



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 43 OF 2015**

**DAVID OBARE OMWOYO t/a OMWOYO AUCTIONEERS**

**DENNIS GEANGO KEMONI .....APPELLANTS**

**VERSUS**

**JOSEPH OLE KIPUNYI**

**NATIONAL BANK OF KENYA LTD.....RESPONDENTS**

*(Appeal from the Ruling and Order in Kisii CM Civil Case No. 424 of 2014 (Hon. Nyagah RM))*

**JUDGMENT**

1. This appeal arises from the ruling and order of the Resident Magistrate at Kisii delivered on the 22<sup>nd</sup> January 2015, in **Kisii CMCC No. 424 of 2014**, in which the appellants, **David Obare Omwoyo** t/a Omwoyo Auctioneers and **Dennis Geango Kemoni**, together with the **National Bank of Kenya Ltd**, had been sued by the first respondent, **Joseph Ole Kipunyi**, for “inter-alia” a declaration that the sale by public auction of the tractor RegNo. KAS 952T belonging to the first respondent was wrongful.

2. The appellants filed their joint statement of defence dated 10<sup>th</sup> November 2014, in which they denied the first respondent’s alleged ownership of the motor tractor and contended that the tractor was lawfully sold in execution of a debt due and owing from the first respondent.

The statement of defence was filed together with a notice of preliminary objection dated 10<sup>th</sup> November 2014, directed at the first respondent’s notice of motion dated 4<sup>th</sup> November 2014, seeking temporary orders of injunction against the appellants and the second respondent.

3. The objection was based on the court’s jurisdiction to determine the matter, among other factors.

All the parties having filed their pleadings including the second respondent’s statement of defence dated 27<sup>th</sup> November 2014, reached a consensus to have the preliminary objection canvassed by way of written submissions. In that regard, written submissions were accordingly filed and on the 22<sup>nd</sup> January 2015, the court rendered its ruling dismissing the preliminary objection.

4. The appellants were aggrieved by the ruling and hence, filed this appeal on the basis of the grounds contained in their memorandum of appeal dated 27<sup>th</sup> March 2015.

At the hearing of the appeal, learned counsel, **Mr. Ochwangi**, appeared for the appellants while learned counsels, **M/s Sagwa** and **Mr. Godia**, appeared for the first and second respondents respectively.

5. As directed by the court the appeal was argued by way of written submissions and in that regard the appellants and the first respondent filed their submissions.

The second respondent did not file any submissions but supported the appeal and urged this court to allow it.

As a first appellate court, the duty of this court would be to reconsider the preliminary objection afresh and draw its own conclusions in deciding whether or not to allow the appeal.

6. In that regard, the objection as may be deciphered from the notice of preliminary objection dated 10<sup>th</sup> November 2014, was based on eight (8) grounds of which the most relevant were grounds one and four. These grounds were given more prominence by the trial court in arriving at its impugned ruling. The rest of the grounds were strictly not based on points of law, a cardinal requirement in raising preliminary objections as was held in the famous case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969)EA 696.**

7. It was stated in that case that:-

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.*

*It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

Ground one of the objection raised the issue of jurisdiction. This was an issue capable of disposing of the application at hand and indeed the entire suit for the reason “as has been re-stated in countless decisions of the superior courts” that jurisdiction is everything and without it the court must down tools (see, **The owners of m/vessel Lilian “S” Vs. Caltex Oil (K) Ltd (1989) KLR 1.**

8. The issue is raised herein in ground two of the memorandum of appeal and in addressing the same both at the trial and in this appeal, the appellants argued that the matters dealt with by the trial court touched on or were concerned with the validity, legality and/or propriety of the execution proceedings carried out vide an earlier suit, **Kisii CMCC 163 of 2011**, between the appellants and the first respondent by way of objection proceedings under S.34 of the Civil Procedure Act.

That, the objection proceedings commenced by the first respondent having been heard and dismissed in the previous suit, the first respondent could not turn back and institute the present suit expecting the trial court to assume jurisdiction which it did not have.

9. In response, the first respondent argued that the appellants and himself were not parties in the previous suit Kisii CMCC No. 163 of 2011 and therefore S.34 of the Civil Procedure Act did not apply to them. That, the present suit is a fresh suit for damages for wrongful execution rather than a suit to challenge the validity, legality and/or propriety of the execution proceedings in the previous suit No. 163 of 2011.

The first respondent thus contended that the trial court was possessed of the necessary jurisdiction to deal with the fresh suit as it was not an appeal from the decision of the court in the previous suit No. 163 of 2011.

10. The learned trial magistrate in the impugned ruling agreed with the first respondent and arrived at the conclusion that the application by the first respondent in the suit No. 163 of 2011 did not amount to objection proceedings but was rather an application for stay of execution without any challenge to the execution process. That, the application merely sought a stay of the vesting order issued on 14<sup>th</sup> August 2014. It was for those reasons that ground one of the appellant’s objection was overruled.

11. The ruling of the court in suit No. 163 of 2011 dated 23<sup>rd</sup> October 2014, is contained in the

supplementary record of appeal. It was in respect of an application dated 4<sup>th</sup> September 2014, essentially made under Order 22 of the Civil Procedure Rules seeking a stay of orders made by the court on 14<sup>th</sup> August 2014. The parties in the suit were the second respondent herein and a person known as Mark Nyakora. Neither the appellants nor the first respondent were initial parties in the suit. As may be deciphered from the ruling, they became parties to the suit when the first respondent entered the suit as an objector in the attachment of a tractor RegNo. KAS 952T which he claimed belonged to him rather than the individual called Mark Nyakora.

12. The second appellant became a party to the suit when he filed his opposition to the first respondent's application by virtue of his capacity as the purchaser by public auction of the tractor.

The public auction was conducted by the first appellant in his capacity as a registered auctioneer. His replying affidavit on behalf of the second respondent in opposition to the first respondent's application effectively made him a party to the suit.

13. S.34 (i) of the Civil Procedure Act provides that:-

*“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”*

To the extent that the first respondent and the appellants became parties to the previous suit No. 163 of 2011, on account of the first respondent's application dated 4<sup>th</sup> September 2014 presented therein, and further to the extent that the first respondent was therein treated as a person objecting to an execution process undertaken by the appellants on behalf of the second respondent, it would follow that the ruling of the court in the suit affected all the parties therein without any exception.

14. Indeed, the first respondent's application of the 4<sup>th</sup> September 2014, was made under Order 22 of the Civil Procedure Rules which essentially deals with the execution process. The application was indeed an objection to attachment and that is why the first respondent was described as the applicant/objector. The proceedings which emanated from that application became objection proceedings within the main suit. Therefore, all questions relating to the execution of the decree in the main suit were determined in that suit and could not be determined by a separate suit. This present suit No. 424 of 2014 is in effect a separate suit to determine matters relating to the execution process, which matters have since been determined in the previous suit No. 163 of 2011.

15. This suit is for all intents and purposes “res-judicata” and no level of craftsmanship in its pleadings would validate it. Indeed, it is tantamount to an appeal against the decision of a court with equal jurisdiction and hence, a gross abuse of the court process.

16. For all the foregoing reasons, this court would uphold not only ground one of the preliminary objection but also ground four. By the same breath, grounds one, two, four and six of the appeal are hereby sustained.

In the upshot, this appeal is allowed to the extent that the ruling of the trial court dated 22<sup>nd</sup> January 2015, in Kisiii CMCC No. 424 of 2014 is hereby set aside and substituted for an order allowing the notice of preliminary objection dated 10<sup>th</sup> November 2014 and dismissing the first respondent's said suit.

The costs of the appeal and those incurred in the lower court shall be borne by the first respondent in favour of the appellant only.

Ordered accordingly.

**[Delivered and signed this 31<sup>st</sup> day of January 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Ochwangi for Appellants

M/s Sagwe for Respondent

Njoroge CC