



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. E008 OF 2021

1. JOSEPHAT ONGWENYI.....1ST APPELLANT/OBJECTOR

2. WYCLIFF OMWENGA GITEYA.....2ND APPELLANT/OBJECTOR

=VRS=

1. RUSIA KWAMBOKA.....1ST RESPONDENT

2. MOSES MAKORI.....2ND RESPONDENT

(Being an appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM

Nyamira dated and delivered on the 10th day of December 2020 in the

original Nyamira Chief Magistrate’s Court Civil Case No. 93 of 2019)

JUDGEMENT

This appeal arises from a ruling which dismissed objection proceedings filed by the objector/appellants in regard to the attachment of motor vehicle Registration No. KBX 769J in satisfaction of a decree in favour of the decree holder/1st respondent after obtaining a judgement against the judgement debtor/2nd respondent in a personal injury claim. The objection proceedings also had a prayer for special damages in the nature of loss of user at Kshs. 3,000/= per day. After considering evidence before him the trial Magistrate’s finding was that the 2nd objector/2nd appellant did not prove legal or beneficial ownership of the motor vehicle and dismissed the objection proceedings. Being aggrieved the objectors/appellants preferred this appeal. The same is premised on the following grounds: -

“1. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the law and evaluate the evidence placed before her.

2. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the documents filed to confirm the equitable interest of the objectors.

3. That the Learned Trial Magistrate erred in law and fact by dismissing the objector’s application irrespective of demonstrating that the objectors had demonstrated equitable interest in the subject motor vehicle.

4. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that if the objectors were successful how much special damages could have been awarded to the objectors.”

The appeal proceeded by way of written submissions. In summary Counsel for the appellants submitted that the attachment of the motor vehicle KBX 769J was irregular, null and void since it affected the equitable interest of the 2nd appellant yet he was not a party to the suit and there was no judgement against him. Counsel submitted that the Advocate for the 1st respondent should have exercised due diligence by obtaining a copy of records to confirm ownership of the motor vehicle before sending an auctioneer to attach it. Counsel submitted that **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 motor vehicle. Counsel contended that as there was no nexus between the then registered owner and the defendant (now the 2nd respondent), the doctrine of vicarious liability could not have arisen and the judgement obtained by the 1st respondent could only affect the property of the 1st respondent and not any other third party and the execution proceedings against the property of the 2nd appellant was therefore not safe or proper. On whether the appellants had an equitable interest in the motor vehicle Counsel contended that they did as they were purchasers for value without notice and as such were protected by the law and the attachment ought to be lifted. To buttress his argument Counsel cited the following cases: -

- **Order 22 Rule 51 (1) of the Civil Procedure Rules.**
- **Section 8 of the Traffic Act.**
- **Arun C Sharma v Ashana Raikundalia T/a Raikundalia & Co., Advocates & 4 others [2014] eKLR.**
- **Precast Portal Structures v Kenya Pencil Company Ltd & 2 others [1993] eKLR.**
- **Thomas Malinda Musau & 3 others v Ruth Anyango Odhiambo Election Petition No. 3 of 2013.**

Counsel faulted the trial Magistrate for what he referred to as shifting the burden of proof to the 2nd appellant. Counsel submitted that the appellants had filed documents to confirm not only their interest in the vehicle but also to prove that the vehicle was under the use and benefit of the 2nd appellant. Counsel reiterated that the 2nd appellant was a purchaser for value without notice and with the consent of the 1st appellant as demonstrated in the sale agreement between the 2nd appellant and one Obeid Nyabaro Mainya. Counsel submitted that the trial Magistrate's finding that the 2nd appellant did not discharge the burden was not well founded. He submitted that this court is clothed with jurisdiction to determine the issues raised by the parties to this appeal. He urged this court to lift the attachment and to release the motor vehicle to the appellants unconditionally and award them the costs of this appeal.

The appeal is vehemently opposed. Counsel for the 1st respondent began by stating that despite being a party to the objection proceedings the 1st appellant did not sign an authority in writing as required in **Order 1 Rule 13 of the Civil Procedure Rules**. Counsel submitted therefore that the 2nd appellant did not demonstrate the nexus between him and the 1st appellant. Counsel then contended that the documents exhibited in the trial court were a logbook in the name of Josephat Ongwenyi Osinde (1st appellant) and a sale agreement between one Obed Mainya Nyabaro and the 2nd appellant and nowhere did the 1st appellant state that the vehicle was sold to the 2nd appellant with his blessings. Counsel submitted that as such the 2nd appellant cannot claim to have equitable ownership in the vehicle. Counsel further accused the appellants of introducing documents in this appeal which were not exhibits in the objection proceedings. Counsel identified those documents as the sale agreements at page 44, 46 and 43 of the record of appeal. He submitted that those documents were, in this appeal, mere papers with no evidential value and the 2nd appellant could not rely on the same to claim ownership of the attached vehicle. Counsel stated that the same applied to the lease agreement between the 2nd appellant and one Regolma Limited. To buttress this submission Counsel cited the cases of: -

- **South Nyanza Sugar Co. Ltd v Mary A Mwita & another [2018] eKLR.**
- **Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR.**

Counsel contended that whereas the documents may have been marked for identification the same were not produced in evidence and hence they did not become exhibits. In regard to this Counsel cited the case of **Des Raj Sharma v Reginam (1953) 19EACA 310** and the Nigerian case of **Michael Hausa v the State (1994) 8-8 SCNJ 144** where he submitted that it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence. Counsel for the 2nd respondent also took issue with the fact that the 2nd respondent was not served with the objection proceedings. Counsel contended that this was despite the mandatory provisions of **Order 22 Rule 51 (3) of the Civil Procedure Rules**. In conclusion Counsel submitted that the appellants had an obligation to demonstrate that their right of ownership to the suit motor vehicle is greater compared to that of the 2nd respondent and that by excluding the 2nd respondent they violated **Article 50 (1) of the Constitution and Order 22 Rule 51 (3) of the Civil Procedure Rules**. Counsel urged this court to find the appeal not merited and dismiss it with costs.

I have considered the rival submissions, the proceedings before the trial court and the law. Objection proceedings are brought pursuant to **Order 22 Rule 51 (1) of the Civil Procedure Rules** which states: -

“(1) 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.”

Flowing from the above provision the **issue for determination** in the trial court and in this court is **whether or not the appellants did on a balance of probabilities demonstrate that they were entitled to or that they had a legal or equitable interest in motor vehicle Registration No. KBX 769J.**

I shall not attach much to the submission by Counsel for the 1st respondent that the appellants cannot rely on the agreements for sale and lease as they were not marked as exhibits. I do this because it is evident from the record that the objection proceedings were instituted by way of a Notice of Motion with a supporting affidavit to which a replying affidavit in opposition was filed and the same having been canvassed by way of written submissions a distinction cannot be drawn between documents marked for identification and documents produced in evidence. The documents save for the purported agreement between the 1st appellant and one Obed Mainya and which I shall not consider were annexures to the supporting affidavit and were therefore part of the pleadings and evidence. The objection proceedings having been canvassed by way of written submissions as opposed to *viva voce* evidence the annexures to the affidavits *iposo facto* became part of the evidence for the appellants. I shall therefore refer to those documents when considering the merits of this appeal. What I find objectionable however is that the objectors did not serve the objection and the subsequent proceedings upon the 2nd respondent who is the judgement debtor yet **Order 22 Rule 51 (3) of the Civil Procedure Rules** requires the notice and the application to be served on all the parties in the suit.

Be that as it may I have carefully considered the 2nd appellant's claim and I am not persuaded that it was proved on a balance of probabilities. Firstly, a cloud hovers around the omission to serve the 2nd respondent who is the judgement debtor. Why was he excluded from the objection proceedings yet there is evidence that he was the registered owner of the subject motor vehicle at all times material to the claim? This definitely raises a red flag. It is also not lost to this court that the motor vehicle the subject of the objection proceedings purportedly changed hands a handful of days prior to the proclamation and attachment in the primary suit. Indeed, there is also a gaping hole when it comes to the transfer of the motor vehicle from the judgement debtor/2nd respondent to Obed Mainya Nyabaro who according to the sale agreement is alleged to have purchased it from the 1st respondent before selling it to the 2nd appellant. It is also instructive that the logbook relied upon by the 2nd appellant and which is in the name of the 1st appellant does not indicate when he became the owner. One would also wonder how Obed Mainya Nyabaro would purport to sell a motor vehicle which being registered in the name of another person did not belong to him and hence he had no interest which he could pass to someone else. The Moon Motor Mart agreement found at page 46 of the Record of Appeal was not among the annexures laid before the trial court during the objection proceedings and hence has been introduced to this appeal unprocedurally and I shall not therefore consider it. In any event even was I to consider it the gap that arises between the ownership of that vehicle by the judgement debtor and Obed Mainya would still not be filled because there is no transfer between the two parties. Moreover, a closer scrutiny of the sale agreement between the appellants confirm that the 2nd appellant was not a purchaser for value without notice. This is because **"the agreement"** for sale has a clause which states: -

"8. LIABILITIES: The motor vehicle in question is owned by the seller, and on the understanding that the seller will transfer the said motor vehicle sold as at today as per this agreement, liability immediately shifts to the purchaser, as the purchaser herein takes possession of the said motor vehicle. All pending liabilities of any nature in relation to the said motor vehicle, be they as a result of earlier sale, transaction or due to an accident or of any other sort, shall be the responsibility of the purchaser." (Underlining mine).

The foregoing clause clearly put the 2nd appellant on notice that he was to take upon himself any pending liability which arose/attached from use of the motor vehicle including any liability arising from the accident. He cannot now be heard to state that the attachment of motor vehicle KBX 769J in satisfaction of the decree arising from the 1st respondent's claim was illegal or unlawful as he had bound himself to take the same upon himself from the previous owner.

In the upshot I find that this appeal has no merit first as there is no evidence that the 2nd respondent legally acquired the ownership of the motor vehicle which belonged to the judgement debtor/2nd respondent and secondly because if he did the 2nd appellant undertook to take responsibility for all liabilities arising from the motor vehicle before the sale including those arising from accidents. The appeal is dismissed with costs to the 1st respondent. The 1st appellant and the 2nd respondent having not participated in the proceedings before this court are not entitled to costs. It is so ordered.

Signed, dated and delivered (Electronically via Microsoft Teams) at Nyamira this 24th day of June 2021.

E. N. MAINA

JUDGE