

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 25 OF 2016

KEFA OMBUHI MOGIRE.....APPELLANT

=VRS=

1. NYANGATE OGETO.....1ST RESPONDENT

2. GEOFFREY MAOGA OMWANZA.....2ND RESPONDENT

3. DAVID OBARE OMWOYO

T/A OMWOYO AUCTIONEERS.....3RD RESPONDENT

{Being an Appeal against the Judgement of Hon. E. K. Nyutu – PM dated and

delivered on the 1st day of April 2016 in the original Nyamira PMCC No. 60 of 2012}

JUDGEMENT

This is an appeal against a ruling of the lower court rendered on 1st April 2016 in regard to the appellant’s application dated 26th September 2014. In the said application the appellant sought to be enjoined to the proceedings so that he could ventilate his interest in respect of a motor vehicle KAY 359M Station Wagon that was the subject of the execution proceedings and which he claimed to have purchased at an auction held on 14th May 2014. The appellant also sought to review, rescind, vary or set aside an order made on 8th August 2014 which had made orders nullifying the sale and ordering that the motor vehicle KAY 359M be returned to Geoffrey Maoga Omwansa the judgement debtor.

By the time the application dated 26th September 2014 came for hearing the trial magistrate N. Njagi had been transferred and the application was therefore heard by magistrate E. K. Nyutu and in a ruling rendered on 1st April 2016 she dismissed it noting that the exparte judgement which was the genesis of the execution proceedings **“having been set aside *“on ground of irregularity”* it followed that the actions emanating therefrom could not be sustained in law and consequently the sale of the motor vehicle could not be cured by a pronouncement that the exparte judgement was otherwise than irregular.”** She exhorted the appellant to seek another remedy in law.

The appellant has urged this court to set aside and/or quash the afore-stated ruling and substitute it with an order allowing the Notice of Motion. The appellant has also urged this court to award him costs both in the subordinate court and in this court.

The appeal was canvassed through written submissions which I have considered fully. I have also painstakingly perused the record of the lower court so as to arrive at my own independent conclusion. The appellant was heard in the lower court. Indeed, the impugned ruling concerned his Notice of Motion dated 26th September 2014. He has also been heard in this court on appeal and the complaint that he was not allowed to ventilate his cause therefore does not have merit.

On the merits of the application my finding is that the sale conducted on 14th May 2014 by Omwoyo Auctioneers was a nullity as there was in place an order staying the sale. That order was made on 13th May 2014 and it was to last until 27th May 2014 when the judgement debtor’s application to set aside the exparte judgement was to be heard interpartes. On 15th August 2014, the Auctioneer filed a Notice of Motion in which he sought to review the order made on 8th August 2014 nullifying the sale. The record has Counsel for the Auctioneer attending court on 26th September 2014 and urging the court to enjoin the now appellant as a party in the suit and seeking a stay of the orders. All of those orders were granted on the same day. That however was the last time the Auctioneer and his Advocate attended. It would appear that the appellant having been enjoined the auctioneer felt his role in the matter was finished and so he retreated and left the appellant to pursue his interest in the vehicle. Counsel for the appellant filed submissions which culminated in the ruling now appealed from. It is my finding that in the ruling the trial magistrate considered the appellant’s position and as a decision had been rendered that the exparte judgement was irregular and taking into account that the sale was a nullity an order to that effect having been made on 8th August 2014 and that order having not been set aside, this court finds that she did not err. I find that the appeal has no merit and dismiss it but with no orders as to costs as Counsel for the respondents did not actively participate in the appeal.

Signed, dated and delivered in Nyamira this 26th day of July 2019.

E. N. MAINA

JUDGE