



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CORAM: A.K NDUNG'U, J

CIVIL APPEAL NO. 475 OF 2016

EAST & CENTRAL AFRICA ENTERPRISES LIMITED.....1ST APPELLANT

SAMUEL MUHUNU KIMANI.....2ND APPELLANT

VERSUS

DORCAS WAIRIMU NDIRANGU.....1ST RESPONDENT

EAST AFRICA STAR BAKERIES.....2ND RESPONDENT

WILLIAM OWITI.....3RD RESPONDENT

(Being an appeal from the ruling and order of Hon. Orenge (SRM))

delivered on 09/06/2016 in Nairobi CMCC No. 6996 of 2012)

JUDGEMENT

1. The appellants have lodged this appeal against the lower court's ruling dismissing their application dated 4th February, 2015 in which they objected to execution proceedings by the 1st respondent.
2. The background of the appeal is that the 1st respondent had sued the 2nd and 3rd respondents and one Kibet for special damages following an accident in which her motor vehicle registration number KAW 048P was extensively damaged in a collision with the 2nd respondent's vehicle. She claimed that the 3rd respondent was driving the vehicle at the time and his negligent and reckless control of the 2nd respondent's vehicle had caused the accident.
3. Default judgment was entered against the defendants who had failed to enter appearance and a decree was issued in favour of the 1st respondent on 10th June 2014. On the 1st respondent's instructions, Moran Auctioneers obtained warrants of attachment and sale of the 2nd and 3rd respondents' property in execution of the decree.
4. It is then that the 1st appellant moved the trial court by an application dated 16th September 2014 seeking to be enjoined in the suit as an interested party and for stay of execution of the decree. That application was dismissed on 2nd February 2015.
5. Apprehensive that the auctioneers instructed by the 1st respondent would proceed with execution, the appellants filed the subject objection proceedings. In the application dated 4th February 2015, the appellant sought to restrain the 1st respondent from disposing of goods attached on the basis of the warrants on the grounds that they owned the goods.
6. The 1st appellant's managing director, Abdulkadir Salad, swore an affidavit in support of the application. In it, he averred that the 1st appellant owned a bakery business known as East Africa Star Bakery which operated at rented premises within Nairobi. He averred that the bakery business and assets thereof had been purchased by the 1st appellant for a total costs of Kshs. 3,000,000/= in August 2011. To prove this, he attached an agreement for sale of the major equipment used in the bakery dated 9th August 2011 and a statement of account showing payment.

7. The managing director further averred that on 3rd September 2014, M/s Moran Auctioneers invaded the business premises claiming that they had come to attach and auction the 1st appellant's property due to an unsettled judgment debt and proceeded to proclaim several of the objectors' properties. He deposed that he was surprised by the proclamation as he was unaware of any pending suit against the 1st appellant. Upon perusal of the court file, he realized that a suit had been instituted against East Africa Star Bakeries which had a similar name to the 1st appellant's business East Africa Star Bakery. He stated that their application to be enjoined in the suit had been dismissed therefore the 1st appellant was not a party to the suit and thus its property could not be disposed of to satisfy the judgment debt.

8. The 2nd appellant also swore an affidavit in support of the application. He stated that he ran a transport business in Nairobi and in line with his said business he had entered into an oral agreement with the 1st appellant to hire out his vehicle registration number KAW 715X to be used in the transportation of their products and supplies for their bakery business named East Africa Star Bakery. He averred that he was aware that on 3rd September 2014, auctioneers instructed by the 1st respondent had attached movable property obtained from the 1st appellant's premises and in the process they also proclaimed his vehicle. He urged the court to grant the orders prayed otherwise his vehicle would be sold off.

9. In response, the 1st respondent averred that when her vehicle was involved in the accident involving motor vehicle registration number KBJ 221 F, a police abstract was issued indicating that the vehicle was being driven by the 3rd respondent who confirmed that he was employed by the 2nd respondent, whose name was printed on the vehicle. A search at the registrar of motor vehicles revealed that the owner of the vehicle was one Kibet who was sued alongside the 1st and 2nd respondents.

10. Demand letters and statutory notices were sent to the 2nd and 3rd respondents and their respective insurance companies but none responded. The 1st respondent averred that efforts to trace the whereabouts of the 2nd and 3rd respondents were futile and service had to be done through post office. She insisted that the 2nd respondent was the beneficial owner of the vehicle that had been involved in an accident with her vehicle. She also stated that to the public, the 2nd respondent referred to itself as East Africa Star Bakeries and that the two names referred to the same business.

11. In brief rejoinder, the 1st appellant's managing director refuted the claim that motor vehicle registration number KBJ 221 F had ever been owned by Kibet. According to the copy of records he had obtained, the vehicle was owned by Scientific Advisory and Information Network at the time of the accident. He stated that the postal address used by the 1st respondent was not his and therefore no party had ever been served with summons and pleadings. He also averred that the 2nd respondent did not have the capacity to be sued as it was not a legal entity.

PARTIES' SUBMISSIONS

12. The parties took directions to dispose of this appeal by way of written submissions.

13. In his submissions, the appellants' counsel discussed the ownership of the proclaimed goods; the ownership of Motor Vehicle Registration No. KAW 048 P and whether the 2nd respondent had capacity to be sued.

14. On the first issue, the appellants' counsel submitted that the trial court erred by failing to appreciate that the appellants had an equitable interest in the proclaimed goods yet the appellants had produced sufficient proof establishing ownership. He submitted that the appellants having alleged that they had a legal interest in the property, the burden of proof shifted to the 1st respondent to disprove this and show that the attached property belonged to the 2nd and 3rd respondents who were the judgment debtors, but she failed to do so.

15. Counsel also contended that the 1st respondent did not prove that the appellants had been served with the summons and pleadings in the matter from which the execution arose hence the execution proceedings against them was wrong.

16. He also assailed the trial court's ruling on the grounds that motor vehicle registration no. KAW 048 P was not registered in the name of the 1st respondent. She had deposed that her late husband had bought her the vehicle from one Njenga Geoffrey but failed to furnish evidence to prove that she had been married to Charles Ndege Kirundi. Further, that the transfer from Njenga Geoffrey ought to have taken place within 14 days as per **section 9 (1)** of the **Traffic Act** hence the 1st respondent's cause of action was based on an illegality and ought to have been dismissed.

17. Counsel also argued that the lower court erred in law by allowing the 1st respondent's suit to proceed against the 2nd respondent which was a business name and had no capacity to be sued in its own name.

18. The 1st respondent's counsel confined his written submissions to the issue of ownership of the proclaimed goods. He argued that it was the appellants' duty to prove on a balance of probabilities that the goods proclaimed were theirs and not the 2nd and 3rd respondents'. Reliance was placed in the case of *Kennedy Njuguna Mwangi v Collins Kiprono Bett & 3 others [2018]eKLR* in support of this proposition.

19. Counsel submitted that the 2nd appellant ought to have produced documentary evidence of his proprietary interest in the attached motor vehicle but failed to do so. He argued that the proclaimed goods including motor vehicle registration number KAW 715X, which had the name East Africa Star Bakeries on the right hand side, were found at the 2nd respondent's premises; That since the 1st appellant had confirmed that it owned East Africa Star Bakery and East Africa Star Bakery referred to itself as East Africa Star Bakeries, the names East Africa Star Bakery and East Africa Star Bakeries referred to the same business and the 1st appellant was liable for all the liabilities incurred by the business.

20. Counsel contended that since the 2nd and 3rd respondents had ample time to enter appearance but failed to do so within the stipulated period, this appeal is merely a tactic to prevent the 1st respondent from enjoying the fruits of her judgment. He urged the court to disregard the appellants' submissions on the ownership of motor vehicle registration no. KAW 048 P which he argued was not within the purview of this court as this is not an appeal against the judgment of the lower court.

ANALYSIS AND DETERMINATION

21. I agree with counsel for the 1st respondent that this is not an appeal against the judgment of the lower court, as such the question of whether or not motor vehicle registration no. KAW 048 P belonged to the 1st respondent is not an issue for determination in this appeal.

22. The question in this appeal is essentially whether the appellants had any equitable or legal interest in the goods attached and proclaimed by the 1st respondent's agent.

23. In the case of *Brar v Wareng Quarry Achare Construction Civil Appeal No. 10 of 1977[1984] KLR 705* which was cited by the appellants, the Court of Appeal stated the duty of a court in determining objection proceedings thus;

“The purpose of instituting proceedings under the Civil Procedure (revised) Rules 1948 order XXI rule 57 is to provide the objector with an opportunity to establish his claim to the attached moveable property. If he is able to do so and also that the judgment debtor has no attachable interest in the attached movable property, it should be ordered to be released to the objector ... it is the duty of the court to make a finding under rule 57 about the ownership of the attached movable property even if the property has been sold”

25. The Civil Procedure Rules now, provide for objection proceedings in *Order 22 Rule 51(1)* in the following terms;

(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.

25. The appellants in this instant claim that the goods attached by M/s Moran Auctioneers on the instructions of the 1st respondent belong to them. In the proclamation of attachment dated 3rd September 2014, the schedule of moveable properties listed a motor vehicle registration no. KAW 715 X Mitsubishi, 4 office desks, 2 computer sets, 10 office chairs and a round conference table. A notification of sale dated 11th September 2014 listed the attached items as 2 complete computer sets, round conference table, 5 chairs, 10 office chairs, 4 office desks 5 small ovens and 50 baking trays.

26. The burden of proving the ownership of these attached goods lay on the appellant. (See *Dubai Bank Kenya Ltd v Come-Cons Africa Ltd & Another Civil Suit 68 of 2003 [2012]eKLR*)

27. The 1st appellant's managing director, in his affidavit sworn in support of the application, annexed a certificate of incorporation and certificate of registration showing that the 1st appellant was the proprietor of the business known as East Africa Star Bakery. He attached a sale agreement and statements of account to corroborate his averment that the 1st appellant had bought the bakery together with its equipment from Linset Industries Limited at Kshs. 3,000,000/-. The 2nd appellant also annexed a copy of a log book to support his assertion that he owned motor vehicle registration no. KAW 715 X Mitsubishi.

28. In my view, the appellants proved on a balance of probabilities that they owned these properties. They successfully countered the 1st respondent claim that the properties belonged to the 2nd respondent.

29. It was the 1st respondent's argument that East Africa Star Bakeries and East Africa Star Bakery referred to the same business. That may be the case. However, it is trite that a business entity is incapable of owning property. The 1st appellant on the other hand did establish that it is a body corporate capable of owning property and in this case, the attached properties. I find that the appellants proved that they had a legal and equitable interest in the properties attached.

30. The upshot is that the appeal is allowed. In the circumstances of this case, each party is to bear its own costs.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE