



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 558 OF 2005**

**JAMES KAMAU NJOROGE.....APPELLANT**

**- V E R S U S -**

**KIHARA MANJAU KAGIRI..... RESPONDENT**

***(Being an appeal from the judgement of Hon. Mrs. R. N. Kimingi (SPM)***

***delivered on 29<sup>th</sup> July, 2005 in Nairobi court suit CMCC no. 4721 of 2003)***

**JUDGEMENT**

1. On 11<sup>th</sup> May 2005, Expeditions General Merchants proclaimed motor vehicle registration no. KXS 192 belonging to James Kamau Njoroge, the appellant herein, in execution of warrants of attachment issued in Nairobi C.M.C.C. No. 4721 of 2003. The attachment prompted the appellant to take out objection proceedings through the chamber summons dated 6<sup>th</sup> June 2005.

2. The appellant sworn an affidavit in support of the summons.

When served with the aforesaid summons, Kihara Manjau Kagiri, the respondent herein, filed a replying affidavit he swore to oppose the summons. It was the argument of the appellant that he was not a party to the suit and that the goods attached did not belong to the judgment debtor, one Kamau Kareru Matathia. The respondent, who is the decree holder, argued and alleged that the appellant and Kamau Kareru, the 2<sup>nd</sup> defendant in the suit, were one and the same person. The respondent further claimed that the appellant was the owner of motor vehicle registration KUD 990 which caused the accident which gave rise to the judgment which resulted to the decree being executed. Hon. R. N. Kimingi, the then Senior Principal Magistrate heard and dismissed the objection proceedings in her ruling delivered on 29<sup>th</sup> July 2005. Being aggrieved, the appellant preferred this appeal.

3. On appeal, the appellant put forward the following grounds:

***1. The learned trial magistrate erred in law and in fact in failing to appreciate that the objector who is now the appellant herein was not a party in CMCC 4721 of 2003.***

***2. The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant, James Kamau Njoroge, is a different person from Kamaru Kareru Matathia named in the said suit as the defendant.***

**3. The learned trial magistrate erred in law and in fact in disregarding the appellant's sworn evidence as to identity.**

**4. The learned trial magistrate erred in law and in fact in failing to appreciate that the proclaimed property was the property of the objector, the appellant herein.**

**5. The learned trial magistrate erred in law and in fact in coming to the conclusion that she did against the weight of available evidence.**

4. When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the arguments put forward before the trial court. I have also considered the written submissions filed herein.

6. Though the appellant put forward a total of five (5) grounds of appeal, the main ground which commends itself for determination is whether the learned Senior Principal Magistrate erred when she failed to appreciate the importance of an identity card. It is also argued that the trial magistrate failed to appreciate the fact that the appellant was not a defendant, in the suit before the trial court and the fact that James Kamau Njoroge is a different person from Kamau Kareru Mutathia, the 2<sup>nd</sup> defendant in the suit. In her ruling delivered on 29.7.2005, the learned Senior Principal Magistrate stated that she is persuaded that though the 2<sup>nd</sup> defendant is known by the names of the objector in his identity card and the logbook exhibited, he is personally known to the plaintiff (respondent) who has personally identified the 2<sup>nd</sup> defendant's attachable property proclaimed herein. With respect, I think the learned Senior Principal Magistrate misapprehended the point when she held that the appellant and the 2<sup>nd</sup> defendant in the suit was one and the same person. The record shows that the appellant had produced evidence in form of an Identity card indicating his name to be James Kamau Njoroge. He also produced the log book of motor vehicle registration KXS 192 in the name of J. K. Njoroge. There was no suggestion that the details contained in the identity card and the log book were forgeries. The learned trial magistrate should not have introduced extraneous inferences to arrive at her conclusion yet there were documentary evidence showing that the appellant was not a party to the suit before her. There was no reliable evidence to show that the appellant was also known as Kamau Kareru, the 2<sup>nd</sup> defendant.

7. In the end, I find this appeal meritorious. It is allowed.

Consequently, the order dismissing the summons dated 6/6/2005 is set aside and is substituted with an order allowing the summons with costs. Costs of the appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of October, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent