



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 692 OF 2017

MUHATIA PALA AUCTIONEERS.....1ST APPELLANT

WILFRED MWANGI.....2ND APPELLANT

-VERSUS-

EDWIN KIBATI GICHIA.....1ST RESPONDENT

INDEXKO MARKETING SERVICES LTD.....2ND RESPONDENT

MOSES NGUNJIRI KIBOI.....PROPOSED INTERESTED PARTY/APPLICANT

(Being an Appeal against the Ruling delivered by Hon. D.O. Mbeja Senior Resident Magistrate in Nairobi on 10th November, 2017 in Milimani CMCC No. 2951 of 2016)

RULING

The ruling herein relates to two applications one dated 8th February 2018 and the other dated the 12th March 2018 and a preliminary objection dated the 16th day of April, 2018.

The application dated the 18th February 2018 is brought under Sections 3A, 1A, 1B; Order 43 Rule 23 of the Civil Procedure Act and Rules respectively. It seeks the orders that;

1. Spent
2. This Honourable Court be pleased to stay the lower court orders issued on 15th day of November 2017 specifically prayers 1,2, and 3
3. The court do stop any further transfer of the said motor vehicle.
4. The cost of this application be provided for by the Respondents.

The application is made on the grounds that the Appeal has a good chance of success and the same could be rendered nugatory if stay is not granted and that the purchaser of motor vehicle KBR 742A is innocent and could suffer irreparable damages if orders are not stayed.

It is supported by the annexed affidavit sworn by Humphrey W. Okuku, on the 8th day of February 2018 in which, he deposes that he is one of the nominees of the Appellant. That he has learnt that the Respondent has applied for the transfer of motor vehicle which action, in the absence of stay order, will render the application for stay and Appeal nugatory if further transfer is made. He swears the affidavit for the court to issue a stay of the order dated 10th November, 2017.

The application dated the 12th day of March 2018 is brought under Order 1 Rule 10(1), (2), and 14, Order 40 Rule 1(a), 4 (1) and 10(1) (a) of the Civil Procedure Rules and Sections 1A, 1B, 63(e) and 3A of the Civil Procedure Act Cap. 21 Laws of Kenya. The orders sought in the application are;

1. Spent
2. That this Honourable Court be pleased to grant leave to enjoin **MOSES NGUNJIRI KIBOI** as a Necessary/Interested party in

this appeal.

3. Spent

4. That upon grant of prayer (2) above, this Honourable Court be pleased to issue an order restraining any further dealings either by way of transfer or creation of a charge over the suit motor vehicle registration number KBR 742A pending the hearing of the appeal.

5. Spent

6. That this Honourable Court be pleased to issue an order directing that the suit motor vehicle registration number KBR 742A be preserved under neutral safe custody either within the secure precincts of this Honourable Court or any other safe location that the court may deem fit, pending the hearing and determination of the Appeal herein.

7. That in the alternative this Honourable Court should issue such orders for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the suit motor vehicle as the court thinks fit until the disposal of the appeal or until further orders.

The application is premised on the grounds set out on the body of the same and is supported by the annexed affidavit sworn by Moses Njunjiri Kiboi on 12th day of March, 2018 in which, he depones that he bought motor vehicle registration number KBR 742A in a public auction that took place on the 8th day of April, 2017 for Kshs.1,200,000/-.

That after paying the whole purchase price, he obtained a certificate of sale on the 23rd May 2017 following which, a valid logbook was issued in his name. He was given possession of the vehicle and he undertook extensive repairs and modification which cost him the sum of Kshs.534,490/- and since the month of June 2017, he has had exclusive use and quiet enjoyment of the said vehicle for a period of six months or thereabouts.

He averred that on the 18th October, 2017 police officers from the Kenya Railways Police Station took custody of the motor vehicle on the strength of a court order issued in Nairobi Criminal Case No. 1447/2017 (R. Vs. Edwin Kibathi Gachia) and he deposited the log book for the vehicle. That he purchased the motor vehicle in good faith as an innocent purchaser for value without notice that the 1st Respondent had not paid the full purchase price for the motor vehicle to the 2nd Respondent.

He contended that the sale of the motor vehicle by way of public auction has never been challenged neither an order of stay issued against the process nor did the court at any stage invalidate the 1st and 2nd Appellant's legal title to attach and sell the motor vehicle towards realization of the decretal sum awarded in court.

He averred that at the point of attachment, the 1st Respondent had actual and legal possession of the motor vehicle with the sale between the 1st and 2nd Respondents being captured vide a valid agreement for sale pursuant to section 21(2) of the sale of goods Act. That in the circumstances, the 1st Respondent had acquired a good title to the vehicle pursuant to Section 26(2) of the sale of goods Act and that is the title that the 1st Appellant went for in attaching the said motor vehicle from the 1st Respondent and which title subsequently passed to him by way of operation of the law.

That the said vehicle is in danger of being alienated or wasted by the 2nd Respondent since he (the applicant) no longer have the custody or control of the same. He has urged the court to grant the orders, in the interest of justice.

The 1st Respondent filed a replying affidavit on the 8th November, 2018 sworn by Edwin Kibathi in which, he depones that the applicant was not a party to the proceedings that gave rise to this Appeal. That in execution of a decree of the lower court, the Appellants did proclaim motor vehicle KBR 742A that did not wholly belong to him, the same having been left at his car yard and had only made part-payment for it. He deposed that he placed it as a security to partially cover the attachment as he sorted out his finances which finances did not come through and the motor vehicle was sold in a public auction by the Appellants.

He further deponed that the said motor vehicle had been left over by the 2nd Respondent who had wanted to trade the motor vehicle in, but he had partially acquired it and therefore the motor vehicle belonged to the 2nd Respondent and it did not belong to him and so it could not be placed as security.

The 2nd Respondent filed a replying affidavit sworn by Samuel Ochola Kwenda on the 28th April, 2018 in which he depones that the motor vehicle KBR 742A was registered under the name of 2nd Respondent and Equity Bank Limited as at 23rd August 2017. That he gave the vehicle to Edwin Kibathi Gichia to sell it on his behalf who took it to a yard called Auto Black Limited as an agent.

That on or around 8th June 2017, the first Respondent offered to purchase it and they entered into an agreement for sale. The first Respondent gave cheques that did not clear as they were returned for lack of sufficient funds but since he had been given the possession, he did not return the vehicle but rather he offered it for sale by public auction which was bought by the proposed interested party and a vesting order issued in his favour. He avers that a logbook had also been issued in the name of the proposed interested party which was strange because the vehicle is lawfully registered in the name of 2nd Respondent and Equity Bank Limited.

He deponed that he opposes the joinder of the proposed interested party to the Appeal as he should not argue his case in the Appeal when he

was not a party in the lower court. He also opposes any restraining orders and preservation of the motor vehicle as it jointly belongs to him and Equity Bank and it (Equity Bank) is not even a party to the suit. He contends that he should not be restrained from using what is legally his because if so restrained, his business will suffer irreparable loss and damage.

In a further affidavit filed on 11th April, 2018 and sworn by Moses Ngunjiri on 5th April, 2018, he deposes that the 2nd Respondent's director having voluntarily made a decision to sell the motor vehicle and having parted with its possession by giving it to 1st Respondent, cannot be heard to claim that the suit motor vehicle was registered jointly between Equity Bank and itself yet, it was well aware that such a decision to sell the motor vehicle required authorization and sanction of the Bank but he decided to go ahead and sell it well aware of the consequences and especially knowing that the 1st Respondent was its authorized agent.

He averred that he obtained registration of the motor vehicle in his name through a court order issued on 6th June 2017 in CMCC No. 2951/2016 and there were no objection proceedings lodged by any party claiming interest in it during the execution proceedings commenced against the 1st Respondent. He further deposed that the money received from the public auction was paid directly to the Chief Magistrate's court which collected it on behalf of the 1st Appellant and thus, the funds cannot be refunded to him as it was applied towards satisfaction of a valid decree which has never been set aside.

He stated that due to the rival claims surrounding the motor vehicle and which must be conclusively resolved, it is imperative that the motor vehicle be preserved under neutral safe location pending the hearing and determination of the Appeal with a view to preventing any wasting and/or damage to the same.

In addition to the replying affidavit, the 2nd Respondent filed a preliminary objection dated the 16th day of April, 2018 in which, he states that the application is incompetent as the same is anchored on an incompetent Appeal in contravention of the provisions of Order 43 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act and that the Appeal has been brought in clear disregard of the court process.

In response to the preliminary objection, the Appellants filed grounds of opposition dated the 12th day of June 2018 in which they contend that the objection is incompetent and void in law as the Appellants did not require the leave of the court to file the Appeal.

Parties filed submissions which this court has duly considered. The proposed interested parties argues that he is an innocent purchaser for value without notice and all what he was required to do was to establish whether the motor vehicle was advertised for sale by way of public auction through a bonafide court sanctioned process. He also argued that the sale has never been challenged and therefore, it means the same was a regular and proper process that passed a good title to him.

In dealing with the applications, the court will have to ask itself whether the title that was passed to applicant by the 1st Respondent was a genuine title. The first Respondent in his Affidavit stated that the vehicle did not belong to him though he had made part-payment for it. He placed it as security to partially cover the attachment in a decree that had been obtained against him in CMCC No. 2951/2016 but since he was not able to pay, the motor vehicle was sold in a public auction by the Appellants.

In the Replying Affidavit of the 2nd Respondent sworn by Samuel Ochola Kwenda, one of its directors, he states that the vehicle was jointly registered in the names of 2nd Respondent and Equity Bank Limited as at 23rd August 2017. He gave it to the first Respondent to sell it on his behalf and a sale agreement was entered into, between them. The first Respondent issued 2 cheques for Kshs.990,000 each and another one for Kshs. 120,000, all of which were dishonoured and were returned for lack of sufficient funds. Samuel Ochola, sought back the possession of the motor vehicle from the first Respondent who went underground and he was forced to report the matter to the police. The 1st Respondent was finally charged with obtaining by false pretences contrary to Section 313 of the Penal Code.

The court notes that the order vesting the suit property in the name of the proposed interested party was set aside via a ruling of the court delivered on 10th November, 2017 and a further order was issued stopping any transfer of the motor vehicle. That, despite the court order against transfer of the vehicle, a transfer was done in favour of proposed third party which was illegal.

In view of the foregoing, it is clear that though the first Respondent had been given possession of the motor vehicle by the 2nd Respondent and that there was a sale agreement between them, the first Respondent could not pass a good title to the proposed third party because he did not have it himself. There was no consideration as the cheques that he issued were dishonoured. The vehicle legally belongs to the 2nd Respondent and Equity Bank and as rightly submitted, the only recourse that the proposed third party has, is to claim his money from the 1st Respondent and the Appellants.

As to whether an injunction should be granted, the 2nd Respondent has demonstrated that he is the legal owner of the motor vehicle and there is no justification to keep the motor vehicle under neutral custody and deprive the 2nd Respondent of its use.

I am of the considered view that the Applicant did not establish a *prima facie* case to warrant the issuance of the orders sought. The two applications lack merits and they are both dismissed with costs, save for prayer 2 in the application dated 12th March 2016. Moses Ngunjiri Kibue is hereby enjoined as a necessary/interested party to the Appeal.

As for the preliminary objection, the same should be substantively argued during the hearing of the main Appeal.

Costs of the applications shall abide the outcome of the Appeal.

It is so ordered.

Dated, signed and delivered at **NAIROBI** this **20th** day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent