



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wood Venture (K) Limited v Muigai & another (Civil Appeal  
165 of 2018) [2022] KEHC 11147 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 165 OF 2018**

**SJ CHITEMBWE, J**

**MAY 31, 2022**

**BETWEEN**

**WOOD VENTURE (K) LIMITED ..... APPELLANT**

**AND**

**JAMES GITAU MUIGAI ..... 1<sup>ST</sup> RESPONDENT**

**ALI JAMAL ABDULNASIR ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal form part of the Ruling and Order of the Honorable M. Obura(SPM)  
in Milimani Civil Suit No. 8403 of 2007 delivered on the 15th day of March, 2018)*

**RULING**

**Introduction**

1. The appellant has filed an appeal challenging part of the ruling and orders made by the subordinate court on August 24, 2018 which allowed the appellant's application on condition that it pays throw away cost of Kshs 15,000 to the auctioneers.
2. In that application, the appellant prayed for the court to set aside the *ex parte* judgment made on January 30, 2017 and an order for stay of execution of the proclamation and warrants of attachment dated November 27, 2017. The appellant also sought orders that the court declare the proclamation and warrants of attachment unlawful and the costs of the application.
3. By this appeal, the appellant prays for orders that:
  - a. The ruling and order of the Senior Principal Magistrate in Civil Suit No 8403 of 2007 on payment of auctioneers be set aside and;
  - b. The respondent pays the cost of the appeal.



## **Appellant's Submissions**

4. The appeal was determined by way of written submissions. The appellant summarizes the grounds of appeal into two issues for determination. Whether, the proclamation notice dated December 9, 2017 is lawful and whether the trial court erred in fact and in law in exercise of discretionary powers in ordering that the auctioneer's charges be paid by the appellant.
5. The appellant submits that the proclamation notice was irregular and unlawful as the motor vehicle described in the police abstract dated April 19, 2007 as KAR 069J Land Rover does not exist. It submits further that the trial court failed to take into consideration that the motor vehicle KAR 069J was not in the appellant's possession and was therefore not available for attachment.
6. On the second issue, the appellant submitted that the trial court made an order dependent on settlement of the auctioneer's costs which arose from a botched process of attachment that did not meet the legal threshold. It submits that this court has jurisdiction to reverse the orders by the subordinate court. The appellant relied on the case of *Price & another v Hidler* [1984] eKLR where the court affirmed the test in the case of *Mbogo & another v Shah* [1968] EA 93 when it stated that:

“In the well-known case of *Mbogo v Shah* [1968] EA 93, at page 95, Sir Charles Newbold P expressly approved Harris J's test of the principles it was necessary to consider in the exercise of the judicial discretion as to whether to set aside a judgment or not, as follows:

“Whether ... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

I am perfectly satisfied that this is the test that should be applied notwithstanding that the rules have been re-cast since then.”
7. Finally, the appellant submits that the trial court disregarded the issue of legality of proclamation and evidence together with the appellant's arguments on the issue which led to an incorrect finding which is highly prejudicial to the appellant.

## **1<sup>st</sup> Respondent's Submissions**

8. The 1<sup>st</sup> respondent contends that the appeal has no basis and that the discretion reserved and exercised by the court is to aid a party who has made a genuine mistake but not to assist a litigant who deliberately seeks to obviate the process.
9. On the auctioneer's charges, the appellant submits that the charges are not monstrous as intimated by the appellant. That taking up this issue in court only serves to delay litigation which must come to an end.

## **Analysis and Determination**

10. As this is a first appeal, the duty of the first appellate court is to examine matters of both law and facts and subject the whole of the evidence to a fresh scrutiny and draw its own conclusion from that analysis.
11. In my view, the main issues for determination in this appeal is whether the proclamation and warrants of attachments were valid and who should meet the auctioneer's costs. To determine this, it is necessary



to ascertain the owner of motor vehicle KAR 069J and make a finding based on the timeline in which pleadings were filed in the trial court.

12. In the trial court, the 1<sup>st</sup> respondent, as plaintiff sued the appellant and another for damages caused on his vehicle number KAL 597W after it was hit by motor vehicle KAR 069J in April, 2007. A motor vehicle search dated September 18, 2007 showed that the owner of motor vehicle number KAR 069J was the appellant, Wood ventures ltd.
13. The appellant claimed that the said vehicle was sold in 2003 way before the alleged accident and attached a sale agreement dated November 18, 2003 between it and Yasmin S Bharmal as evidence.
14. On the description of the vehicle, what is on record is a record from NTSA which describes the vehicle as a Toyota Corolla but does not state the owner of the vehicle. In addition to this, the sale agreement between the appellant and Yasmin has a note at the bottom stating that the logbook would be transferred later. On ownership and registration of motor vehicles, section 8 of the [Traffic Act](#) provides that:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

15. In interpretation of the section, the court in [Ignatius Makau Mutisya v Reuben Musyoki Muli](#) [2015] eKLR, it was held *inter alia* that:

"Also recently, this court in the case of Joel Muga Opinja v East Africa Sea Food Ltd [2013] eKLR restated this position as follows:

“We agree that the best way to prove ownership would be to produce to the court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection, the contents cannot later be denied”

All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao v Silas Thiani Nkunga, Civil Appeal No 92 of 1998,

“whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.”

16. It is evident that there was indeed an agreement between the appellant and Yasmin for the sale of the motor vehicle KAR 069J. This is proved by the sale agreement dated November 18, 2003. It is also evident from the search dated September 2007 which was done 4 years after the sale agreement that the vehicle still belonged to the appellant.
17. Prima facie, ownership of a vehicle is proved by registration with the Registrar of Motor Vehicles. The 1<sup>st</sup> respondent filed the suit based on the information provided from the search findings. The appellant filed a defence denying ownership on November 13, 2007. At this point, the burden of proving ownership shifted and it was upon it to prove that it was not the owner. The case proceeded to hearing which was ex parte and an ex parte judgement was entered before the appellant could adduce its evidence. The warrants were issued by the court following a valid judgment.



18. In my view, judgment was delivered in the trial court based on evidence tendered to it. What followed the judgement was lawful and it was within the 1<sup>st</sup> respondent's rights to enjoy the fruits of his judgement. The applicant prayed that the *ex parte* judgement be set aside and that leave be granted to present its testimony and evidence in support of its defence. The learned magistrate could not declare the proclamation and warrants of attachment unlawful without hearing the defendant's case.
19. On the question on the identity of the vehicle, the plaint by the 1<sup>st</sup> respondent does not specify that the vehicle was Toyota corolla, it only states the registration number as KAR 069J. This contradicts the description provided in the police abstract which describes the vehicle as a Land Rover defender.
20. It was held in the case of *Wellington Ng'ang'a Muthiora v Akamba Public Road Services and another* CA Kisumu [2010] eKLR that:

"...where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination, the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary." (emphasis)

21. As much as the police abstract could be defective, it is not conclusive evidence of ownership of a motor vehicle. The 1<sup>st</sup> respondent did produce a certificate from the registrar of motor vehicles as evidence apart from the police abstract. However, his testimony during the ex-parte hearing is contradictory wherein he testified that the vehicle that hit his was a Land Rover while the search established the vehicle as KAR 069J Toyota Corolla. The truth of these facts can only be ascertained during the hearing. I shall therefore not delve into the identity of the motor vehicle in question. What is at hand is the issue of payment of the auctioneer's fees.
22. In conclusion, I find that the trial magistrate made correct findings in the ruling. The orders shall therefore stand.
23. The appeal lacks merit and is hereby dismissed with costs. The appellant shall bear the costs of the appeal.

**DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2022**

.....

**S CHITEMBWE**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2022**

.....

**JK SERGON**

**JUDGE**

