



IMPERIAL BANK LIMITED.....PLAINTIFF

-VERSUS-

1. TREADSETTERS LIMITED

2. LEISURE TRADING COMPANY LTD.....DEFENDANTS

JUDGMENT

The plaintiff lodged suit by plaint dated **27th September, 2006**, pleading that at all material times, it was a registered joint-owner of motor vehicle Reg. No. KAG 154U Mercedes Benz, with **2nd defendant**; the subject motor vehicle was, however, attached and sold through illegal action and negligence on the part of **1st defendant**, occasioning loss, for which the plaintiff claims: (i) Kshs.1,920,000/= with interest at commercial rates as from **28th July, 2002**, (ii) refund of legal fees expended in defending a lower Court case and in prosecuting an appeal, in the sum of Kshs.99,491/00, and (iii) costs of the suit.

The record shows no pleadings in respect of **2nd defendant**; but **1st defendant**'s original statement of defence, of **9th March, 2007** was amended on **14th July, 2009**. Such amendment came later in time than the plaintiff's listing of issues for determination, which was dated **11th June, 2008** and filed on **25th June, 2008**. The list of issues may, in the circumstances, be taken to reflect the common perception of the parties, as to the nature of the case before the Court. The said issues may be set out (in summary) as follows:

- 1. who was the owner of the suit motor vehicle as at **11th January, 2001** when Objector Proceedings were lodged by the plaintiff?*
- 2. did the plaintiff have a registrable interest in the suit motor vehicle as at **11th January, 2001**?*
- 3. did the High Court in Mombasa H.C. Civil Appeal No.59 of 2001 confirm that the plaintiff had an interest in the suit motor vehicle as at **11th January, 2001**? If so, does the High Court's decision bind the parties?*
- 4. who occasioned the attachment and detention of the suit motor vehicle, in Mombasa C.M.C.C. No. 4653 of 1999? Are the defendants to blame in that regard, and to what extent?*
- 5. what was the value of the suit motor vehicle as at the time of attachment and/or as at **6th February, 2002**? Did the value deteriorate, and if so, why?*
- 6. were the defendants aware of the plaintiff's interest in the suit motor vehicle as at **5th February, 2002**?*

Did the parties take any steps to mitigate the losses likely to follow on deterioration in value, and which party did so, and how?

7. had the defendants released the suit motor vehicle on the occasion of notice of the Objector Proceedings, and allowed the plaintiffs to sell the same on the open market – would 1st defendant have suffered any loss which the plaintiff could not compensate, in the event the Objector proceedings were dismissed?

8. did 1st defendant commit certain illegalities, and which, and how?

9. was 1st defendant, by itself or by its servants or agents, guilty of negligence, in the manner in which it dealt with the suit motor vehicle? If so, in what manner?

10. did the plaintiff suffer damage and/or loss? If so, how, and to what extent?

11. has the plaintiff come to Court with unclean hands? If so, how?

12. is the conduct of the plaintiff in this matter irregular, or unlawful, or fraudulent? If so, in what manner?

13. is the plaintiff entitled to compensation? If so, how much?

14. what is the proper order as to costs?

Learned counsel, **Mr. Wameyo** and **Mr. Nyaanga** represented the plaintiff and 1st defendant, respectively, at the hearing of the suit; 2nd defendant, though duly served, was unrepresented.

Mr. Wameyo, in his introductory statement, submitted that 1st defendant had sold the subject motor vehicle through hire-purchase agreement, to 2nd defendant; the motor vehicle was later registered in the joint names of the plaintiff and 2nd defendant; in a dispute arising between 1st and 2nd defendant, regarding the said sale, 1st defendant won Judgment in the lower Court, in Mombasa CMCC No.4653 of 1999; 1st defendant moved to execute that Judgment, and this led to the *attachment of the suit motor vehicle*; at this stage, the plaintiff lodged an objection to such execution of the lower Court's Judgment – on the ground that the plaintiff had an interest in the suit motor vehicle; the Magistrate's Court *dismissed the objection*; this led to an *appeal by the plaintiff*, in the High Court, in **Mombasa H.C. Civ. Appeal No. 59 of 2001**; the appeal was determined in favour of the plaintiff; the relevant passage in the High Court's decision (**Sergon, J. on 30th June, 2006**) was as follows:

“.....I am satisfied that the appeal must succeed. Consequently, this appeal is allowed, with the result that the Order dismissing the [plaintiff's] application dated 5th February, 2001 is set aside and the same is substituted with an Order allowing the application to the extent that [the suit motor vehicle] is jointly owned by Leisure Trading and Imperial Bank Ltd.”

Counsel submitted, in the background statement, that a valuation of the subject motor vehicle had been conducted before the hearing of the plaintiff's appeal, and both defendants were aware of this fact: and on that basis the plaintiff made an application in the lower Court, for a *reserve price, in the event the subject motor vehicle was sold* – this prayer being granted. The 1st defendant later got the approval of the lower Court for a *variation of the reserve price, from Kshs.1,920,000/= to Kshs.1,000,000/=*.

Mr. Wameyo stated that the plaintiff had filed suit because the proceeds of the sale of the suit motor vehicle have not been rendered to the plaintiff. The plaintiff was claiming the *value of the motor vehicle*, in the sum of Kshs.1,920,000/=, together with a refund of legal fees paid in the lower Court, as well as the costs of the instant suit.

The plaintiff called a single witness, **Kombo Masudi** (PW1), its credit controller. PW1 testified that the plaintiff had financed 2nd defendant on the basis of a hire-purchase agreement of **29th April, 1996**; and the suit motor vehicle was registered in the *joint names* of the plaintiff and 2nd defendant. The 2nd defendant duly made repayments for some time, before falling into arrears, with the consequence that, to-date, the plaintiff has not recovered the full amount advanced under the hire-purchase agreement.

By PW1's evidence, the suit motor vehicle became the subject of an *attachment Order*, in a dispute between 1st defendant and 2nd defendant. The plaintiff upon receiving information of the impending sale, filed an action, seeking possession of the motor vehicle, to enable them to *recover outstanding repayments from 2nd defendant*. In their application, the plaintiff averred that they were *part-owners* of the said motor vehicle; but their objection was dismissed by the learned Magistrate, and this led to a successful *appeal in the High Court* which, however, was concluded only *three years after the motor vehicle had been sold*. The effect was to confer entitlement, *ex post facto*, upon the plaintiff; but PW1 said: "*But we did not manage to get the motor vehicle back.*"

From PW1's evidence, it is apparent that the plaintiff was not staking all, in *receiving* the object that was the motor vehicle; the plaintiff *would have been satisfied with sale at the reserve price of Kshs.1,920,000/=*. The 1st defendant, apparently, was in physical control of the motor vehicle, and, after getting an approval from the lower Court, sold it on the basis of a *reserve price of Kshs.1,000,000/=* – and this was in execution of a lower Court decree against 2nd defendant.

PW1 testified that the plaintiff herein, though a part-owner of the motor vehicle (the other part-owner being 2nd defendant), was not party to the suit in the lower Court which turned *in favour of 1st defendant and against 2nd defendant*.

The witness testified that the lower Court, before which the plaintiff was not a party, at first agreed to and authorized the plaintiff's proposed reserve price of *Kshs. 1,920,000/=*, but later, at the instance of 1st defendant, *varied* this to *Kshs.1,000,000/=*.

Upon cross-examination, PW1 testified that even though the plaintiff had applied to the lower Court for an Order stopping the sale of the motor vehicle at the lower reserve price, this prayer was *not granted*. On this point, regarding the proper *locus* of the decision to sell, PW1 averred:

"We didn't want the 1st defendant to sell [the suit motor vehicle]; the vehicle belonged to us. We disclosed those facts to the Court. The motor vehicle was sold in execution of that Court's Order."

PW1, still responding to cross-examination, averred that 1st defendant's claim, as at **13th July, 2000**, was *Kshs.402,147/50*; that the proclamation of attachment was dated **28th July, 2000**; that a stay against 1st defendant and its agents disposing of the suit motor vehicle had been issued on **22nd December, 2000**; that, on **5th July, 2001** the plaintiff won an Order of stay of sale of the suit motor vehicle; that a consent Judgment was entered, in Mombasa HCCC Appeal No.141 of 2001, ***Leisure Trading Co. Ltd v. Tread Settlers Tyres Limited***, for "the sum of *Kshs.600,000/=* all-inclusive being principal amount claimed, costs, interest, storage charges and auctioneers' charges"; and that consent further provided that "the said amount be payable within 14 days from the date of filing this consent; and in default the plaintiff [*1st defendant herein*] be at liberty to sell the defendant's [*2nd defendant herein*] motor vehicle Registration No. *KAG 154U* already under attachment to recover the sum of *Kshs.600,000/=* plus additional costs of sale and any additional excess amount recovered" – and the same was signed on **4th June, 2002**.

The 1st defendant's only witness, **George Keti** (DW1) is part of the Accounts- personnel of the company. He testified that the dispute between 1st and 2nd defendant was in respect of "*non-payment for services*"; and this resulted in *Judgment for 1st defendant*, which 1st defendant moved to execute by *attaching the subject motor vehicle*. The move to sell the motor vehicle immediately attracted the plaintiff herein, who sought "*costs on that motor vehicle.*" All along, 1st defendant had believed the suit motor vehicle

“belonged to Leisure Trading Company Limited”, the only registered owner formally indicated in the registration book.

DW1 testified that the dispute between the two defendants herein had been resolved by *lower Court orders* awarding 1st defendant herein Kshs.402,147/50, and giving a *warrant of attachment* issued on **13th July, 2000**. The auctioneer who conducted the sale of the motor vehicle, *Mwambao Kenya Auctioneers*, gave an account on **22nd February, 2003** stating that they conducted a *public auction* on **22nd February, 2003** and realized in gross receipt **Kshs.1,000,000/=**, but after making the necessary deductions (in respect of filing of warrants, issuing of proclamation attachment, commission on attachment, commission on sale, disbursements, advertisements, storage charges), only a balance of **Kshs.593,960/40** was left – and this, they now *handed over to the Advocates of 1st defendant* herein. DW1 testified that, out of the gross proceeds of sale, the auctioneer had retained as much as Kshs.406,039/60, largely on account of *storage charges*, as the subject motor vehicle had been stored for **795 days** before the sale took place. It took so long before sale was effected because *2nd defendant “used to apply for stay – and this caused loss of value.”*

DW1 gave evidence in respect of the contested issue of the registered ownership of the suit motor vehicle: he produced a copy of the registration book, showing name of registered owner as “**LEISURE TRADING & I.B. LTD**” (dated **29th April, 1996**). The address given is that of 2nd defendant – P.O. Box 84902, Mombasa. According to DW1, the name “*Imperial Bank*” (plaintiff) “*was not shown on that document.*”

DW1 testified that **948 days** had elapsed between the date of the warrant of attachment and the date of sale; the *authorized reserve price* was **Kshs.1,000,000/=**, and the motor vehicle was sold at that price; 1st defendant then recovered what was due to them.

Upon being cross-examined by learned counsel, **Mr. Wameyo**, DW1 testified that the plaintiff was not a party to the lower Court suit which 1st defendant had brought against 2nd defendant, and which led to the *Orders of attachment occasioning the sale* of the suit motor vehicle. The plaintiff herein came with Objector Proceedings only *after* Judgment in the earlier case had been rendered. It however, became difficult to execute the Court’s Judgment, as the *plaintiff had obtained orders of stay* against execution; to DW1, the emergence of the plaintiff with claims of co-ownership of the motor vehicle was strange; the witness avers: “*I don’t know why Imperial Bank was making the claims.*”

In the submissions, learned counsel, **Mr. Wameyo** stated that the plaintiff had proved its case “*to the required standard*”; and that “*the plaintiff was a registered joint-owner of the [suit motor vehicle] with the 2nd defendant*”.

Counsel submitted that in the lower Court, in Mombasa CMCC No. 4635 of 1999, **Treadsetters Ltd v. Leisure Trading Co. Ltd**, Judgment had been entered *in favour of 1st defendant* herein and 1st defendant *obtained attachment orders* for the suit motor vehicle; but the plaintiff herein then lodged Objector Proceedings. **Mr. Wameyo** submitted that the said Objector Proceedings had “*disclosed the fact that the subject motor vehicle was not solely owned by the 2nd defendant but rather was jointly owned by the plaintiff and the 2nd defendant pursuant to a financial facility advanced to 2nd defendant by the plaintiff.*”

Mr. Wameyo submitted that the plaintiff’s Objector Proceedings in the Chief Magistrate’s Court “*took a long time to be finalized resulting in the subject motor vehicle deteriorating in value to Kshs.1,000,000/= from Kshs.1,920,000/=*”. The Objector Proceedings were ultimately *dismissed*, on **14th February, 2003** and 1st defendant then sold the suit motor vehicle at a *public auction* for **Kshs.1,000,000/=**. The plaintiff, who was aggrieved with the decision of the Chief Magistrate’s Court, appealed in **H.C. Civil Appeal No. 59 of 2001** – but judgment in this appeal was only rendered on **30th June, 2006** – well after the sale of the suit motor vehicle had taken place.

It is clear to the Court, in these circumstances, that the Judgment of **30th June, 2006** could not save the suit motor vehicle: and therefore, in law, the plaintiff herein would have to accommodate that *status quo*.

But **Mr. Wameyo** gives the Judgment of **30th June, 2006** a different kind of significance; he states:

“Finally, on 30th June, 2006 a Judgment was delivered in the aforementioned appeal wherein the High Court confirmed and set aside the decision made in the lower Court, stating that the lower Court erroneously made a finding that the plaintiff had no interest in the subject motor vehicle.”

Counsel urged that the High Court had found *“that the subject motor vehicle was registered in the joint names of the plaintiff and the 2nd defendant herein, with the consequence that the Objector Proceedings in the Subordinate Court are upheld.”*

On that premise, counsel submitted that the issue for determination herein *“is the effect of the decision of the High Court [in] Civil Appeal No. 59 of 2001 in relation to the sale.”* Counsel contested 1st defendant’s position that *“since the sale was done before the decision of the Court in Civil appeal No.59 of 2001 the 1st defendant cannot be ordered to refund [to] the plaintiff the value of the said motor vehicle.”*

Mr. Wameyo submitted that the 1st defendant’s position was not tenable: because the appeal was pending at the time of the sale, and *“1st defendant [had the] full knowledge that the [appeal] could succeed”*; the plaintiff should not suffer loss *“by reason of the execution of [a] decree [to which plaintiff was not a party]”*; the High Court, on **30th June, 2006** ordered that *“the decision of the Subordinate Court be substituted with the....decision on appeal”*; parties are now bound to the decision rendered on appeal – the lower Court decision *ceased to be in force, the sale was irregular* as the property was jointly-owned, and 1st defendant would benefit from its own wrongs.

Counsel submitted that the plaintiff had suffered damage *“by reason of the irregular sale”*; and the plaintiff was *claiming damages*, in the sum of **Kshs.1,920,000/=** which *“represents the value of the subject motor vehicle at the time of attachment”*. He submitted that *“the subsequent deterioration of the value of the motor vehicle to Kshs.1,000,000/= does not in any way change the position since the delay in resolving the dispute was caused by the 1st defendant’s insistence on attaching and selling eth subject motor vehicle in execution of the decree of the Subordinate Court even after the plaintiff had notified them of its interests in the same.”* Counsel urged that 1st defendant be *“condemned to pay [damages] together with the sum of Kshs.99,491/= being the legal fees spent by the plaintiff in both the Subordinate Court and the appeal....”*

Although the plaintiff’s position is that they were *joint-owners* of the suit motor vehicle, **Mr. Wameyo** attributes to the plaintiff entitlement to the *entire proceeds of sale*. Counsel did not attempt to justify this full-scale claim.

Learned counsel, **Mr. Nyaanga** for 1st defendant, submitted that after 1st defendant won the case against 2nd defendant, in **CMCC No. 4653 of 1999**, the plaintiff herein lodged Objector Proceedings to stop execution against 2nd defendant: the *plaintiff also obtained stay Orders* which remained in place from **20th December, 2000 to 22nd February, 2003** – a total of **795 days**. When the motor vehicle was sold it fetched only **Kshs.1,000,000/=**, which, after a number of costs had been set off, left a balance of **Kshs.593,000/=** which was released to 1st defendant by the auctioneers. Only much later, on **30th June, 2006** did the plaintiff win on appeal, a validation of the Objector Proceedings of 2001: and, feeling thus belatedly empowered by the Judgment of **30th June, 2006** the plaintiff *lodged the instant suit*, by plaint dated **27th September, 2006**.

Counsel submitted that, at the time of sale of the suit motor vehicle, on **22nd February, 2003** there were no *Court Orders staying the sale*. Indeed, in a Ruling of the High Court (by **Omwitsa, CA**) on **22nd**

November, 2001, one of the plaintiff's applications for stay of execution had been dismissed, in the following terms:

".....I do not find any merit in the application. The applicant being a joint-owner with the second respondent of the attached motor vehicle, would still have a cause of action against the second respondent to recover the difference in the sum owed to it by the latter on contract between them if the sale does not realize sufficient amounts to meet both the 1st respondent'sclaim as well as theapplicant's claim, if any, against the second respondent. In other words, the applicant's claim against the 2nd respondent will not disappear upon the execution by the 1st respondent against the 2nd respondent by way of sale of the attached motor vehicle. I do hold that the dismissal of [a] similar application in the lower Court by the Honourable Magistrate was well considered. I dismiss the application with costs to the 1st respondent."

Learned counsel urged that the sale of the subject motor vehicle was conducted after *due process*: there had been a *stay on sale* for 795 days, and sale took place thereafter, to the *full knowledge of all the parties*.

Counsel urged that a claim [in Objector Proceedings] by virtue of Order XXI, Rule 57 of the earlier edition of the Civil Procedure Rules, was not tenable. For in an earlier case, ***Simba Colt Motors Ltd. v. Lustman & Co. (1990) Ltd & E.M. Mathenge t/a Property Consultants & Another***, Mombasa HCCC No. 729 of 2002v (***Waki, J*** as he then was), it had been held that:

"The purpose of [Order XXI] Rule 57 [of the Civil Procedure Rules] is to provide the objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the Objector to prove that the property belonged to him and not...for the decree-holder to prove that the property belonged to the Judgment-debtor."

Three years after the suit motor vehicle herein was auctioned, the High Court now made a decision favouring the plaintiff, holding that the plaintiff had a joint interest with 2nd defendant in the motor vehicle; *"by then, the motor vehicle had long been sold and was not available. The funds fetched had also been used to satisfy the decree."*

Counsel was depicting what appeared to him as a slip in the application of the law, in respect of the Objector Proceedings; in his words:

"...I humbly submit that Objector Proceedings are only meant to prevent a sale of attached goods. If..., as in this case, the attached goods are sold before the Order for release of the goods is made, then Objector Proceedings are no longer relevant. The proceedings are thereby rendered otiose and cannot serve any purpose."

Proceeding from the factual foundation that "the attached motor vehicle was sold long before the High Court declared that the plaintiff herein had an interest in the motor vehicle", counsel asked the entirely logical question: *"would that decision affect or cancel a sale properly and regularly conducted?"*

On this point counsel makes a submission of law; and it is clear to me that he is right: "I think the answer is in the negative." Upon that foundation, counsel proposes that *"the party damnified by [such] regular sale of attached property cannot sue the attaching creditor for refusing to [heed] [an] advice to release the attached goods."* The proper party to be sued, in those circumstances, learned counsel submitted, *"is the one [who] exposed the goods to the attachment"* – and thus, *"only the 2nd defendant may be liable and not 1st defendant"*.

This is a lawyers' case *par excellence*, turning as it does on detailed fact, from which specific legal conclusions are to be drawn. It is important to get critical facts straight, before considering the merits of the conclusions drawn by counsel, in terms of relevant legal principle.

The subject-matter is motor vehicle Registration No. KAG 154U, Mercedes Benz, which was purchased by 2nd defendant on hire-purchase terms in **April, 1996**; the three parties involved being the plaintiff, the 1st defendant, and the 2nd defendant. Even though, certainly, each of the three parties had a demonstrable interest in the subject-matter, the formal record was skimpy. The official record of ownership of the subject-matter gave the particulars as: owner – “**LEISURE TRADING & I.B. LTD**”; date – **20th April, 1996**; address – P.O. Box 84902, Mombasa. The 2nd defendant is “**LEISURE TRADING CO. LTD.**” and its address, apparently, is P.O. Box 84902, Mombasa. The plaintiff in that ownership scenario, if it has a place at all, is only denoted by *nickname*, and entirely incidentally and inaptly, as just “**I.B.**”; and no further particulars of it are given.

Is it true, in those circumstances, that registered ownership of the suit motor vehicle was in the *joint names* of the plaintiff and 2nd defendant? The 1st defendant’s witness, when cross-examined by learned counsel, **Mr. Wameyo**, testified that 1st defendant duly auctioned the suit motor vehicle, which was registered only in the name of 2nd defendant: and that the emergence of the plaintiff with claims of co-ownership, in a cause between 1st defendant and 2nd defendant, was a strange event.

The plaintiff was aware of the dispute between 1st and 2nd defendant, which led 1st defendant to sue 2nd defendant in the lower Court, in Mombasa CMCC No. 4653 of 1999 – which suit 1st defendant won and was set to *execute the decree by sale and disposal of the suit motor vehicle*. The plaintiff moved the lower Court with Objector Proceedings – on the basis that the plaintiff was a part-owner of the said motor vehicle, and the same must not be sold by public auction. Upon the learned Magistrate dismissing the Objector Proceedings, the plaintiff herein filed Civil Appeal No.59 of 2001 in the High Court, to reverse the said decision.

The sale of the sale motor vehicle under a *valid warrant of attachment*, took place on **22nd February, 2003** after numerous Orders of stay, all through since the issuance of the warrant of attachment on **13th July, 2000** – stays mainly obtained by the *plaintiff* herein – after some **795 days** of waiting.

Within the umbrella of the plaintiff’s Civil Appeal No. 59 of 2001, to reverse the rejection of the Objector Proceedings, the plaintiff moved the High Court on an *interlocutory application for stay of execution* pending the determination of the appeal: and the application was determined by the Commissioner of Assize, on the basis of distinct lines of persuasion. The applicant had urged that “*should the appeal succeed while the attached motor vehicle is sold, it will render the appeal nugatory.*” Counsel for the plaintiff herein, on that occasion, submitted that “*the applicant has [an] arguable appeal and the application should therefore be allowed.*” But it was submitted for the respondent, in that matter, that “*[the] chances of [the] appeal succeeding [were] slim*”; and that “*the applicant had not shown that it will incur substantial loss if the attached motor vehicle is sold before the appeal is heard.*”

The learned Commissioner of Assize disposed of the foregoing issues, quite certainly, on merits; and he thus held:

“I have considered the submissions made by both the applicant and the respondents. I have also considered the legal authority cited....[I] did not find any merit in the application. The applicant being joint-owner with 2nd respondent of the attached motor vehicle, would still have a cause of action against the 2nd respondent to recover the difference in the sum owed to it by the latter on contract between them if the sale does not realize a sufficient amount to meet both the 1st respondent’s claim [and] the appellant’s claim if any, against the 2nd respondent.”

The learned Commissioner of Assize made a fundamental statement about the *contract between the plaintiff herein, and 2nd defendant*: that contract would remain valid whether or not the suit motor vehicle was sold, and regardless of such meagre *amount* in the proceeds as may be realized from a sale of the suit motor vehicle, in execution of an *accrued Judgment of the lower Court*. The effect of this statement, clearly, was that the rights of the plaintiff herein, were *not dependent on the fate of the suit motor vehicle*.

The implication, of course was that there would be *nothing improper in law*, in executing the *decree of the lower Court*.

It is after the Ruling of the Commissioner of Assize, on **22nd November, 2001** that, on **22nd February, 2003** the suit motor vehicle was sold by public auction.

So long *after* the completion of the sale of the suit motor vehicle, the plaintiff herein prosecuted his main cause, in **Civil Appeal No. 59 of 2001**, with Judgment being delivered on **30th June, 2006**. It is necessary to look at aspects of this Judgment to see how it reflects on the **High Court's earlier Ruling** rendered by the Commissioner of Assize, on **22nd November, 2001**; this is because learned counsel, **Mr. Wameyo** has urged that the baseline of rights, for the plaintiff herein, would emerge exclusively *from that Judgment*. Hardly any justification has been given for that line of reasoning: and I presume counsel advances the technical point that a *Judgment* would enjoy pre-eminence over a *Ruling*, even though they be decisions of the very same Court.

In the Judgment (**Sergon, J**) of **30th June, 2006** it is recorded that the plaintiff herein had "*claimed that it wholly owned motor vehicle Registration No. KAG 154U*"; that, of course, is inconsistent with the facts of the instant case, as the recorded evidence shows.

The learned Judge, in reversing the lower Court's decision in relation to the Objector Proceedings, went beyond the indicia of title for the suit motor vehicle, and examined prior contractual documents, notably the hire-purchase contract; he made the following inference:

"Under clause 7 of the Hire-Purchase Agreement the 2nd respondent had no proprietary interest over the motor vehicle unless it had paid all the specified instalments, otherwise it remained a mere bailee. Clause 5(vi) of the aforesaid Hire-Purchase Agreement clearly states that the appellant was entitled to the immediate possession of the motor vehicle if any step should be taken by any judgment creditor of the 2nd respondent to levy execution upon the goods of or in possession of the 2nd respondent."

After addressing other questions of fact, the learned Judge held that the appeal must succeed:

"...this appeal is allowed with the result that the Order dismissing the application dated 5th February, 2001 is set aside and the same is substituted with an Order allowing the application to the extent that motor vehicle registration No. KAG 154U is jointly owned by Leisure Trading and Imperial Bank Ltd."

By virtue of the High Court's Ruling of **22nd November, 2001**, effect was given to the lower Court's Judgment, *at a time when there was no stay* on execution; and the subject motor vehicle was duly sold on **22nd February, 2003**. At the time of the said sale by public auction, the plaintiff herein *had no objection on the record*: by the evidence of the plaintiff's witness, the plaintiff's desire was only to realize **Kshs.1,920,000/=** as proceeds of sale. This may be taken to signal *consent* to the auction-sale; and it is inconsistent with the statement of the plaintiff's witness that: "*[in spite of the Judgment] we did not manage to get the motor vehicle back.*" That statement is, besides, not sincere, because PW1 knows well that, as at the date of the Judgment, the sale had already taken place, some *three years earlier*. The witness also acknowledged, significantly, that "*the motor vehicle was sold in execution of [the lower] Court's Order.*"

This Court takes it as a fact, that the plaintiff's position regarding the conduct of the public-auction sale was marked by *acquiescence*: and so the plaintiff will not be heard to raise the fact of the sale as a *grievance*. But it then follows *that under the said auction-sale*, the plaintiff is not entitled to claim **Kshs.1,920,000/=** as the expected proceeds of sale; because, firstly, the plaintiff *contributed to value-deterioration* by repeatedly securing stay of the sale process; and secondly, because the plaintiff knows that the lower Court had authorized the *lower reserve price of Kshs.1,000,000/=*.

The real question before this Court is *whether the plaintiff derives any rights from the Judgment of the High Court in Mombasa H.C. Civ. Appeal No.59 of 2001, and whether such a possibility subjects the*

defendants to liability as against the plaintiff.

This Court takes judicial notice that, by *valid Orders* of the lower Court, and at a time when there were *no High Court Orders of stay*, the suit motor vehicle was sold by public auction, on **22nd February, 2003**; and it follows, as a matter of fact, that the High Court's Judgment on appeal, of **30th June, 2006** lacked the capacity to restore that item whether to the plaintiff alone, or to the plaintiff jointly with 2nd defendant/respondent. Consequently, it becomes an irrelevant issue whether the plaintiff was the sole owner of the suit motor vehicle. In the suit, therefore, the plaintiff cannot be properly seeking to enforce any rights against *1st defendant*; the 1st defendant's sole relationship was with *2nd defendant* – and either 1st defendant already has fully obtained satisfaction in that relationship, or *it will pursue a further cause of action*, to secure recompense. And the plaintiff's sole relationship such as may occasion a legal claim, is with *2nd defendant*; since the plaintiff is aware that the suit motor vehicle *isn't available*, the plaintiff must explore other avenues of making good 2nd defendant's indebtedness to them. This position coincides with that expressed by the learned Commissioner of Assize: ***"In other words, the applicant's claim against the 2nd respondent will not disappear upon the execution by the first respondent against the second respondent by way of [sale of the] attached motor vehicle."***

The plaintiff's suit by plaint dated 27th September, 2006 is dismissed, with costs to 1st defendant.

Decree accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 27th day of February, 2012.

**MAUREEN ODERO
JUDGE**