



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 19 OF 2019**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**EQUITY BANK (KENYA) LIMITED.....APPELLANT**

**AND**

**MAURINE MORAA NYAMWAKA .....1<sup>ST</sup> RESPONDENT**

**MAKORI VICTORINAH KEMUNTO..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the Order and Ruling of Hon. E.A Obina, PM dated 22<sup>nd</sup> January 2019 at the Magistrate's Court at Kisii in Civil Case No. 57 of 2015)*

**JUDGMENT**

1. The appellant (“the Bank”) is dissatisfied with the decision of the subordinate court dismissing its application objecting to the attachment and sale of motor vehicle Registration Number KBP 707A, Mitsubishi Fuso (“the vehicle”). The application was made under **Order 22 rule 51** of the *Civil Procedure Rules*.

2. The basis of the Bank’s claim was that it was the registered owner of the vehicle as the financier. According to the deposition of Robert Shioso in support of the application, the Bank advanced the 2<sup>nd</sup> respondent who is the judgment debtor the Kshs. 3,150,000/- to purchase the vehicle. In order to secure its interest, the vehicle was registered in the joint names of the 2<sup>nd</sup> respondent and the Bank and annexed a copy of the logbook confirming this fact.

3. In response to the application, the 1<sup>st</sup> respondent, who was the decree holder/judgment creditor, contended that the application was an abuse of the court process and intended to deny her the fruits of her judgment. She pointed out that she had attached the vehicle before and third party, Reuben Mongare Kaba, objected to the attachment stating that he had undertaken to pay the loan and had paid the loan substantially. She pointed out that delay in lodging the objection application was inordinate given that the vehicle was attached on 28<sup>th</sup> September 2017 and that the attachment should not be raised.

4. The trial magistrate considered the matter and expressed the view that in fact this was the third objection application and it appeared to be a concerted effort to deny the decree-holder the fruits of her judgment. The trial magistrate was not impressed by the argument that the Bank was asserting a financial interest in the property and remarked that:

*The objector cannot be allowed to accept the loan repayment yet at the same time lay claim to the attached motor vehicle should the loanee default, there is when the objectors right would crystalise and they would be allowed under the law to move the court for the relevant remedy.*

5. As this is a first appeal, I am required to review the entire evidence and reach my own independent conclusion. As this appeal arises from objection proceedings, the duty of the court in objection proceedings is to determine whether the objector is a legal or equitable owner of the property attached (see *Akiba Bank Limited v Jetha and Sons Limited ML NRB HCCC No. 919 of 1999 [2005] eKLR*). The trial magistrate decision, as I understand it, is that the vehicle belongs to the judgment debtor and not the objector who financed the purchase of the vehicle.

6. In a previous appeal that came up in respect of objection proceedings lodged by a purchaser of the vehicle; *Reuben Mong'are Kaba v MMN a minor suing through her mother and next friend RM and Another KSI HCCA No. 75 of 2017 [2018] eKLR*, I dealt with the issue of ownership of the vehicle as follows:

*[6] Having reviewed the evidence, I find that the motor vehicle was owned and registered in the joint names of Equity Bank (Kenya) Limited and the 2<sup>nd</sup> respondent. While it is true that **section 8** of the **Traffic Act** is a rebuttable presumption of ownership, I do not think the appellant could acquire an interest in the vehicle without the consent of the owners. It is evident from the agreements dated 14<sup>th</sup> and 16<sup>th</sup> December 2015, Equity Bank (Kenya) Limited was not a party yet it was a co-owner whose consent was necessary to transfer or acquire ownership. I therefore find and hold that the appellant could not acquire a legal or equitable interest in the motor vehicle without the consent of the co-owner.*

7. In that decision I recognised that the Bank was a co-owner of the vehicle. That fact has not changed and in this case, the trial magistrate had clear evidence of the registration certificate of the vehicle but did not make the finding as requires in objection proceedings.

8. The respondent contended that there was unreasonable delay in the filing the objection proceedings and that the proceedings were an abuse of the court process. I have read the record and it shows that the previous objection proceedings were lodged by Reuben Mongare who had entered into an agreement to purchase the vehicle from the judgment debtor and settle the loan with the Bank. As I ruled in the appeal, his was no privity to the agreement between the Bank and the judgment debtor hence he could not assert any rights to the vehicle.

9. On the other hand, the Bank is entitled to act independently and its right to move the court cannot be implicated by the acts of a third party. I therefore reject the contention that the Bank's application is an abuse of the court process or that it is defeated by delay.

10. For the reasons I have stated, I dismiss the appeal with no order as to costs.

**SIGNED**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KISII this 25<sup>th</sup> day of APRIL 2019.**

**R.E. OUGO**

**JUDGE**

Mr Mose instructed by Mose, Mose and Millimo and Company Advocates for the appellant.

Mr K. Gichana instructed by Ben K. Gichana and Company Advocates for the 1<sup>st</sup> respondent.