehicle shows that the same was owned and registered in the joint names of the appellant and the 3rd respondent; and therefore the interest of the appellant in the said motor vehicle was only available by way of notice prohibiting alienation of the said motor vehicle to third parties;
 - (c) The purported sale was false and fraudulent and was not a sale in fact and in law for failure to comply with the mandatory provisions of Rule 17(5) and (6) of the *Auctioneers Rules*.
10. On the second issue, Mr. Nanji submitted that, had the lower court properly directed itself and found that the impoundment and subsequent alleged sale by public auction of the subject motor vehicle was illegal, he would have come to the conclusion that there was no such sale by public auction that took place on the 7th October 2020. He accordingly urged the Court to allow the appeal, set aside the alleged sale and order a reversal of the consequential transfers of the said motor vehicle made on 22nd January 2021 and 5th August 2021 in favour of the 5th and 6th respondents.
11. In support of the appeal, Mr. Wafula of the firm of Mulanya & Maondo Advocates filed written submissions on 31st October 2022. He proposed the following issues for consideration:
- (a) Whether the 3rd respondent demonstrated to the trial court that it had a legal and/or equitable interest in the subject motor vehicle;
 - (b) Whether the proclamation, attachment and the alleged sale of the suit motor vehicle was valid and legal.
12. Mr. Wafula submitted that vide its application and supporting affidavit both dated 8th October 2020, the 3rd respondent demonstrated its interest in the suit motor vehicle on the basis of a loan which was yet to be fully repaid. He relied on Order 22 Rule 51 of the *Civil Procedure Rules* and the cases of *Equity Bank (Kenya) Limited v Maurine Moraa Nyamwaka & Another* [2019] eKLR and *Joseph Kinuthia Mungora v East Africa Rail Handling Logistics Ltd & Another* [2019] eKLR to demonstrate that the 3rd respondent had a legal interest in the suit motor vehicle; and that the 1st and 4th respondents ought to have done their due diligence before attaching and purporting to sell the said motor vehicle.



13. Counsel further submitted that, under Rule 12(1)(b) & (c) of the *Auctioneers Rules*, 1997, the Auctioneer has a mandatory obligation to serve a proclamation and the 7 days' redemption notice upon the owners of the goods being attached; and yet no evidence was tendered before the trial court to prove such service on the 3rd respondent despite it being a joint registered owner of the suit motor vehicle. Counsel also referred to *CMC Motor Group v Garex Kenya Ltd & Another* [2001] eKLR to support his submission that the hirer's interest is not available for attachment; and therefore that the alleged auction of the suit motor vehicle was therefore illegal and therefore null and void ab initio.
14. Mr. Wafula also submitted that the sale was also illegal as it failed to comply with the mandatory provisions of Rule 17(5) and (6) of the *Auctioneers Rules* that require an Auctioneer who has sold movable property to file an application to the court which issued the decree for purposes of effecting transfer in favour of the purchaser. According to him no evidence was presented to the trial court to demonstrate that such an application was filed and the order envisaged in Rule 17(5) and (6) of the *Auctioneers Rules* granted.
15. In the light of the foregoing, the two issues for determination are as follows:
 - (a) Whether the proclamation, attachment and the alleged sale of the suit motor vehicle was valid and legal; and,
 - (b) Whether the learned trial magistrate misapprehended both the law and the facts when he found that there was no recourse in reversal of the consequential transfer of the subject motor vehicle registration number KCV 296R.

A. On the legality or otherwise of the attachment of Motor Vehicle Registration No. KCV 296R:

16. Counsel for the appellant impugned the alleged attachment and sale of the suit motor vehicle on the ground that it was illegal. In this regard, reliance was placed on Rule 12(b) of the *Auctioneers Rules*, which provides that:
 - (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
 - (a) record the court warrant or letter of instruction in the register;
 - (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
17. Accordingly, Mr. Nanji pointed out that, pursuant to the warrants of attachment re-issued to the 4th respondent on 23rd July 2020, the 4th respondent prepared a proclamation notice dated 27th July 2020 which was duly served on the appellant; but that the said proclamation did not include the subject motor vehicle. The proclamation is at page 59 of the Record of Appeal and it does confirm that Motor Vehicle Registration No. KCV 296R was not listed therein. I therefore find considerable merit in Mr. Nanji's submission that the attachment of the suit motor vehicle was done in contravention of Rule 12(b) of the *Auctioneers Rules*. I find succor for this conclusion in *Lakeland Motors Limited v Harbhajan Singh Sembhi* [1998] eKLR in which it was held:

“There does not appear to be any provision in the *Auctioneers Act*, 1996 nor in the *Auctioneers Rules*, 1997 for dispensing with the foregoing rule. Yet the respondent



proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution. Hence...we think that on account of the respondent's non-compliance with the law in the execution process of the decree as we have indicated in this ruling and to prevent abuse of the process of this Court...the said execution process must and is hereby set aside..."

18. I have similarly given consideration to the assertion by the appellant that the 4th respondent failed to comply with Order 22 Rule 57(1) and (2) of the Civil Procedure Rules, which provides that:

- (1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct.
- (2) Such public notice shall be drawn up after notice to the decree-holder and the judgment-debtor, and shall state the time and place of sale, and specify as fairly and accurately as possible —
 - (a) the property to be sold;
 - (b) any encumbrance to which the property is liable;
 - (c) the amount for the recovery of which the sale is ordered; and
 - (d) every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property:

Provided that notice to the judgment-debtor may be dispensed with, or substituted service thereof ordered, for reasons to be recorded by the court.

19. There appears to be no indication that this provision was complied with. Accordingly, the judgment debtor was thereby denied the notice it was entitled to by virtue of Rule 58 of Order 22, Civil Procedure Rules. That provision states:

“Save in the case of property of the kind described in the proviso to rule 37, no sale hereunder shall without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the public notice has been affixed in the precincts of the court of the judge ordering the sale.”

20. Further to the foregoing, a careful consideration of the record of the lower court shows that, at the time of the alleged attachment and sale, the subject motor vehicle was registered in the joint names of the appellant and the 3rd respondent, having been given as collateral for a loan. The Registration Certificate in proof thereof is to be found at page 109 of the Record of Appeal. That being the case, the 4th respondent was by law required, not only to carry out due diligence and ascertain whether or not the subject motor vehicle was encumbered, but to also take note of such encumbrance for purposes of Order 22 Rule 57(2)(b) aforementioned.



21. More importantly, on account of the encumbrance aforementioned, any attachment of the appellant's interest could only be effected by way of a notice of prohibition. In this regard, Order 22 Rule 41 of the Civil Procedure Rules is explicit that:

“Where the property to be attached consists of the share or interest of the judgment debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.”

22. Hence, I entirely agree with the position taken by Hon. Majanja, J. in Reuben Mong'are Kaba v MM N a minor suing through her mother and next of friend R M & Another [2018] eKLR, in which the learned judge held:

“In a previous appeal that came up in respect of objection proceedings lodged by a purchaser of the vehicle; Reuben Mong'are Kaba v MMN a minor suing through her mother and next friend RM and Another KSI HCCA No. 75 of 2017 [2018] eKLR, I dealt with the issue of ownership of the vehicle as follows:

- (6) Having reviewed the evidence, I find that the motor vehicle was owned and registered in the joint names of Equity Bank (Kenya) Limited and the 2nd respondent. While it is true that section 8 of the *Traffic Act* is a rebuttable presumption of ownership, I do not think the appellant could acquire an interest in the vehicle without the consent of the owners. It is evident from the agreements dated 14th and 16th December 2015, Equity Bank (Kenya) Limited was not a party yet it was a co-owner whose consent was necessary to transfer or acquire ownership. I therefore find and hold that the appellant could not acquire a legal or equitable interest in the motor vehicle without the consent of the co-owner.
7. In that decision I recognized that the Bank was a co-owner of the vehicle. That fact has not changed and in this case, the trial magistrate had clear evidence of the registration certificate of the vehicle but did not make the finding as requires in objection proceedings.”

23. A similar position was taken in CMC Motor Group v Garex Kenya Ltd & Another (supra) thus:

“There is no dispute that the motor vehicle was jointly owned by the judgment debtor as hirer and the 2nd objector as financier. The interest of the judgment debtor was therefore, under OXXI Rule 42 of the Rules only available for attachment by way of Notice prohibiting alienation of the motor vehicle to third parties. I do not believe a decree holder should exercise its rights of a lien holder by attaching such a motor vehicle through a completely different court process and in any event, such right of a lien holder would have to be confined to the interest of the judgment debtor which would again be subject to the provisions of Rule 42 of Order XXI aforesaid. The motor vehicle, it is common ground, was under a Hire Purchase agreement between the objector and the decree holder. The hirer's interest in such a situation has been held as not being attachable in the case of *Daibai versus Fatim and Ano* 1967 EA 526. I apply this reasoning and the holding in the case and hold that the hirers interest in motor vehicle registration no. KAJ 947 W was not available for attachment by any third parties.”



24. A final point raised by Mr. Nanji is in connection with the “alleged” sale. He pointed out that the alleged sale was not a sale in fact. He made reference to the Certificate of Sale dated 7th October 2020 signed by the 4th and 5th respondents. It is to be found at page 177 of the Record of Appeal and it shows that the subject motor vehicle was sold for Kshs. 3,500,000/=. There is another Certificate of Sale issued on 7th October 2020 at page 208 of the Record of Appeal. It was similarly signed by the 4th and 5th respondents, but purports that the subject motor vehicle was sold for Kshs. 4,800,000/=. That is a material inconsistency, and I am convinced that it goes to support the assertion by Mr. Nanji that there was fraudulent collusion between the 4th and 5th respondents to illegally deprive the appellant of its property.

25. In the light of the foregoing, the next question to pose is, what was the effect of the transfers to the 5th and 6th respondents? I have no hesitation in holding that those transfers are null and void. Indeed, in *Nationwide Finance Co. Ltd v Mech Industries Limited & another* [2001] eKLR it was held:

“I do not think that the court’s power to set aside a sale which is published or conducted irregularly or fraudulently is affected by the fact that the property had been sold to a bona fide purchaser for value without notice of the irregularity. The learned author of Volume II of Mulla On *The Code Of Civil Procedure Act V OF 1908* (13th Edition, ...) says as follows at p. 1182:-

“If the conditions of this rule are satisfied, the sale will be set aside though the purchaser may be a bona fide purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale.”

The failure to comply with the relevant mandatory requirement of the auctioneers Rules was a material irregularity.

B. On whether the learned trial magistrate misapprehended both the law and the facts when he found that there was no recourse in reversal of the consequential transfer of the subject motor vehicle registration number KCV 296R:

26. Granted all the matters aforesaid, the inescapable conclusion to draw is that the learned magistrate erred in failing to reverse the impugned transfers. As for the aspect of contempt of court, I find no reason, granted the evidence on record, to overturn the decision of the learned magistrate.

27. In the result, I find merit in the appeal. It is hereby allowed and orders granted as follows:

- (a) That the ruling and order of the learned Senior Resident Magistrate be and are hereby set aside;
- (b) That the transfer of the said motor vehicle effected on 22nd January 2021 in favour of the 5th respondent be and is hereby reversed;
- (c) That the transfer of the said motor vehicle effected in favour of the 6th respondent be and is similarly reversed;
- (e) Costs of and occasioned by the application dated 27th January 2021 and this appeal are hereby awarded to the 2nd defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF AUGUST 2023



**OLGA SEWE
JUDGE**

