



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 91 OF 2018

SPIRE BANK LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

GLADYS NJERI WAINAINA.....1ST DEFENDANT/APPLICANT

SIMON GATHU NJOGU.....2ND DEFENDANT/APPLICANT

RULING

1. Before Court is a Notice of Motion dated 18/3/2021 brought under *sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act & Order 10, Rule 11, Order 51 Rules 1 and 3, Order 5 of the Civil Procedure Rules*.
2. In the Motion, the applicant has sought an order to have motor vehicle registration number **KCA 905D** (hereafter “the vehicle”) to be released to her unconditionally and for the Officer in charge of the Central Police Station to enforce that Order.
3. The grounds for the application include that; the applicant is the registered owner of the vehicle, an interlocutory judgment had been entered against her on 7/11/2018 whose stay of execution was ordered on 8/7/2019. On 30/4/2020, the Court set aside that judgment and ordered that the matter do proceed to full hearing.
4. In opposition, the respondent filed a replying affidavit sworn by **John Wageche**, the respondent’s senior legal officer, on 21/4/2021. He averred that judgment in default was entered on 7/11/2018 pursuant to which the plaintiff extracted a decree and commenced execution. That the application is unmerited and an abuse of the court process as the vehicle had already been sold by public auction on 9/7/2019 to an innocent purchaser for value.
5. It was further contended that the innocent purchaser for value is protected by *section 14 of the Sale of Goods Act* therefore the orders sought cannot be issued.
6. The applicant responded to the respondents’ contentions through a supplementary affidavit of 18/5/2020. She averred that, an order for stay of execution was made on 8/7/2019 and served upon the auctioneer’s office on the same day but he refused to stamp receipt of the same until the next day. That from the advertisement in the Daily Nation of 15/7/2019, the auction was to take place at 11am therefore the claim by the respondent that the auctioneer had sold the vehicle at 11am to the highest bidder is false.
7. The applicant further contended that the entire auction and sale is null for reasons that: the notification of sale of movable property dated 24/6/2019 indicated the wrong case number, that on 9/7/2019 she arrived at the auctioneer’s office/compound at 9.am and at no time was there an auction conducted, that it is not possible to schedule a public auction at 11am and claim that the vehicle was already sold by 11am. That the vehicle is still registered in her name and that the respondent had failed to secure an affidavit from the auctioneer or the purported purchaser to explain the alleged sale and purchase.
8. Having considered the pleadings, affidavits and evidence on record, the court finds that the issue for determination is **whether or not a lawful auction took place**.
9. The respondent’s auctioneers, Regent Auctioneers, advertised the sale by public auction of the vehicle in the Daily Nation of 1/7/2019. The advertisement indicated that the auction would take place on 9/7/2019 at 11 a.m. and gave specifics of the vehicle.
10. An Order for stay of execution of the interlocutory judgment and decree was issued on 8/7/2019. The applicant averred that the order

was served upon the auctioneers' office on the same day but the auctioneer refused to stamp receipt thereof until the next day. That positive averment was not denied by the auctioneer. Instead, the respondent averred that the stay Order was only served upon the auctioneers on 9/7/2019 at 3.01pm when the vehicle had already been sold.

11. In support of this assertion, the respondent produced a letter dated 10/7/2019 from the auctioneers indicating that the stay orders were served upon them on 9/7/2019 at 3.01pm after the vehicle had been sold.

12. The Court has carefully considered the contents of the said letter. Firstly, the contents thereof did not seek to counter, challenge or deny the averments made on oath by the applicant in her affidavits. Secondly, the contents thereof were not made on oath. Thirdly, that letter was a private communication between the respondent and its agent, the auctioneers. Fourthly, the letter is not evidence of the carrying out of an auction. The Court expected the auctioneers to produce a Memorandum containing the auction details, the time the auction took place, those present, the list of the bidders and more importantly, the full particulars of the alleged highest bidder.

13. Further, the letter purported to forward two cheques whose particulars were not disclosed. It was not explained why the cheque numbers were left blank. It may as well have been that there were no cheques.

14. The Court entertains reasonable doubts that any lawful auction took place. For the foregoing and the following reasons, the Court holds the opinion that there was no auction or lawful auction that was held by which the vehicle was sold: -

a) the respondent averred in its replying affidavit of 21/4/2021 that the subject vehicle was sold via public auction at 11.00am. The advertisement of the auction stated that the auction would begin at 11.00am. Is it reasonably possible to start a public auction at 11.00am and conclude the same at the same time? How many bids were there? Who were the bidders?

b) a search on the ownership of the vehicle on the National Transport and Safety Authority (NTSA) platform indicates that the applicant is still the owner of the vehicle. This search was as of 11/3/2021. The question that arises is, if the vehicle was indeed sold via public auction on 9/7/2019, why has the ownership not changed to that of the purported purchaser almost 2 years after the alleged sale took place?

c) No memorandum of sale was produced to confirm the alleged sale. There is also no proof of the existence of a purchaser.

d) Neither the alleged purchaser nor the auctioneer swore any affidavit to challenge the applicant's averments made on oath.

15. In **Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others [2015] eKLR**, the court set aside a public auction and the consequences arising therefrom and ordered the refund of all the monies paid to the purchaser pursuant to the alleged public auction. The court found that there had been no sale and that there was a possibility of fraud. This Court will adopt a similar finding in this case.

16. Further, in the ruling of Kasango J made on 30/4/2020, the Court found that there were serious allegations of fraud made against the respondent in relation to the loan facility it alleges to be the basis of its claim against the applicant. It would therefore be in the interest of justice that the vehicle be released to the applicant, who is the registered owner, pending the determination of the suit.

17. Consequently, the Court allows the application and makes the following orders: -

a) The alleged public auction for the sale of motor vehicle registration number KCA 905 D on 9/7/2019 and the consequences arising therefrom are hereby set aside.

b) Prayer nos. 2 and 3 of the application dated 18/3/2021 are hereby granted as prayed.

c) Costs of the application are awarded to the applicant, in any event.

DATED and **DELIVERED** at Nairobi this 19th day of August, 2021.

A. MABEYA, FCI Arb

JUDGE