

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 196 of 2005

DUNCAN MWANGOVYAPLAINTIFF

VERSUS

MEENA BHAGWANDAS PATEL DEFENDANT

RULING

The plaintiff herein, Duncan Mwangovya, took out a Notice of Motion dated 31st October 2007 in which he sought for an order to declare the sale by public auction of Motor Vehicle Registration No. KAR 650/- Make Subaru Legacy held on 23rd May 2007 to be illegal and fraudulent hence null and void *ab initio*, and be set aside. The motion is premised on the provisions of Sections 3A and 63 (e) of the Civil Procedure Act and under order L rule 1 of the Civil Procedure Rules. The motion is supported by the affidavit of Duncan Mwangovya. The replying affidavit of Peter Kinyua Muchendu was filed to counter the motion.

Mr. Kinyanjui, learned advocate for the plaintiff urged this court to set aside the sale because the auctioneer is said to have sold the motor vehicle without the authority of the defendant and that the auctioneer sold the same in contravention of rules 12 F and 16 (2) of the Auctioneers' rules. It is said the notice given was short and that the same was not advertised in a Newspaper as required. It is also said that there was a court order staying sale when the auctioneer purported to sell the motor vehicle. It is the submission of Mr. Oloo, learned advocate for the Interested Party that the Orders sought in the motion dated 31.10.2007 are not available under order XXI rule 69 of the Civil Procedure rules. It is the learned advocate's view that the only remedy available to the applicant is to sue for damages. It is argued that the Interested Party is a bonafide purchaser for value without notice hence the acquired rights over the aforesaid motor vehicle should not be disturbed. Mr. Sewe learned advocate for the defendant opposed the motion by relying on the grounds of opposition. It is the submission of Mr. Sewe that motor vehicle registration No. KAR 650F was attached in distraint for rent. He was of the view that the sale cannot be set aside in view of the provisions of Order XXI rule 69 of the Civil Procedure Rules.

I have considered the submissions of the three learned counsels. I have carefully considered the grounds set out in the motion dated 31st October 2008 plus the facts deponed in the affidavits filed for and against the summons. I have further looked at the grounds of opposition. It is not in dispute that motor vehicle registration No. KAR 650F was sold by public auction held on 23rd May 2007 by veteran Auctioneers on the instructions of the Defendant. The aforesaid motor vehicle was purchased by Peter Kinyua Muchendu at a bid price of Kshs.300,000/-. It has been alleged that Mr. Kiema t/a Veteran Auctioneers did not have a licence to carry out auctioneering business hence the sale was tainted with illegality. This fact was not controverted by the Auctioneer. It has also been alleged that the auction proceeded in direct contravention of a court order issued by this court maintaining the *status quo* on 23rd May 2007. This fact appears not to have been controverted also. It is also alleged that the auctioneer did not comply with rules 12F and 16(2) of the Auctioneers rules. Again these facts were not controverted by the auctioneer and the defendant. There is an allegation that the motor vehicle was sold to one Peter Kinyua Muchendu, an auctioneer. It is expected that Mr. Peter Kinyua Muchendu knew the rules governing auctioneers when disposing of property by public auctions. It is difficult at this stage for me to agree with the suggestion by learned counsel that Peter Kinyua Muchendu bought the motor vehicle in dispute as an innocent purchaser without notice.

I have anxiously considered the complaints raised against the sale. It is obvious that the auctioneer sold the subject motor vehicle in breach of rules 12F and 16(2) of the Auctioneers Rules. However, those defects cannot invalidate the sale under order XXI rule 69 of the Civil Procedure rules. The only available remedy for the aggrieved party is to file a suit for damages. However, there are serious allegations made against the auctioneer. It is said that

Mr. Kiema t/a Veteran Auctioneers had no licence to practice by the time he pretended to sell the subject motor vehicle. The second serious issue is that the subject motor vehicle was sold in contravention of a court order maintaining the *status quo* as of 23rd May 2007. These facts have not been challenged. It is now crystal clear that the motor vehicle was sold by an auctioneer without a valid licence. The auctioneer without a valid licence also sold the suit motor vehicle in contravention of a valid court order maintaining the status quo. The aforementioned flaws are not covered nor contemplated under Order XXI rule 69 of the Civil Procedure rules. The defects are fundamental not mere irregularities. The auction was a pretended sale. No rights can flow from such an illegal exercise. The auction was null and void ab initio. I am convinced the same should be declared null and void which I hereby order. The public auction held on 23/5/2007 is set aside. The motor vehicle registration No. KAR 650F should be returned to the plaintiff forthwith. Costs of the motion is given to the plaintiff to be paid by Mr. Kiema trading as Veteran Auctioneer. The aforesaid auctioneer and or the defendant should refund to Peter Kinyua Muchendu the purchase price.

In the application dated 27.8.2007, Peter Kinyua Muchendu seeks to be joined as an Interested Party. He also seeks to be given a vesting Order over the ownership of the aforesaid Motor and an order of injunction. In view of my findings in respect of the notice of motion dated 31st October 2008, it is obvious that the orders sought by the Peter Kinyua Muchendu cannot be given. He was not an innocent purchaser for value without notice. I dismiss the summons with costs to the plaintiff.

Dated and delivered at Mombasa this 24th day of July 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Oloo for the Interested Party. Mr. Kinyanjui for plaintiff and Mr. Ouma h/b Omollo for the Defendant.