



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 44 of 1994

SORGET SAWMILLS LTD.....PLAINTIFF

VERSUS

J. M. NDIRANGU t/a MOLAIN AUCTIONEERS.....1ST DEFENDANT

EMKAY ESTABLISHMENT LTD.....2ND DEFENDANT

DIAMOND TRUST OF (K) LTD.....3RD DEFENDANT

HEMLAND MOTORD LTD.....4TH DEFENDANT

JUDGMENT

The plaintiff, Sorget Sawmills Limited, by a further amended plaint, filed suit seeking judgment to be entered against the defendants jointly and severally for the following orders:

- (i) A declaration that the sale and/or auction of motor vehicle registration number KZH 711 (*hereinafter referred to as the said motor vehicle*) was unlawful.
- (ii) The plaintiff prayed for the defendants to be compelled to return the said motor vehicle to his possession or
- (iii) Alternatively, the plaintiff to be paid the market value of the said motor vehicle by the defendants jointly.
- (iv) The plaintiff further prayed to be paid loss of user for the said motor vehicle from the date of its attachment to the date of the judgment.
- (v) The plaintiff further prayed for the costs of the suit.

The 1st defendant did not file a defence in this case. Neither did he attend court during the hearing of the suit. The 4th defendant filed a defence to the plaintiff's suit. In the said defence the 4th defendant denied the plaintiff's claim against it. It stated that it had purchased the said motor vehicle in a public auction which had been lawfully held by the 1st defendant. The 4th defendant averred that it paid the bid sum after the said property had been knocked down to it after being declared to be the highest bidder in the public auction. It denied that it was aware of any defect in the proceedings that led to the said warrants of

sale being issued to the 1st defendant. The 4th defendant urged this court to dismiss the plaintiff's suit with costs.

The 2nd and 3rd defendants also filed a defence denying the plaintiff's claim. The 3rd defendant averred that it had financed the 2nd defendant to purchase the said motor vehicle from the 4th defendant. The 3rd defendant averred that it had no interest over the said motor vehicle other than the fact that it had secured its interest when the 2nd defendant borrowed money from it to purchase the said motor vehicle from the 4th defendant. The 2nd defendant averred that it had purchased the said motor vehicle from the 4th defendant for value without knowledge of any defect of title in respect of the said motor vehicle. It averred that its ownership of the said motor vehicle could not be defeated by the plaintiff's claim. The two defendants urged this court to dismiss the plaintiff's suit with costs.

At the hearing of the case the plaintiff called two witnesses. PW1 Fortunatus Charles Mureithi Kamau testified that he was a Director of the plaintiff company which was incorporated in 1968. The other directors of the plaintiff company were Francis Kamau Kinuthia and Henry Chege. He testified that the company was incorporated with the objective of conducting sawmilling business. It was his testimony that upto date the said company was still in existence. He testified that the company owned several motor vehicles including motor vehicle registration number KZH 711 Nissan Lorry. He produced the logbook of the said motor vehicle in evidence. He testified that on the 22nd of October 1993, the said motor vehicle was attached by the 1st defendant pursuant to the warrants of attachment which were issued by the **Molo Senior Resident Magistrate's Court in Molo SRMCC No. 15 of 1992 Peter Kamau Thiongo – vs- F.C. M. Kamau t/a Mololo Woodworks & Francis K. Mwangi**. PW1 testified that the plaintiff was not a party to the said suit. He testified that after the said motor vehicle had been proclaimed, his driver gave him the proclamation which he produced as Plaintiff's Exhibit No. 4. It was his testimony that after the said motor vehicle was attached, he learnt that the same had been sold to the 4th defendant in a public auction. He later undertook a search at the Registrar of Motor vehicles and established that the said motor vehicle had been transferred to the 2nd and 3rd defendants. He testified that the plaintiff company had purchased the said motor vehicle for the sum of Kshs 799,286/=. At the time of testifying in court, PW1 assessed the market value of the said motor vehicle to be between Kshs 840,000/= and Kshs 860,000/=.

He testified that the company lost the sum of Kshs 5,000/= which it use to earn everyday net of costs when it operated the said motor vehicle. PW1 produced deposit slips indicating the amount that was banked by the plaintiff company when it had the said motor vehicle in its possession. PW1 denied that the plaintiff company had ceased to exist. He further denied that the plaintiff company had anything to do with a company known as Sorget Sawmills (Nakuru) Limited. He however conceded that the Managing Director of that company was one Francis Kamau Kinuthia. PW1 conceded that he had incorporated a business name in the name of Mololo Woodworks in 1991. He further conceded that he was aware that he had been sued at Molo Senior Resident Magistrate's Court arising out of a road accident. He admitted that although he had been given a proclamation notice by his driver he did not file any objection proceedings to the said attachment. He testified that the said attachment was illegal and the subsequent sale thereof was illegal. He reiterated that the said motor vehicle was owned by the plaintiff company and at the time of its attachment it had not been transferred to Mololo Woodworks. He urged the court to allow the plaintiff's suit with costs.

PW2 Patrick Mambo testified that he was instructed by the plaintiff company to calculate the market value of the said motor vehicle which had been attached and sold. He admitted that he had not physically seen the said motor vehicle before he undertook the said valuation. He testified that he assessed the value of between Kshs 840 – 860,000/= based on the logbook which was availed to him. He also valued the said motor vehicle based on his experience. He reached this valuation on the assumption that the lorry would be in a good condition after being well maintained. He produced his report as plaintiff's exhibit No. 7.

The 4th defendant called one witness, Henry Mugo Mugonyo. He testified that on the 6th of November 1993, he saw an advertisement in the Kenya Times Newspaper by which the 1st defendant was offering

motor vehicle registration number KZH 711 for sale. Mr Mugonyo saw the motor vehicle and was interested. He attended the public auction, bid and was successful. He paid the bid sum of Kshs 240,000/= and was issued with a receipt. The newspaper advert and the receipt were produced as defence exhibits No. 1 and 2 respectively by the 4th defendant. The 4th defendant was issued with a certificate of sale which he used to obtain a duplicate logbook from the Registrar of motor vehicles. The 1st defendant transferred the said motor vehicle to the 4th defendant. The letter of authority, the transfer form, copy of warrant of sale, copy of proclamation were produced as defence exhibits No. 3-7 in evidence by the 4th defendant. Mr Mugonyo testified that after he had purchased the said motor vehicle, he undertook extensive repairs, including repainting it and purchasing new tyres after which he sold the same to the 2nd defendant for a sum of Kshs 1.2 million. He denied that he had colluded with the 1st defendant so that the said motor vehicle could be sold to him at an undervalue. He however conceded that he did not have any documents which could show that he had undertaken the repairs of the said motor vehicle before he sold it to the 2nd defendant. He denied that he was aware of the circumstances under which the said motor vehicle was attached that could have voided the said sale transaction. He asked this court to dismiss the suit against the 4th defendant with costs.

The 3rd defendant called one witness, Elizabeth Hinga, its company secretary. She testified that the 3rd defendant had no interest in the said motor vehicle other than financing the 2nd defendant to purchase the same from the 4th defendant. She testified that the 3rd defendant, as a financier, had been paid all the monies that it had advanced to the 2nd defendant and therefore it had not interest whatsoever in the said motor vehicle. The 3rd defendant's witness testified that the company was jointly registered with the 2nd defendant as owners of the said motor vehicle to enable it protect its interest as a chargee. She denied that the 3rd defendant was aware of any shady dealings involving the eventual transfer of the said motor vehicle to the 2nd defendant. She urged the court to dismiss the suit against the 3rd defendant with costs.

I have read the pleadings which were filed by the parties to this suit and carefully considered the evidence adduced by the parties to this suit. I have also read the written submissions filed by the parties to this suit. The issues for determination by this court are as follows; (a) Whether or not the plaintiff has established that it owned the said motor vehicle and whether or not it has proved that the said motor vehicle was illegally attached and sold by the 1st defendant, (b) whether or not PW1, a director of the plaintiff company was aware of the suit which had been filed against him and which had resulted in the issuance of the warrants of attachment that led to the attachment and sale of the said motor vehicle, (c) whether the plaintiff company is in existence or not, (d) whether the said attachment and sale of the said motor vehicle by the 1st defendant to the 4th defendant was lawful and (e) whether the 2nd defendant was a purchaser of value without notice of the said motor vehicle.

As to the first issue the plaintiff established that it was the registered owner of the said motor vehicle. Evidence was adduced by PW1 which proved that the plaintiff was the registered owner of the motor vehicle registration number KZH 711. A logbook was produced in evidence which established the ownership of the plaintiff of the said motor vehicle at the time of its attachment. Although the defendants attempted to raise doubts as to the existence of the plaintiff company, they did not succeed in persuading this court that the plaintiff company was indeed no longer in existence. On a balance of probabilities, I will hold that the said company still exists and was at the material time of the attachment of the said motor vehicle registered as the owner thereof.

PW1 testified that he had been sued in his personal capacity in a civil suit at Molo Senior Resident Magistrate's Court arising out of an accident involving one of his motor vehicles. PW1 did not defend the suit. This suit was **Molo SRMCC No. 15 of 1992**. Judgment was entered against him. Warrants of attachment were issued. The 1st defendant attached the said motor vehicle owned by the plaintiff. The proclamation notice was availed to PW1 as a director of the plaintiff. PW1 did nothing at the time to safeguard the interests of the plaintiff in respect of the said motor vehicle. He did not file objection proceedings in court to challenge the attachment of the said motor vehicle. A company acts through its directors. In this regard, it was incumbent upon PW1 as a director of the plaintiff to safeguard its

interest. Instead the plaintiff waited until when the motor vehicle was sold in a public auction pursuant to the said warrant of attachment and sale issued to file this suit seeking to have the said motor vehicle returned to its possession. I hold that the plaintiff was lackadaisical in protecting its ownership of the said motor vehicle. The plaintiff did not use the legal avenues available to it to protect its interest. The plaintiff only woke up when it realized that the said motor vehicle had already changed hands and had so changed hands twice over. That is the time the plaintiff thought it fit to file this suit.

Were the circumstances under which the said motor vehicle sold in a public auction by the 1st defendant illegal? Evidence has been adduced how the 1st defendant attached the plaintiff's motor vehicle pursuant to the warrant of attachment issued by the Molo Senior Resident Magistrate's Court. The said warrants were issued for the attachment of PW1's properties. PW1 is a director of the plaintiff company. It is clear that a confusion arose as to the ownership of the said motor vehicle when the said attachment was made. The 1st defendant mistakenly believed that the said motor vehicle was owned by PW1. The 1st defendant ought to have undertaken a search of the said motor vehicle to establish its ownership. Instead it has now emerged that the same was owned by the plaintiff.

After the attachment of the said motor vehicle the same was in possession of the 1st defendant for a period of fifteen days pending its redemption by the plaintiff before the same could be sold in public auction. During this period the plaintiff did nothing to assert its rights of ownership of the said motor vehicle. PW1 as a director of the plaintiff in charge of the day to day running of the plaintiff did nothing to safeguard the interest of the plaintiff. Evidence was adduced by Mr Mugonyo on behalf of the 4th defendant how he saw an advertisement in the newspaper, attended the public auction, was the highest bidder, and was sold the said motor vehicle by PW1 for a sum of Kshs 240,000/= . This evidence established that the right legal procedure was followed by the 1st defendant in selling the said motor vehicle in a public auction. Up to that stage, the plaintiff had not put to the notice of the 1st defendant that it owned the said motor vehicle. The 1st defendant proceeded with the said sale on the assumption that the said motor vehicle belonged to PW1, the judgment-debtor in the Molo SRM's case. Whereas I agree with the plaintiff that the said motor vehicle could have been undervalued when it was sold, in normal case involving sale by public auctions, unless there is a reserve price, the highest bidder usually takes the day. This however does not absolve the auctioneer from the duty imposed upon him by the law to secure the best possible price in a public auction.

In this case, it is clear that the 1st defendant advertised the said motor vehicle for sale in a public auction, conducted the public auction where there were several bidders, and where the 4th defendant emerged as the highest bidder. The subsequent sale by the 4th defendant to the 2nd defendant was therefore lawful. In the circumstances of this case the 2nd defendant was a purchaser for value without notice of the defect of title in respect of the said motor vehicle. The 3rd defendant as a financier should not have been enjoined in this suit. The 3rd defendant interest in the said motor vehicle after it had been purchased by the 2nd defendant was to secure the amount advanced to the 2nd defendant pending its repayment in full. According to Elizabeth Hinga, the company secretary of the 3rd defendant, the 2nd defendant paid in full the loan that was advanced to it for the purchase the said motor vehicle. The 3rd defendant therefore no longer had any interest on the said motor vehicle. I will therefore dismiss the plaintiff's suit with costs against the 3rd defendant.

Having made the above findings, what are the remedies available to the plaintiff in this case? **Order XXI rule 69 of the Civil Procedure rules** provide that;

“No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for recovery of the specific property and for compensation in default of such recovery”.

Section 26 of the Auctioneers Act provides that;

“(i) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licenced auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action:

Provided that nothing in this section shall-

- (a) prevent the auctioneer from claiming contribution or indemnity from any other person;***
- (b) limit the damages recoverable under any other written law”***

In this case the plaintiff has established that it owned the said motor vehicle at the time of its attachment. However the plaintiff took no action to safeguard its interest before the said motor vehicle was sold to the 4th defendant in a public auction. The 4th defendant sold the said motor vehicle to the 2nd defendant after undertaking repairs on it. The said motor vehicle was attached and sold in 1993. It is now over twelve years since the said motor vehicle was attached and sold.

In the circumstances of this case, the plaintiff having proved that the said motor vehicle was unlawfully attached from it by the 1st defendant would only be compensated by an award of damages. The damages shall be paid by the 1st defendant. The 4th and the 2nd defendants are innocent victims of the action by the 1st defendant in attaching and selling the plaintiff’s said motor vehicle. He did not confirm the ownership of the said motor vehicle before he attached it. In the premises therefore after evaluating the evidence on record the orders that commends themselves to me is as follows;

- (i) Judgment is entered for the plaintiff against the 1st defendant for the sum of Kshs 850,000/= which I have assessed as damages being the value of the said motor vehicle which was unlawfully attached from the plaintiff.
- (ii) The claim for loss of user was not proved. It is dismissed.
- (iii) The plaintiff shall have the costs of the suit as against the 1st defendant.
- (iv) The plaintiff’s suit against the 2nd, 3rd and 4th defendants is hereby dismissed.
- (v) There shall be no orders as to costs as regard the suit against the 2nd and the 4th defendants.
- (vi) The plaintiff shall however pay the costs of the 3rd defendant.

DATED at NAKURU this 14th day of March 2006.

L. KIMARU

JUDGE