



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 364 OF 2005

JAMES MUANGE MUSYOKI.....APPELLANT/DECREE HOLDER

-VERSUS-

EAST WEST VEG LTD.....1ST RESPONDENT/OBJECTOR

CHARLES KIMOTHO.....2ND RESPONDENT/JUDGMENT DEBTOR

MONA FRESH VEGETABLES LTD...3RD RESPONDENT/ JUDGMENT DEBTOR

(Being an appeal from the ruling delivered by Honourable P. Gichohi (Mrs.) (Senior Resident Magistrate) on 17th May, 2005 in objection proceedings in CMCC NO. 768 OF 2004)

J U D G E M E N T

1. By way of a plaint dated 19th January, 2004 the appellant lodged a suit against the 2nd and 3rd respondents herein seeking special damages amounting to Kshs.343,815/= for loss/damage occasioned to his motor vehicle. The appellant also prayed for costs of the suit and interest thereon.
2. It was pleaded in the plaint that on or about the 30th day of August, 2002, the appellant's duly authorized agent was driving the abovementioned motor vehicle registration number KAK 256B along Akiba Estate Road, when the 2nd respondent acting as an agent for the 3rd respondent negligently drove the motor vehicle registration number KAJ 574Z, causing the same to hit the appellant's said motor vehicle.
3. It was noted that the 2nd and 3rd respondents failed to enter appearance upon service of the summons and plaint, thereby resulting in the entry of a default judgment on 16th August, 2004. The appellant thereafter commenced execution.
4. Consequently, the 1st respondent filed a Notice of Objection and Notice of Stay of Execution dated 14th February, 2005 respectively arguing that one motor vehicle registration number KAQ 882P included in the list of properties for attachment and sale belongs to the 1st respondent.
5. The 1st respondent then filed an application seeking inter alia, an order that the trial court raises attachment of the motor vehicle in issue and a further order compelling the appellant and/or his agents to restore the abovementioned motor vehicle to the 1st respondent and which application was vehemently opposed by the said appellant. Finally, the trial court granted the substantive orders sought in the 1st respondent's application.
6. The appellant has now instituted an appeal against the aforementioned ruling on the objection proceedings summed up in six (6) grounds set out in the memorandum of appeal dated 31st May, 2005 thus:

(i) THAT the learned trial magistrate erred in fact and in law by finding that there was no evidence that the sale of the attached motor vehicle had taken place.

(ii) THAT the learned trial magistrate erred in fact and in law by failing to find that the objection proceedings had been overtaken by events.

(iii) THAT the learned trial magistrate erred in fact and in law by finding that there was no intimation to the court on the part of the appellant in response to the notice of objection taken out by the 1st respondent/objector under Order XXI, Rule 53 of the Civil Procedure Rules.

(iv) THAT the learned trial magistrate erred in failing to appreciate that there were sufficient grounds for belief on the part of the appellant and his agents that the subject motor vehicle belonged to the 3rd respondent/judgment debtor.

(v) THAT the learned trial magistrate erred in granting the orders raising the attachment and compelling the appellant and his agents to restore the said motor vehicle.

(vi) THAT the learned trial magistrate erred in law by basing her ruling on a misinterpretation and misconstruction of the provisions of Order XXI, Rules 53, 54 and 55 of the Civil Procedure Rules.

7. Parties were directed to file written submissions on the appeal. The appellant brought forth the submission that by the time he was served with copies of the notice of objection and stay of execution on 21st February, 2005 the sale of the subject motor vehicle had already taken place on 19th February, 2005 which is to say that the objection proceedings had been overtaken by events. It is thus the appellant's submission that the learned trial magistrate's finding was improper and made in vain. Various authorities were cited to buttress this point.

8. The appellant further submits that the learned trial magistrate erred in finding that there was no intimation in response to the notice of objection, since his advocates had in fact written to the Executive Officer of the court informing him of the position set out hereinabove.

9. On the subject of ownership of the subject motor vehicle, it is the appellant's submission that his advocates had carried out prior investigations to ascertain the same and which investigations confirmed the 3rd respondent as its registered owner, save to add that during execution, it was established that some of the 3rd respondent's assets were being transferred to the 1st respondent and that the directors of the 3rd respondent not only had a stake in the 1st respondent but had begun operating in the name of the said 1st respondent. The appellant adds that by the time the subject motor vehicle was transferred to the 1st respondent, warrants of attachment and sale had already been issued.

10. In his opposing submissions, the 1st respondent fully supported the learned trial magistrate's finding, arguing that no documents were adduced to prove that the sale actually took place or at the very least, the details of the said sale. As such, the 1st respondent is convinced the objection proceedings have not been overtaken by events.

11. As relates to the third ground of appeal, it is the 1st respondent's contention that the letter purported to have been delivered to court as an intimation was not served upon him as required under Order XXI, Rule 54 of the Civil Procedure Rules and hence the learned trial magistrate was correct in her finding.

12. The 1st respondent further contends that a copy of the log book availed before the trial court confirms he is the owner of the subject motor vehicle and it is of no effect that the said motor vehicle had previously been registered in the 3rd respondent's name.

13. I have cautiously considered the rival submissions on appeal alongside the authorities relied upon. In the same way, I have re-evaluated the evidence tendered before the trial court. I have also studied the decision being challenged.

14. I will first and foremost discuss grounds (i) and (ii). The record of appeal bears the application dated 21st March, 2005 filed by the 1st respondent herein seeking inter alia, that the attachment in respect to the subject motor vehicle be raised and the appellant be ordered to restore the same to the 1st respondent.

15. In response, the appellant through the replying affidavit of Advocate *Collins Namachanja* asserted that the motor vehicle sale had already taken place. In a second replying affidavit filed on behalf of the appellant, *Muganda Wasulwa* deponed that the subject motor vehicle was attached and advertised for sale on 19th February, 2005 and which sale had taken place at the time of service of the objection proceedings.

16. Ultimately, the trial court reasoned that though the appellant had issued a notification of sale, the same did not show the details of the said sale, neither were there any documents to show where the sale took place and who bought the subject motor vehicle and for what amount.

17. I have taken into account the documents availed by the appellant before the trial court in support of his claim that a sale in fact took place. It is evident that a proclamation of attachment dated 4th February, 2005 and notification of sale dated 11th February, 2005 were issued in respect to the subject motor vehicle. Further to this, it is apparent the intended sale was advertised in the Kenya Times Newspaper dated 12th February, 2005 to the effect that the sale was scheduled to take place on 19th February, 2005 by way of public auction. Page 44 of the record of appeal also bears a letter dated 12th February, 2005 from Keysian Auctioneers to the appellant's advocates, updating them of the time and place of the said sale.

18. Be that as it may, I noted that no evidence was presented before the trial court confirming the sale or providing details thereof such as the name of the buyer and the sale price. In the premises, the argument that the objection proceedings have been overtaken by events cannot stand in the absence of documentary evidence to ascertain that the sale did in fact take place. Consequently, the authorities cited by the appellant on this limb cannot apply here. I therefore find proper reasoning in the learned trial magistrate's analysis on this subject. The two (2) grounds automatically fall.

19. In respect to the grounds (iii) and (vi) of appeal, it was the learned trial magistrate's rendition that upon being served with the notice of objection, the appellant ought to have intimated to the court and objector within 15 days therefrom as to whether he would proceed with the attachment pursuant to Order XXI, Rule 54, but he did not. The appellant's argument is that the correspondence made by his advocates on record amounted to an intimation.

20. *Order 22, Rule 51* of the Civil Procedure Rules (*the Rules*) provides for the lodging of an objection to attachment, which is the procedure which was applied by the 1st respondent. *Order XXI, Rule 54* being the equivalent of *Order 22, Rule 52* of the Rules expresses thus:

“Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

21. *Order 22, Rule 53* on its part provides for the raising of an attachment in the following style:

“Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor...”

22. From the foregoing, the question to answer is whether the appellant’s letter to the court could be termed as an intimation. I have looked at the letter dated 24th February, 2005 at *page 32* of the record of appeal addressed to the Executive Officer by the appellant’s advocates; its contents are that the notices of objection and stay of execution were served well after the sale of the motor vehicle.

23. It is also apparent that the said letter was copied to the 1st respondent’s firm of advocates and bears their official stamp which, in my reasoned view, is sufficient proof of service given that the 1st respondent was at all material times represented by the said advocates. This therefore throws out the 1st respondent’s submission that there was non-service.

24. In the circumstances and given that the law does not make provision for any particular form of giving such intimation, it is reasonable to state that the appellant adequately communicated his position regarding the attachment to both the court and 1st respondent. Furthermore, the appellant responded to the application through filing two (2) replying affidavits. This, to my mind, is compliance with the abovementioned provisions. Resultantly, I disagree with the learned trial magistrate’s conclusion that there was non-compliance. Suffice it to say that I am not persuaded by the argument that the said magistrate based her ruling entirely on the above provisions so as to deem it erroneous.

25. Ground (iv) concerns ownership of the subject motor vehicle. In his application filed before the trial court, the 1st respondent on the one hand maintained ownership of the said vehicle. On the other hand, *Collins Namachanja* advocate for the appellant averred in his replying affidavit that search results revealed the 3rd respondent was at all material times the registered owner. In the second replying affidavit sworn by auctioneer *Muganda Wasulwa*, it was stated that having also carried out his investigations, he was able to ascertain that the 2nd and 3rd respondents share a common link with the 1st respondent by virtue of the fact that their directors have an interest in the 1st respondent company.

26. In rendering her decision, the learned trial magistrate held that a copy of the log book tendered by the appellant confirmed his ownership of the motor vehicle in question, adding that annexure *CN2* relied upon by the appellant is neither a copy of search or records and hence there is nothing to show that the vehicle changed hands in the course of attachment.

27. I have re-evaluated the copy of the log book at *page 27* of the record of appeal and observed that the subject motor vehicle is registered in the joint names of the 3rd respondent and CFC Bank Ltd. There also appears to have been a change of ownership to the 3rd respondent from the log book records availed.

28. In addition, a copy of the KRA motor vehicle registration document dated 13th November, 2004 annexed as *CN2* and found on *page 38* of the record of appeal verifies that the said vehicle was registered in the names of the 3rd respondent and CFC Bank Ltd as at the aforementioned date.

29. According to *Section 8* of the *Traffic Act*, Cap 403:

“The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle”

30. In view of the foregoing, it is evident that ownership of a vehicle can be determined from the relevant records. Be that as it may, it has been established that a logbook or copy of search records is not *conclusive* evidence of ownership for the reason that ownership more often than not tends to change hands without such changes reflecting on the records. This was the position taken by the court in *Samwel Mukunya Kamunge vs John Mwangi Kamuru Civil Application No.34 of 2002* as follows:

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time’s vehicles change hands but the records are not amended.”

31. Nevertheless, going by the abovementioned log book records, it is apparent that ownership of the subject motor vehicle was transferred from the 3rd defendant to the 1st defendant and that no contrary evidence has been availed to prove otherwise. Guided by the provisions of *Section 8* of the *Traffic Act* (*supra*), the 1st respondent is deemed to be the owner of the subject motor vehicle in the absence of contrary

evidence.

32. I must also address the issue raised by the appellant that there is a possible link between the 1st and 3rd respondents. This argument was raised in the replying affidavit of *Collins Namachanja* and countered in the supplementary affidavit of *Julius Abiu Adika*. In the end, the trial court settled on the conclusion that the two entities are distinct.

33. Having considered the above in addition to re-evaluating the relevant evidence presented before the trial court, I take the following view. Firstly, *page 37* of the record of appeal constitutes a letter dated 17th November, 2004 from Keysian Auctioneers addressed to the appellant’s advocates informing them of preliminary investigations undertaken and which investigations revealed transfers of assets by the 2nd and 3rd respondents to the 1st respondent. A second letter dated 17th February, 2004 was addressed to the said advocates by Beta Recovery Investments bearing content that the 2nd and 3rd respondents are operating under the name of the 1st respondent.

34. Notably, no investigation reports were adduced before the learned trial magistrate for her reference or consideration, which is to say that the claims that the two companies are linked or share a common interest aimed at defeating justice has not been supported by way of any evidence. In the circumstances, I see no reason to doubt that the said magistrate arrived at a proper finding.

35. As related to ground (v) of appeal and having already given a detailed analysis hereinabove, I am satisfied that the learned trial magistrate duly considered the circumstances and evidence placed before her and having done so, arrived at a proper finding ultimately.

36. The upshot is that the appeal lacks merit and is hereby dismissed. The 1st respondent shall have the costs thereof.

Dated, signed and delivered at **NAIROBI** this **27TH** day of **JUNE, 2019**.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Decree Holder

..... for the 1st Respondent/Objector

..... for the 2nd Respondent/Judgment Debtor

..... for the 3rd Respondent/Judgment Debtor