



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 34 of 2008

LILIAN ANYANGO GEORGE APPELLANT

-VERSUS-

NASIR MARMOOD LIANI & 3 OTHERS RESPONDENTS

JUDGMENT

Coram:

Mwera J.

Orengo for the appellant

Ouma for the respondents

Dianga CC.

This appeal follows the lower court orders delivered on 1.4.2008 by which a motor vehicle attached by an auctioneer in execution of a decree was released without hearing the appellant. The background which Mr. Orengo narrated and Mr. Ouma did not appear to dispute much, was that on 31.8.2005 the lower court delivered a judgment in favour of the appellant in the sum of Ksh 492,230/=. It followed a successful claim of unlawful repossession of a certain motor vehicle. After several unsuccessful attempts to execute, some goods of the respondents were attached. Objection proceedings followed and all ended in a consent recorded on 27.2.2008 regarding the mode of payment of the decretal amount. The respondents failed to pay as per that consent and so the appellant got their motor vehicle no. KAT 339 M attached on 1.4.2008. But on the same 1.4.2008 the respondents moved the lower court *ex parte* and got this motor vehicle released by the auctioneer. The appellant had not been served with the application regarding such release and so without being heard, the motor vehicle was released. That this denied him a right to be heard as per the rules of natural justice and he also missed on realizing the fruits of his litigation – the decretal sum. Even had the attachment been wrongful, still the appellant was entitled to a hearing before the motor vehicle was released. Mr. Orengo seemed to read mischief in the way the release of the said motor vehicle was gone about.

Mr. Ouma on his part told the court that the subject motor vehicle had since been sold. It had been released on 1.4.2008 by an *ex parte* order which the lower court was entitled to do as provided for under O50 r 2 CPR. But then the appellant would challenge that release under O50 r. 17 CPR. Indeed he took course under that provision of law, but then abandoned the due application. Instead this appeal was filed.

Counsel told the court that a serious prejudice befell the respondents when the motor vehicle, not in the inventory to be attached, was attached and for that the lower court properly released the motor vehicle. That under Rule 12 (Auctioneers Rules) the auctioneer at the time of proclaiming movable properties is required to itemize each property proclaimed, its value and condition. Motor vehicle no. KAT 339 M was not regularly attached and so it was regularly released even without hearing the appellant first. In any event the application to release the motor vehicle was set down for hearing *inter partes* on 10.4.2008. Apparently it did not go on.

The court perused the auctioneer's proclamation of 20.3.2008 in this matter. The only motor vehicles stated there are: KAZ 438 L and KAW 609 K. There is no KAT 339 M. Accordingly on attaching this motor vehicle the auctioneer fell foul of the law.

O50 r 2 CPR provides for making *ex parte* orders:

“ 50 (2). No motion shall be made without notice to the parties affected thereby:

Provided, however, that the court, if satisfied that the delay caused by proceedings in the ordinary way would or might entail irreparable or serious mischief, may make an order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just, and any party affected by such order may move to set it aside.”

And that setting aside is as per O50 r 17 CPR.

“ 17. The court may set aside an order made *ex parte*.”

The court was told that the appellant embarked on this course then for no reason abandoned, it preferring this appeal. Mr. Orenge maintained that the appellant was entitled to do so and now by this judgment, a clear message should go out that *ex parte* orders will not issue left and right without hearing the other side.

In this court's view the order of 1.4.2008 to release motor vehicle registration no. KAT 339 M need not be faulted at all. It had been irregularly attached. It was not stated in the inventory of proclamation as two others were. No reason was given as to this exclusion yet the motor vehicle was attached. The respondents could be excused for moving the lower court *ex parte* on 1.4.2008 when they satisfied it that if they went via the ordinary way, that would entail irreparable or serious mischief being made/perpetrated. This would for instance be in a manner of a delayed or derailed sale of that motor vehicle. The court heard that it had since been sold. The irregular proclamation and attachment could be prejudice or mischief. The learned trial magistrate was thus proper in releasing the motor vehicle by issuing an *ex parte* order.

The appellant had provision to have that order set aside. He abandoned the course in that direction and instead brought this appeal.

All in all it was not merited and it is dismissed with costs. The respondents should however honour their part of the consent order to pay the decretal sum in 30 days from now. It is a proper and fair thing to do in this case. Delivered on 29.1.2009.

J. W. MWERA

JUDGE

JWM/hao