



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 399 OF 2009

KENNY NYAGA MBOI.....APPELLANT /DECREE HOLDER

-V E R S U S -

MASH BUS SERVICES LTD..... RESPONDENT/JUDGEMENT DEBTOR

MASH EAST AFRICA LIMITED..... OBJECTOR

RULING

1. Mash East Africa Ltd, the applicant/objector herein, took out the motion dated 13th September 2017 in which it sought for the following orders:

- 1. THAT this application be and is hereby certified of utmost be heard ex-parte and service be dispensed with in the first instance.**
- 3. THAT this honourable court be pleased to stay execution/ sale of the proclaimed motor vehicle KBM 666B Scania bus against the 1st respondent/judgment debtor and the 3rd respondent/auctioneers pending hearing and determination of this application.**
- 3. THAT this honourable court be pleased to order the unconditional release of motor vehicle KBM 666B Scania bus forthwith to the applicant/objector pending hearing and determination of this application.**
- 4. THAT this honourable court be pleased to order that the applicant/objector is not liable to pay the 1st respondent/ judgment debtor and the 3rd respondent/auctioneers at all and or in any event the amount set out in the warrant of sale of movable property dated 3rd August 2017 being ksh.1,364,126/=.**
- 5. THAT the cost of this application be born by the 1st and 3rd respondents.**

2. The motion is supported by the affidavit of Abeid Said Jumaan.

The respondents filed the replying affidavit of Edith Wanjiku Muriu to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival oral submissions. It is the

submission of the applicant/objector that Gladys Kasi Mutisya T/A Trophy Auctioneers, the 3rd respondent herein attached its motor vehicle registration no. KBM 666B Scania Bus and that the 3rd respondent intends to sell the aforesaid bus and use the proceeds of sale to settle the decree issued in this appeal. The applicant further argued that the judgement/decreed was not against it but against Mash Bus Services Ltd, the 2nd respondent/judgment debtor. The applicant averred that it is a separate legal entity from the 2nd respondent therefore it cannot be condemned to settle the debts of the 2nd respondent. The applicant attached to the affidavit of Abeid Said Jumaan, a copy of the log book which indicated that motor vehicle registration no. KBM 666B Scania Bus is registered in its name and not the 2nd respondent.

4. The respondents in the application opposed the motion and relied on the replying affidavit of Edith Wanjiku Muriu. The 1st respondent pointed out that a similar application had been filed by the applicant but was dismissed by this court on 23.5.2016 and upon the dismissal of the aforesaid application, the 1st respondent then instructed auctioneers to execute the warrants of attachment. The 1st respondent further argued that this court has previously found the transfers of some motor vehicles from Mash Bus Services Ltd to Mash Bus East Africa Ltd to have been fraudulent and done to avoid execution. It is on the basis of the above reasons that this court was urged to dismiss the motion.

5. Having considered the arguments from both sides, it is not in dispute that the 3rd respondent proclaimed motor vehicle registration no. KBM 666B in execution of the decree issued in this appeal. It is also not in dispute that the aforesaid motor vehicle is registered in the name of the applicant/objector herein. It is further not in dispute that the applicant is not a party to the suit that gave rise to this appeal. It has been argued that this court in a previous application made a ruling holding the transfers of some motor vehicles from Mash Bus Services Ltd to Mash East Africa Ltd to be fraudulent and were only meant to avoid execution. This argument was raised in the replying affidavit of Edith Wanjiku Muriu. The deponent did not annex a copy of the ruling of this court for ease of reference. What is apparent from the record is that on 23.5.2016, this court dismissed an application similar to the current motion for want of attendance and prosecution on the part of the applicant in that application.

6. In the circumstances the dismissal order may not set up the defence of resjudicata since the principles founding the doctrine resjudicata are missing. I have perused the copy of the logbook in respect of motor vehicle registration no. KBM 666B and it is apparent that the aforesaid motor vehicle was transferred to the applicant as a fresh transfer on the 18.01.2012. The judgment on appeal was pronounced on 8th day of December 2015. I have perused the logbook attached to the affidavit of Abeid Said Jumaan and it is not shown that the motor vehicle was transferred from Mash Bus Services Ltd to Mash E. A. Ltd. The respondents failed to show the link between the applicant and the 2nd respondent. There was no serious arguments to show that there was a fraudulent transfer of the aforesaid motor vehicle to the applicant. This court was not also supplied with the decision previously made declaring certain transfers made in favour of the applicant as fraudulent. This allegation was deponed in paragraph 9 of the replying affidavit of Edith Wanjiku Muriu.

7. Having failed to back up its averments and arguments against the motion, I am satisfied that the applicant's motion is well founded. Consequently, the motion dated 13th September 2017 is allowed in terms of prayers 2, 3, 4 and 5.

Dated, Signed and Delivered in open court this 8th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent