



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 608 OF 2008

A.O. BAYUSUF & SONS PLAINTIFF

VERSUS

SARAH MBITHE KIVUVA DEFENDANT

R U L I N G

1. The Application before Court is the Objector/Applicant's Notice of Motion dated 28th September 2012 brought under the provisions of **sections 1A, 1B, 3A, 27, 99 and 100** of the *Civil Procedure Act* as well as **Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The said Application seeks the following Orders:

- "1. THAT the phrase "orders accordingly" stated in the ruling of the court dated 30th September, 2011 be interpreted to mean that the orders sought in the Application dated 18th September, 2009 which was the subject of the ruling were all granted as prayed in the Chamber summons dated 18th September, 2009, subject to the exceptions made therein.**
- 2. THAT the Objector/Applicant's vehicle registration No. KAY 524J be released to him forthwith unconditionally.**
- 3. THAT orders be made providing for costs on the application dated 18th September, 2009 which was ruled upon on 30th September 2011.**
- 4. THAT the court order extracted on 20th March 2012 be set aside and or amended accordingly as it is inaccurately drawn.**
- 5. THAT the costs of this application be provided for".**

2. The Objector's said Application was brought on the following grounds:

"A) THAT the omission by the court to make a specific order as to who is to bear the costs especially the storage and auctioneers charges is an omission apparent on the face of the record although it was generally addressed in the phrase "Orders accordingly".

B) THAT Section 27 of the Civil Procedure Act provides that costs follow the event unless otherwise ordered by the court.

C) THAT this Honourable Court found that the Applicant/Objector was the owner of the vehicle KAY 524J.

D) THAT it is in the interest of justice that the orders sought herein are granted to save the objectors property from further wastage, damage and loss”.

The Application was supported by the Affidavit of the Objector herein sworn on even date. The deponent noted that this Court delivered its Ruling on 30th September 2011 and that it had found that the Objector was the owner of the vehicle registration number KAY 524J. The auctioneer had still refused to release the vehicle to the Objector demanding that he should pay storage charges of Shs. 200,000/- plus other costs. The Objector maintained that if the auctioneer had conducted a search at the Registry of Motor Vehicles, he would have found that the Objector was the registered owner thereof. The Plaintiff filed Grounds of Opposition dated 3rd April 2013. Such read as follows:

“1. THAT the orders given by this Honourable Court in its ruling of 30th September 2012 and extracted on the 20th March 2012 are accurately drawn as per the said Ruling.

2. THAT any orders of this Honourable Court should only be read and interpreted as ordered and no party should interpret such orders in any other manner whatsoever except as specifically ordered by the court.

3. THAT there was no omission by the court as the said orders were specific to wit:

a. Wilfred Mutinda Kivuva has established a legal and equitable interest in each of the following motor vehicles: KAY 524J, KBB 587D and KAY 297N.

b. The only other items in respect of which the objector has established some interest are a two-door fridge, the seven-seater sofa and the dining table with chairs and the 4 burner cooker.

c. The objector had not established any interest in the other items and those others may be disposed off.

4. THAT the objector’s application dated the 25th September 2012 is a desperate attempt to subvert the course of justice and to deny the Plaintiff herein the reliefs granted by this Honourable Court and is, therefore an abuse of the court’s process.

5. THAT the objector’s claim that the Plaintiff is to bear the costs of the objector is misplaced as it was not an omission as asserted and further, this Honourable Court would have made such order, had it deemed right for to do so.

6. THAT the phrase “Orders Accordingly” as in the said ruling of this Honourable Court can only be interpreted to refer to the specific orders as per the formal order extracted on the 20th March 2012 and that no other inference can and should be made other than that contained in the said ruling.

7. THAT the claim by the objector that the orders extracted on the 20th March 2012 is accurately drawn is untrue and unfounded as the said ruling and orders are clear as made by the Honourable Court.

8. THAT the objector’s Notice of Motion application dated the 28th September 2012 is made in bad faith and is a ploy to stop the Plaintiff from enjoying the just and deserved relief granted to it by this Honourable Court after due consideration of the matters placed before it”.

3. The Submissions of the Objector were filed herein on 6th May 2013. After laying out the background to his Application, the Objector set out what he considered were the issues arising for the determination by Court. These were whether the Plaintiff and/or its agents could continue to hold the Objector's property that it was ordered by Court to release and secondly, whether the Objector was entitled to costs. The Objector commented that the Court had found, in its said Ruling of 30th September 2011, that the Objector had a legal and equitable interest in motor vehicles registration numbers KAY 524J, KBB 587D and KAY 297N together with a two-door fridge, seven seater sofa, dining table with four chairs and a four burner cooker. He maintained that the rationale of objection proceedings is to have the attachment quashed and the goods returned back to the Objector. It was not clear as to why the Plaintiff opposed the release of the goods to the Objector since the Court had established his claim thereto. He went on to say that in the book by **Kuloba J.** being **Judicial Hints on Civil Procedure 1984 Vol.1 page 35 para 92**, the author had stated that:

“Where a person merely enters an objection to an attachment and in the evidence given in the objection proceedings he succeeds in getting the attachment removed, the subsequent order is simply to remove the attachment.” (Emphasis the Objector).

The Objector understood this to mean that after a finding that the Objector had legal title, there was no need to mention the consequent obligation by the decree holder to release the goods. In the Objector's view, it was the Plaintiff herein who was trying to subvert the course of justice by continuing to retain the goods wrongly proclaimed. In the opinion of the Objector, it was the Plaintiff and/or its agents, without lawful reason, who were continuing to hold onto the Objector's property and were in contempt of Court. This had been found in the case of **Godfrey N. Ngugi v Priscilla N. Kitina HCCC No. 2974 of 1995 (2007) eKLR.**

4. As regards clarification of the contents of the said Ruling of **Njagi J.**, the Objector referred this Court to **sections 99 and 100** of the *Civil Procedure Act* submitting that if there was an anomaly therein, this Court could amend the same. Finally, as regards the question of Costs, the Objector referred this Court to **section 27** of the *Civil Procedure Act* as well as the cases of **Ritter v Godfrey (1920) 2 KB 47**, **Elizabeth W. Mungara v Anthony Kariuki & Anor (2012) eKLR** and **Armadillo Equity Ltd v Institute of Correspondence Studies (K) Ltd (2006) eKLR**. The Objector set out the finding of **Lord Sterndale** in the **Ritter** case as regards costs as follows:

“But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial.”

5. Somewhat surprisingly, the Plaintiff did not file any submissions as regards the Application dated 28th September 2012. As a result, the Court found cause to peruse at length the Ruling of **Njagi J.** dated 30th September 2011. Before I get to that however, I think it is important to review just what the learned Judge was ruling upon. That was the Objector's Chamber Summons dated 18th September 2012 which sought the lifting forthwith of the attachment of the Objector's goods as proclaimed by the auctioneer on 2nd September 2009. It also sought the order for the unconditional release of the Objector's motor vehicle registration number KAY 524J as well as for the costs of the objection proceedings to be borne by the Plaintiff. Regrettably, the learned Judge, in his said Ruling, did not respond to the specific Orders requested by the Objector. He found that the Objector had established a legal and equitable interest in each of the three motor vehicles which had been attached by the auctioneer namely KAY 524J, KBB 587P and KAT 297N. He also found that the Objector had established some interest in a two-door fridge, a seven seater sofa, dining table plus chairs and a four burner cooker. The learned Judge made no order as to costs of the Application. However at the bottom of his Ruling, the Judge detailed the words “Orders accordingly”.

6. As I understand it, the Objector would have this Court interpret those words as meaning that as the attachment was lifted with regard to the above items, they should be released forthwith to the Objector.

Further, as **section 27** of the *Civil Procedure Act* provides that costs follow the event unless otherwise ordered by Court, the Objector maintains that not only should the Plaintiff pay the costs of the Application dated 18th September 2009 but also the auctioneer's charges and storage costs. The Objector has also maintained that the Court Order extracted on 20th March 2012, arising out of the said Ruling of **Njagi J.**, should be set aside and amended accordingly. The Objector has come before this Court seeking these amendments based on the provisions of **sections 99 and 100** of the *Civil Procedure Act*. Those sections read as follows:

“99. Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

7. In my view, **section 99** of the Act is not applicable to the Application before Court. I do not consider that **Njagi J.** made any accidental slip or omission in his said Ruling even as regards costs of the Application before him. That leaves only **section 100** of the *Civil Procedure Act* being the general power to amend any proceeding in a suit as regards any defect or error therein. However, is a Ruling a proceeding? In my view, the finding of my learned sister **Kasango J.** in **Winding-up Cause No. 57 of 2001** being in the matter of **K & A Self Selection Stores Ltd** provides guidance wherein she stated:

“Proceedings I would define to be the business done or carried out before a court. Proceedings can also be the record of all court attendance and steps taken in an action or suit.”

Similarly, **Githua J.** in the case of **James M. Ngotho & 4 Ors v Judicial Service Commission (2012) eKLR** found as follows:

“The word procedure is defined in Black’s Law Dictionary, 9th Edition Page 1323 as ‘a specific method or course of action. The Judicial rule or manner for carrying on a civil lawsuit or criminal prosecution - also termed the rules of procedure”.

Perhaps more pertinent to the Application before this Court is the definition of **“proceeding”** again as per **Black’s Law Dictionary 9th Edition** which details at page 1324:

“Proceeding’ is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word ‘action’, but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgement. As applied to actions, the term ‘proceeding’ may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgement; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the records of the lower court from the appellate or reviewing court; (13) the enforcement of the judgement, or a new trial, as may be directed by the court of last resort.”

8. As parties will appreciate, **Black’s Law Dictionary** is an American publication and the above reflects the position with regard to rules of procedure in that country. Before this Court, we are governed by the Civil Procedure Act and the Rules made thereunder. Under the Rules, there is power to amend a document as reflected on the provisions of **Order 8 rule 5**. That Rule reads as follows:

“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgement or order.”

9. Unfortunately for the Objector, **rule 5** cannot help him as the said Order had been extracted from the said Ruling of **Njagi J.** and the rule does not apply to Orders. That brings me back to **section 100** of the *Civil Procedure Act*. What is it that the Objector is asking me to amend so far as the Ruling (and the Order extracted therefrom) is concerned? As I see it, the Objector maintains that by the use of the words **“Orders accordingly”** at the end of his Ruling **Njagi J.** intended that what would follow was the release to the Objector of all 3 motor vehicles as well as the second category of attached items relating to household goods. Regretfully, I cannot agree and concur with the interpretation of the phrase **“Orders accordingly”** as envisaged by the Plaintiff in its Grounds of Opposition No. 6 as detailed above. Further, I do not believe that this Court under **section 100** of the *Civil Procedure Act* can amend **Njagi J’s** said Ruling to reflect the interpretation put on it by the Objector. In my view, what the Judge found was in relation to those items attached that could not be sold by the auctioneer in execution of the Decree herein. The Judge did not go so far as to release those items which he found unsellable, including motor vehicle registration No. KAY 524J, to the Objector. Further, the Judge made no finding as to costs whether of the particular application or in relation to storage charges and auctioneers fees. Accordingly, I do not find myself able to set-aside the Court Order extracted on 20th March 2012.

10. For what it is worth, in my view, what the Objector should have done is to have filed an application before Court for Review under **Order 45, Civil Procedure Rules, 2010** or file an Appeal against the learned Judge’s said Ruling. As a result, I find no merit in the Objector’s Notice of Motion dated 28th September 2012 and dismiss the same with costs to the Plaintiff.

DATED and delivered at Nairobi this 18th day of June, 2014.

J. B. HAVELOCK

JUDGE