REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.17 OF 2010

(From the ruling and order of Honourable S.O. Omwega, SRM, Busia in Busia SRM CC NO.127 of 2000)

CHRISPINUS NYABOLA …….....……..APPLICANT

VERSUS

SILAS ESIROMO …….....…….RESPONDENT

J U D G E M E N T

The Appellant Chrispinus Nyabola appeals against the orders of Busia Senior Resident Magistrate S.O. Omwega in the application dated 6th June 2002 in SRM CC NO.127/2000. The application was brought by the applicant/Defendant seeking release of a motor vehicle reg no.KAJ 179A Peugeot Station Wagon belonging to the applicant on grounds he had been wrongly joined as a defendant in Busia SRM CC no.127 of 2000. The application also sought for orders that the Appellant/Plaintiff bears the costs of the auctioneer.

The facts giving rise to the application are that the Appellant had obtained judgement against the Respondent for damages under the Law Reform Act and Fatal Accidents Act in the Busia SRM CC no.127 of 2000. The defendant failed to satisfy the decree and his motor vehicle was attached, sold by public auction and proceeds deposited in court. The Respondent thereafter filed an application dated 06/06/2002 seeking for orders of restitution of the motor vehicle registration number KAJ 179A Peugeot Station Wagon on grounds that the Respondent who was the owner had been wrongly enjoined in the suit. The Respondent was the 1st defendant while his driver was the 2nd defendant in SRM CC No. 127 OF 2002. The magistrate allowed the orders sought in the application after the application was argued between the parties. The Appellant felt aggrieved by the said orders of striking out the judgement and releasing the motor vehicle which had already been in execution of the decree.

The grounds of appeal are that the magistrate wrongly set aside a validly entered judgement; that the application was defective, that the Appellant was wrongly condemned to pay costs; that the firm of Anyara Emukule & co. Advocates was not properly on record for the Applicant and that the order for release of the motor vehicle was wrong in that the vehicle had already been sold land returns deposited in court.

On 14/06/11 the parties recorded a consent to the effect that this appeal be disposed of by way of written submissions.

The Appellant raised several issues arising from the grounds of appeal. Firstly, that the advocates for the applicant Anyara Emukule & co. were not properly on record having failed to comply with Order lll

Rule 9 of the old Civil Procedure Rule which were in force at the time the application was heard. The firm of Anyara Emukule & co. had come on record through a consent order signed by the firms of advocate record namely Chris Mutuku & co. and Anyara Emukule & co. The Appellant had raised a preliminary objection on grounds that no leave was obtained to allow the firm of Anyara Emukule to come on record. The magistrate overruled the said objection without analyzing the merits or demerits of the arguments by the Appellant based on the provisions of Order lll Rule 9. The Appellant did not apply for leave to file an appeal against the ruling dismissing his application. The parties then agreed to proceed with the application dated 06/06/2002 which was eventually successful. The Appellant lost his right to challenge the ruling of the court when he failed to apply for leave to appeal. The issue is not the subject of this appeal and is hereby put to rest.

The Appellant submitted that the court acted out of its mandate when it struck out the judgement. After the case was determined, it was improper for the court to re-open it in regard to issues which had been determined. The Appellant argued that the issue of ownership of the motor vehicle had been resolved referring to it as res judicata.

Section 7 explanation 4 of the Civil Procedure Rules provides that:

> **"any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

The plaint alleged that the vehicle reg. no.KAD 453X which caused the accident belonged to the lst defendant. The defendant denied the allegations in his defence. However, he did not adduce any evidence to rebut the plaintiffs evidence. The court found in favour of the Appellant that the vehicle belonged to the Respondent/lst defendant. It is correct that the issue of ownership had been resolved in the judgment and it was improper for the court to re-open the matter through an application whose main prayer was only seeking for release of the attached motor vehicle. There was no application for review or setting aside the judgement. I agree with the appellant that the only way a court may interfere with a judgement is by way of review or setting aside or varying on request by a party following the laid down procedure. The application before the Senior Resident Magistrate did not contain any prayer for setting aside, varying or reviewing the judgement. The order to strike out the judgement with all the consequential orders had no legal basis and was a misdirection on part of the court.

The Respondent argued that it was in order for the court to rely on Section 3A of the Civil Procedure Rules and invoke the inherent jurisdiction of the court. He relied on the Ugandan **Court of Appeal case at Kampala Civil Appeal no.30 of 1969 Adibua vs Mutekanga.** The facts of this case are different from those of the case before me. In the Court of Appeal case, the applicant sought orders for review of an order by the High Court to set aside a vesting order. The court ruled that it was proper to invoke the inherent powers of the court even where there was a specific provision provided for by the Civil Procedure Rules. The Respondent did not explain whether the Ugandan Civil Procedure Rules are similar to the Kenyan ones. Even assuming they are, I would not agree with this finding on grounds that specific provisions of procedure are made for a specific purpose. Courts should be guided by specific provisions and only invoke the inherent power of the court where there is no specific procedure in existence. The case relied on is over 40 years old. I am sure for the last forty years jurisprudence has grown in Kenya and Uganda and that there are more recent cases which would have been used in this application.

The Appellant relied on two (2) Kenyan Court of Appeal cases. In the **Civil Application no.340 of 2002 (Nairobi) Agricultural Finance Corporation vs Samuel Kepleting Rono** the Court held:

> **"It has been held time and time again that Section 3A of the Civil Procedure Act merely preserves the inherent power of the court, but does not specifically authorize the bringing of any motion under it.**

Similarly in the case of **Nairobi Milimani Commercial courts Civil suit no.1621 of 1999 Rika Limited vs Jackson Njathi T/A Njathi Mwangi & Co. advocates** it was held:

> **"The inherent power of the court is to be exercised only where it is necessary to do so in the interests of justice or to prevent the abuse of the court process in circumstances where no other procedural device is available."**

The magistrate in this case relied entirely on Section 3A of the Civil Procedure Rules in invoking the inherent power of the court to strike out judgment. There were other specific procedures available to the Respondent herein to seek such orders. Furthermore, the Respondent sought only for the release of the motor vehicle but not for striking out of the judgement. The Magistrate misdirected himself when he purported to invoke the inherent power of the court where other procedural devices were available. It was wrong to grant prayers to a party which were not sought in the application. The court in this case encouraged the abuse of the court process which he was duty-bound to prevent.

The Respondent denied the allegations in the Amended paint but failed to testify in court. This was the chance he had to show the court that he was not the owner of the vehicle. The magistrate was wrong to entertain the Respondent at the wrong stage and through the wrong procedure to challenge the judgment of the court. The vehicle had already been sold by public auction in execution of the decree. The Respondent's application seeking for release of the vehicle had been overtaken by events and should not have been allowed. It is wrong for courts to grant orders which cannot be enforced. Such a practice erodes the authority of the court.

The Appellant was condemned to meet the auctioneers charges without any reason being given. This decision was not supported by any facts or guided by any law. The Appellant had obtained judgment in the case and was entitled to enjoy the fruits of his judgement. He had a right to look for property belonging to the Respondent for attachment in satisfaction of the decree. It was a misdirection to condemn him to pay the costs of the auctioneers.

It is my finding that the ruling of the magistrate in the application dated 6th June 2002 was a misdirection in law and fact.

It was not the interests of justice to grant prayers which were not sought in the application which had been overtaken by events. I find the appeal successful and allow it in the following terms:

(a) the Ruling of the Hon. S.O. Omwega delivered on 11th July 2002 is hereby set aside;
(b) the Respondent to pay the Auctioneers charges in respect of sale of motor vehicle Registration number KAJ 179A;
(c) The Respondent to meet costs of this appeal and For the suit in the lower court.

F.N. MUCHEMI
J U D G E

Judgement dated and delivered on the 5th day of December 2011 in the presence of Mr. Manwari for Omondi for appellant.

F.N. MUCHEMI
J U D G E