



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 554 of 2007

M N NG'ANG'A.....1ST
PLAINTIFF

A N THANGE.....2ND
PLAINTIFF

J M THIGA.....3RD PLAINTIFF

ALL T/A WARUHIU KOWADE & NG'ANG'A ADVOCATES

VERSUS

LAB CONSTRUCTION LTD.....1ST
DEFENDANT/APPLICANT

LAB ENTERPRISES LTD.....2ND
DEFENDANT/APPLICANT

KISUMU CONCRETE PRODUCTS LTD.....3RD
DEFENDANT/APPLICANT

AND

WILLIAM MURIITHI KIMARU.....1ST INTERESTED
PARTY/RESPONDENT

ELIZABETH AKINYI.....2ND INTERESTED
PARTY/RESPONDENT

RULING

1. By their Notice of Motion dated 5th December, 2008 brought under Orders L Rule 1 and Order 1 Rule 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the interested parties herein applied for an order declaring that they had lawfully purchased motor vehicle registration number's KAU 856J, KAL 653Q and KAC 289Z (hereinafter the said "vehicles") at a public auction on 24th October, 2008 and that consequently the court do set aside the orders issued on 27 November, 2008. That Order of 27th November, 2008 required the OCPD – Kisumu to assist in the recovery of the said vehicles.

2. That application was supported by the Affidavits of the Interested Parties sworn on 5th December, 2008, respectively. The interested Parties contended that they saw an advertisement on the Kenya Times Newspaper of Friday 17th October, 2008 advertising the sale by public auction of several vehicles by Ms Igare Auctioneers (hereafter “The Auctioneer”), that the auction was scheduled for Friday 24th October, 2008 at 10.00 a.m., that they called the Auctioneer who advised them that the auction will be at the Auctioneers office yard, Rehema house in Eldoret Town, that they attended the public auction on the said 24th October, 2008 at Eldoret whereby after several bids, they emerged the highest bidders for the said vehicles for which they paid Ksh.550,000/-, Ksh.220,000/- and Ksh.200,000/- respectively. The Interested parties further contended that they paid for the said vehicles in cash, took possession thereof and were given possession of all the documents pertaining to the said sale. They produced the said documents as an exhibit in the application.

3. On the 29th November, 2008, the Interested Parties received a call from the Auctioneer that the Police from Kisumu were looking for the said vehicles that they were sent the order issued on, 27th November, 2008, that they were aggrieved by the said order as it was issued without considering that they had purchased the said vehicles. They accused the Plaintiffs of colluding with the Defendants in having the said order of 27th November, 2008 issued. They claimed lawful title to the vehicles and urged that the application be allowed.

4. One of the exhibits produced by the Interested Parties in the Affidavit of Patrick Kuira Muriithi as “PKM3” was the Affidavit of Margaret Anindo, the Auctioneer, sworn on 5th December, 2008. She swore that on receipt of Warrants of Attachment and sale from the Plaintiffs, she proclaimed six (6) Motor Vehicles KAG 334S, KAH 204T, KAA 274B, KAU 856U, KAC 289Z and KAL 653Q, respectively. That on attachment, the first three were missing and only the last three were attached, that she was never served with any stay order, that she duly advertised the vehicles for sale and sold the same to the interested parties on 24th October, 2008 by 10.30 a.m. that her assistant by the name Ishmael Eshikote received a short message service (SMS) from Mr. Alex Thangei, Advocate at 1 p.m. to hold/stop the sale that as at the time the Public Auction had been concluded. That there was subsequent correspondence with the said Advocate which could not change the fact that a public auction had already been concluded as legally scheduled. That by the time the order of 27th November, 2008 was being served upon her the buyers had already taken the said vehicles.

5. The Plaintiffs opposed the application through a Replying Affidavit of Alex Ngatia Thangei. I should point out that the said Replying Affidavit had various typo and other mistakes but its net effect was that the purported sale of the said vehicles was irregular, illegal, fraudulent and void ab initio for the reason that after having settled the matter with one of the Defendants, on 23rd October, 2008, Mr. Thangei had called Mr. Ishmael Eshokote of the Auctioneer and advised that the sale should not to be proceeded with, that on that day Mr. Eshikote had informed him that he was on his way to Kisumu, he called again on 24th October, 2008 at 10.30 p.m. and Mr. Eshikote confirmed he had arrived in Kisumu but the latter was concerned how the Auctioneers fees were to be guaranteed, that Mr. Thangei wrote to the auctioneer and asked her to release the vehicles but the auctioneer indicated that she had sold two of the vehicles and sent a cheque for Ksh.610,000/-, that the said vehicles had not been proclaimed and that the advertisement of 17th October, 2008 did not disclose the place where the auction was to take place. In his view, the alleged public auction was a fraud.

6. The Defendants opposed the application and filed a detailed and conclusive Replying Affidavit by Lalji Karsan Rabadia. He gave the entire background of the matter, how he and Mr. Thangei had settled the matter on 23rd October, 2008, he contended that motor vehicle KAU K56J belonged to Kajuju Holdings Ltd which had obtained a stay of execution on the same, that on 23rd October, 2008, he hired the services of a security firm Daudi Investments in Kisumu to keep track of the yard of one Mr. Opondo at the junction of Kisumu-Kakamega road where the said vehicles were visibly packed, that Daudi Adams Chepkwony and John Otieno of the said Daudi Investments informed him that they kept watch of that yard from 7.00 a.m. till 5 p.m. and no public auction took place on that yard He therefore concluded that no public auction had taken place on 24th October, 2008. He produced the Affidavits of the said Daudi

Adams Chepkwony and John Otieno sworn on 22nd December, 2008 respectively who confirmed his averments. The Defendants argued that the application be dismissed.

7. I have carefully considered all the Affidavits on record together with the exhibits relied on. I have also considered the submissions of counsel. This matter boils down to only one issue, **was there a public auction on 24th October, 2008 at Eldoret or not?** The interested parties and the Auctioneer on one hand have sworn Affidavits contending that a public auction took place on the said 24th October, 2008 at Eldoret wherein the interested parties emerged the highest bidders and purchased the said vehicles. On the other hand, the Plaintiff's and the Defendants have denied that fact and insisted that the Auctioneer was instructed on 23rd October, 2008 not to proceed with the sale and that the said vehicles were packed at some yard at a junction of Kisumu – Kakamega – Miwani Road on that material day. The Plaintiffs and the Defendants have accused the Interested Parties and the Auctioneer of perpetrating a fraud. All these averments are on oath. None of the deponents was cross-examined. produced and one way or another determine who is telling the truth.

8. On 25th November, 2009 Hon. Kimaru J set aside the sale of motor vehicle registration no. KAU 856J on the basis that there was a valid stay order made on 15th October, 2008 and that motor vehicle could not have been sold. He directed that the issue of ownership of the other two vehicles was to await the hearing of an application dated 15th September, 2009 which is still pending.

9. The evidence on record as to the public auction taking place in Eldoret is to be found in the sworn Affidavits of Patrick Kuira Muriithi, Elizabeth Akinyi and Margaret Anindo all sworn on the 5th December, 2008. From the documents, they have exhibited the following:- I have seen the advertisement appearing in the Kenya Times Newspaper of Friday October, 17, 2008 the Auctioneer advertised that: -

“Under instructions received from under mentioned court, we shall sell the under mentioned by Public Auction.

ON FRIDAY 24TH OCTOBER, 2008 AT OUR AUCTION YARD.

1 MILIMANI HCCC NO. 554 OF 2007.....”

The whereabouts of the so called **“Our Auction Yard”** was never specified. Further, the advertisement did not disclose where the subject vehicles were to be viewed.

10. Since from the advertisement, the whereabouts of the yard is not shown, one may have to look at the auctioneers address to see where they may be found. The auctioneer has given two addresses one in Eldoret and the other is Nakuru, Grey House 2nd Floor next to Langalanga stage. At page 10 of the exhibit **“EAI”** to the Akinyi Affidavit, the VAT registration certificate gives the auctioneers physical address as Nakuru. Mr. Patrick Kuira Muriithi has in his affidavit gives his address as P O Box 1381 – 20100, Nakuru. Both paragraphs 4 of Mr. Muriithi's Affidavit and Elizabeth Akinyi Affidavit state: -

“4. Pursuant to the Advertisement I did on the 24th October, 2008 attend the Public Auction which was concluded at the Auctioneers yard being our offices, Rehema House, Eldoret “(Emphasis added).”

Both the Affidavits by Mr. Muriithi and Elizabeth Akinyi sworn in support of their applications to have the motor vehicles registered in their names (pages 20 **“PICM1”** and page 11 **“EA2”**) were sworn at **Nakuru** on 3rd and 19th November, 2008, respectively. This is so notwithstanding, that Elizabeth Akinyi's address and probably place of abode is given as Kisumu. In my view, the many coincidences of Nakuru in this matter cannot be ignored in seeking to establish the impugned public auction of 24th October, 2008.

11. At paragraph 5 of her affidavit, the auctioneer states that she proclaimed a total of six (6) vehicles but on attachment, only three (3) KAU 856J, KAC 28Z and KAL 653Q) were attached as the other three

were missing. She also adds an afterthought “**and motor vehicle KAL 182Q which were registered in the Defendants names and it had not been on the proclamation list**”. She then seeks to produce the warrants, the proclamation and the attachment. However, only the warrant of notification of sale are produced. I have looked at the Notification of sale dated 3rd October, 2008. The same is received by a Sudhir and is witnessed by Mr. Ishmael Eshikote. the same attaches the said motor vehicles giving their estimated value as follows: -

- i) KAU 856J (Mercedes Benz) –Ksh.1,200,000/-
- ii) KAC 289Z (Nissan Ndovu) – Ksh.1,000,000/-
- iii) KAL 653z (Mitsubishi FH) – Ksh.800,000/-

All were in moving condition. I have also seen the proclamation at pages 12 and 13 of “**PICM 1**”. The same is shown to have proclaimed six (6) vehicles. It is dated 5th May 2008. It is signed by a Sudhir and the Auctioneer. The value of the said vehicles is estimated therein as follows: -

- i) KAU 856J (Mitsubishi) – Ksh.500,000/-
- ii) KAC 289Z (Nissan Ndovu) – Ksh.300,000/-
- iii) KAL 653Z (Mitsubishi PH) – Ksh.350,000/-

The question that arises is, if these three vehicles were proclaimed on the alleged 5th May, 2008 as stated how would their estimated values increase by more than 50% five (5) months later in October, 2008? This raises serious doubts having in mind that both the Proclamation and the Notification of sale were prepared and signed by the same auctioneer, I have also noted that the part below the box that contains the particulars of the proclaimed property are similar in pages 12 and 13 of “**PKM1**”.

12. In her very first communication to her instructing Advocates dated 27th October, 2008, the auctioneer indicated that she had proceeded “**With the sale as per local paper advertisement.**” She enclosed a cheque for Ksh.610,000/- being the proceeds of the sale. She confirmed that one lorry which had a dispute was not put on auction pending further instructions. It should be noted that since only three (3) vehicles had been advertised and the sale “**had proceeded as per the advertisement**” **it follows that only two(2) vehicles were then sold at the public auction.** Then in her letter of 13th November, 2008, she wrote to the Plaintiffs that, “**As indicated to you we did return Motor vehicle Registration Number KAL 182Q since it did not belong to the judgment debtors.**” The question that arises is, motor vehicle registration No. KAL 18Q does not appear either in the proclamation dated 5th May, 2008,, the Notification of Sale dated 3rd October, 2008 or in the advertisement of 17th October, 2009. How does it suddenly arise on 13th November, 2008?

13. The foregoing then is the evidence that there is that a public auction took place in Eldoret on 24th October, 2008.

14. Both the Plaintiffs denied all these facts. They stated on oath that no public auction took place on 24th October, 2008, in Eldoret as alleged. Mr. Thangei swore that he spoke to and informed the auctioneer’s assistant both on 23rd October, 2008 and 24th October, 2008 not to proceed with the sale as scheduled. That Mr. Ishmael of the Auctioneer questioned Mr. Thangei whether the auctioneer’s charges had been secured. There is also an affidavit evidence on record that on the instructions of Mr. Rabadia, Mr. Daudi Adam Chepkwony and John Otieno kept watch at the yard of a Mr. Opondo at Mamboleo area at the junction of Kisumu – Kakamega road on the said 24th October, 2008, that they could see the said motor vehicles packed inside that yard from the gate of the said yard and that on the said date there was no public auction at the said yard and that the said vehicles were never moved therefrom. The evidence presented by the Plaintiffs and the Defendants in the aforesaid Affidavits was never controverted, denied

or challenged by the interested parties.

15. In civil cases, the burden of proof is on him who alleges. My view is, with such evidence by the Defendants and Plaintiff, the interested parties required more than just the contradictory insufficient and unsatisfactory evidence they had presented to court to establish their claim. I would have expected for example the auctioneer to present evidence to the effect that she owns a yard at Rehema House Eldoret, produce the attendance list for the alleged auction for the said 24th October, 2008 and the bid tally thereof.

16. I have seen the three receipts produced by the interested parties for Ksh.550,000/-, Ksh.200,000/- and ksh.220,000/-, respectively for the purchase of the said vehicles. The Auctioneer had sworn that the public auction took a very short time since it was only the three (3) vehicles on sale. That the auction was over by 10.30am of the morning of the auction. These receipts, although they are all dated 24th October, 2008, they are serialized as numbers 774, 773 and 815, respectively. Why the disparity between serial No. 774 and 815 if the payment was made on the same day and at the same time of the alleged purchases?

17. After carefully analyzing the evidence in this matter, my take of it is as follows. The Auctioneer did proclaim three (3) machineries appearing at page 12 of “PKM1” on 5th May, 2008 at Kisumu, on 3rd October, 2008 when she went to attach, she could not remove the three machines KAG 334S, KAW 204T and KAA 274B which Mr. Rabadia swore are machineries used at the Defendants premises. It is possible then that she decided to attach motor vehicle Registration Nos. KAU 856J, KAC 289Z and KAL 653Q and put the proper estimated values appearing at the notification of sale dated 3rd October, 2008 (page 27 “MA – 1”), she advertised the same for sale on 24th October, 2008. On 23rd October, 2008 Mr. Thangei spoke to the Auctioneer’s assistant Mr. Eshmael Eshikote who was on his way to Kisumu instructing that the sale be called off, the auctioneer was desperate as to her charges and was disturbed and disappointed that the Plaintiffs had not secured her costs. On 24th October, 2008, there was no public auction either in Eldoret or anywhere else as the said vehicles were still at Kisumu where they had been attached, probably a private sale took place in the offices of the auctioneer at Nakuru at very little amounts. Desperate to recover her costs, the proclamation at page 13 of “PKM1” was hurriedly prepared to justify the alleged values of Ksh.550,000/-, Ksh.200,000/- for vehicles she had herself personally estimated the value to be Ksh.1,200,000/- and Ksh.800,000/-. One vehicle may not have been sold on that day that is why she wrote on 27th October, 2008 to Mr. Thangei advising that one lorry was returned. Thereafter, she decided to dispose off Motor vehicle Reg. KAL 653Q to the 1st interested party that is why the receipt issued in respect thereof is serial No. 815 whilst the earlier two tally at serial No’s 773 and 774, respectively. This may explain why the Affidavits for transfer by the interest parties are similar and sworn at Nakuru though on different dates!

18. From the evidence on record, I am satisfied and can state with no hesitation that this was a complete fraud by the Auctioneer in collusion with the Interested Parties. That being the case, I am satisfied that the vehicles still belong to the Defendants. This court cannot sanction a fraud. The Auctioneer conducted herself in the most despicable and unprofessional manner. The best that can be done is for her to refund any monies she may have received from the interested parties and be reported to the auctioneers’ board to be dealt with in accordance with the law.

19. In the premises, the Interested Parties application dated 5th December, 2011 is hereby dismissed with costs to the Plaintiffs and Defendants.

20. I am aware that there is no application before me for the release or re-transfer of the motor vehicles to the Defendant. However, the application by the interested parties has been pending since December, 2008, nearly four (4) years now. I am satisfied that the Defendants and Plaintiffs had obtained an order by consent and without any collusion whatsoever that the attached motor vehicles be released to the Defendants. In accordance with the overriding objective of the Civil Procedure Act that there be expeditious disposal of civil disputes and in order to do justice to the parties expeditiously and proportionately and to avert any further delay and expense, I order that the Motor vehicle registration

Nos. KAL 653Q and KAC 289Z be released to the Defendants and if they had been transferred into the names of the interested parties or any other parties, they be forthwith re-transferred to the names in which they were before the fraudulent sale and transfer.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of September, 2012.

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A. MABEYA
JUDGE