



REPUBLIC OF KENYA



**Fakimohamed & another v Principal Magistrate (K. I. Orenge);
Prestige Shuttle Tour & Travels Ltd (Interested Party) (Judicial Review
3 of 2021) [2022] KEHC 11480 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW 3 OF 2021**

JM NGUGI, J

MAY 19, 2022

BETWEEN

ZAIN INAYA FAKIMOHAMED 1ST APPLICANT

**HANIRAZA INAYATALI FAKII MOHAMED T/A MOMBASA CAR
DEALERS 2ND APPLICANT**

AND

PRINCIPAL MAGISTRATE (K. I. ORENGE) RESPONDENT

AND

PRESTIGE SHUTTLE TOUR & TRAVELS LTD INTERESTED PARTY

JUDGMENT

1. This matter was initially filed in Mombasa and presided over by my brother Ogola J, who transferred it to Nakuru. When the matter came before me on 31/05/2021, I granted the Applicants leave to file a Judicial Review Application. Subsequently on 29/11/2021 I ordered that the said leave operate as a stay of the Order dated 15/01/2021 issued by the respondent (hereinafter ‘the Impugned order’).
2. The history of the matter as narrated by the Applicants is that the applicants entered into an agreement with Boniface Mutinda Nzuki, Stephen Nzuki Muli, Irene Njeri Nzuki and the Interested Party herein (hereinafter ‘the Purchasers’) for the sale of two motor vehicles described Scania Omnibuses of registration numbers KBS 035W and KBS 037W. The terms of the agreement were that the Purchasers would pay to the Applicants a purchase price of Kshs. 19,000,000 in 22 instalments, 21 of them of Kshs. 900,000 each of them commencing on 10/09/2018 and thereafter on the 10th day of each month and the 22nd instalment of Kshs. 100,000 on 10/06/2020.



3. According to the applicants, after the delivery of the two motor vehicles, the Purchasers only paid as sum of Kshs. 1,500,000 and then defaulted in payment. After protracted negotiations with the Applicants' advocates, the Applicants say they agreed to vary the terms of the initial agreement. The terms of the varied agreement were that the Purchasers would now make a payment of Kshs. 2,000,000 on or before 30/08/2019 and monthly instalment of Kshs. 400,000 commencing on or about 04/05/2019 and thereafter on the 4th day of each succeeding month until payment in full. It is alleged that for the second time, the Purchasers defaulted in payment, only paying two instalments of Kshs. 400,000 each, leaving a balance of Kshs. 16,700,000.
4. It is after this default that the Applicants say they filed Mombasa CMCC No, 67 of 2020 on 24/01/2020 for the recovery of the unpaid sums. They claim that after filing and serving the Plaint and accompanying documents in that suit, the Purchasers entered appearance through the firm of Karanja Mbugua & Company Advocates on 12/02/2020 but failed to file a Defence within the prescribed time. Accordingly, the Applicants applied for Judgment in Default of Defence and the same was entered on 02/03/2020, jointly and severally against the Purchasers. They then served Notices of Entry of Judgment on the Purchasers on 09/03/2020 and made an application to execute the decree through attachment and sale of Interested Party's movable property found on its premises in Nakuru.
5. The Applicants claim that they had initially contracted Legacy Auctioneers to carry out the proclamation and after receiving a Notice from Messrs Karanja Mbugua and Company Advocates, the said Auctioneers returned the warrants of attachment informing the Applicants' advocates that they could not trace the Purchasers' property.
6. The Applicants says that they then conducted a search at NTSA on various motor vehicles namely KCB 592L, KCF883V, KCF884V, KCD517M, KCD 593L, KCD591, KCD 254L, KCD256L, KCD 572Q, KCD 526Q, KCD569M, KCD648E and KBW321Z and after establishing their ownership applied for the re-issuance of warrants of attachment. The new warrants of attachment were then issued on 11/12/2020 to Regent Auctioneers, who then proclaimed various movable goods and motor vehicles found withing the 4th Purchaser's premises in Nakuru and seized various motor vehicles.
7. The applicants claim that their advocates later received the impugned order issued in Nakuru CMCC E008 of 2021, a suit filed by the Interested Party herein against Messrs Regent Auctioneers. The order issued by the Respondent herein read in part:
 1. Thatthe application dated 12th January 2021 is found merited
 2. Thatpending the hearing and determination of this Application, the Honourable Court hereby issues an order of immediate and unconditional release of Motor Vehicles Registration Numbers KCD 256L, KCF 883V, KCD 517M, KCD 593L, KCD 594L, KCD 591L, KCD 572Q, KCD 526Q,KBW 321Z, KBN 026F, KCD 569M, KCD 592L, KCF 884V, KCD 254L and KCB 648E to the Plaintiff/Applicant in their motor able serviceable and mechanically sound condition with all their components and accessories and the Defendant is hereby restrained from seizing, proclaiming, attaching or in any way interfering with the Plaintiff's/ Applicants Motor Vehicle Registration Numbers KCD 256L, KCF 883V, KCD 517M, KCD 593L, KCD 594L, KCD 591L, KCD 572Q, KCD 526Q KBW 321Z, KBN 026F, KCD 569M, KCD 592L, KCF 884V, KCD 254L and KCB 648E and or any other Motor Vehicle on hire to the Plaintiff.
 3. Thatthe matter shall be mentioned on 3rd February 2021 for further orders.



8. According to the applicants, save for the impugned order, they were never served with any other documents relating to the suit but obtained the Plaintiff and accompanying documents together with the Notice for Motion application dated 12/01/2021. It is after being served with the Impugned Order that the Applicants sought leave of the Court to file a Judicial Review Application against the Respondent.
9. After being satisfied that both the Respondent and the Interested Party were duly served but opted not to participate in the matter, I granted prayer 2 of the chamber summons application dated 28/01/2021.
10. Accordingly, before me for determination is the notice of motion application dated 16/06/2021 in which the applicants seek the following orders:

An order of Certiorari to remove into this honourable court and to quash the orders made by the Respondent in the above Nakuru case on 15th January 2021 on the grounds set out in the copy statement served herewith used on the application for leave to apply for Judicial review

And That the costs of and occasioned by this motion be taxed and be paid by the Interested party to the Applicants (sic)

11. The application is supported by the statement dated 28/01/2021 and the affidavit of Inayat Ali Fakirmohamed of an even date. The facts are as narrated above.
12. The Applicants believe that the only course of action open to the Interested Party who in the Nakuru Suit claims that the Motor vehicles belong to Clyde Motors and other entities was to object to the attachment and sale of the said motor vehicles to the Mombasa Court and that therefore, the Respondent should not have determined the Interested Party's Notice of Motion – and especially not before giving notice to the Applicants.
13. The Applicants also contend that the Respondent failed to deal with the Interested Party's Notice of Motion dated 13/01/2021 according to the Law and that in making the Impugned Order ex-parte, the Respondent acted unreasonably, in bad faith and has grossly erred in law and acted outside his jurisdiction, making the impugned order ultra vires and void. The Applicants also contend that the Impugned Order is wrong in law, outrageous, defiant of logic and basic rules of natural justice and that the Respondent failed in his duty to act fairly towards the Applicants and abused his power by making the Impugned order.
14. The Applicants contend that the Notice of Motion dated 14/01/2021 in the Nakuru Case was an abuse of the court process, meant to circumvent section 34 of the *Civil Procedure Act* and order 22 rule 51 of the *Civil Procedure Rules* 2010. They maintain that before making those orders, the respondent should have accorded them a reasonable opportunity of making representations to him in the Nakuru case and that therefore, the respondent made orders which no reasonable tribunal would have made.
15. In their submissions dated 17/03/2022, the applicants submit that the order of certiorari is granted when a court has acted without or in excess of its jurisdiction or where there is violation of procedure or disregard of the principles of natural justice or where there is an error apparent on the face of the record. They cite the cases of *Esther Kavive v Senior Principal Magistrate's Court Kangundo & another* [2021] eKLR and *Republic v Minister for Agriculture* [2007] eKLR. The Applicants argue that by making orders in the Nakuru Case instead of the Mombasa Case, the Respondent grossly erred in law.
16. The single issue for determination is whether the impugned order was irrational and/ or unreasonable and consequently, whether the applicants have made a case for the grant of a judicial review remedy.



17. The starting point for analysis is section 34(1) of the *Civil Procedure Act*. It is entitled “Questions to be Determined by Court Executing Decree.” The section provides as follows:

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.

18. That section is further amplified by order 22, rule 51 of the *Civil Procedure Rules*. It is entitled “Objection to Attachment.” It stipulates that:

Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

19. The applicants point is that even if the interested parties had a valid claim to the subject motor vehicles, their proper recourse in law would have been to file an appropriate application in the Mombasa Suit which had issued the Warrants of Attachment. The Applicants argue that it was in utmost bad faith for the Interested Parties (who were aware of the Mombasa Suit) to bring a Miscellaneous Application before the Magistrate in Nakuru respecting the attachment of the Subject Motor Vehicle. They equally find it an unreasonable exercise of judicial power for the Learned Magistrate (Respondent) to have entertained and then issued orders in the Nakuru case in the circumstances of the case here.

20. In my view, there is no need to belabour the point. The Applicants are obviously correct. Both section 34(1) of the *Civil Procedure Act* and order 22, rule 51 are clear that the correct procedure would have been for the Interested Parties or any other person claiming ownership of the subject motor vehicles to approach the Court which had issued the warrants of attachment in Mombasa. The Nakuru court had no jurisdiction to entertain the matter under the guise of a new suit. The situation is compounded by the fact that the orders were issued ex parte and without affording the Applicants an opportunity to be heard. If the Learned Magistrate had given the Applicants an opportunity to be heard, perhaps they would have brought to his attention the correct provisions of the law. The issuance of ex parte orders in the circumstances here, one would have to agree with the Applicants, were unreasonable. They provide a rare case where a litigant would be permitted to benefit from a prerogative order to challenge a Court order rather than be required to pursue an appeal or an application to set aside the orders. May this be a cautionary tale for Learned Magistrates: objection proceedings respecting attachment pursuant to warrants issued in satisfaction of a judgment or decree of the Court can only be brought within the same suit with respect to which the warrants of attachment were issued. Objection proceedings cannot be brought as a new and separate suit. Consequently, I have come to the conclusion that the prayed order of certiorari is deserved here.

21. The upshot is that the notice of motion dated 16/06/2021 is meritorious. The court hereby grants the order of certiorari to remove into this honourable court for purposes of quashing the orders made by the respondent (Hon. K. I. Orenge, SPM) in Nakuru CMCC No. E008 of 2021 on 15/01/2021 and hereby so quashes those orders.



22. The interested parties shall also pay the costs of this suit.

23. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF MAY, 2022

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JOEL NGUGI

JUDGE

