



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 82 OF 2003

COAST BROADWAYS LTD PLAINTIFF

VS

ZACHARIA WAKHUNGU BARASA T/A SIUMA TRADERS 1ST RESPONDENT

DAVID HENRY MUCHELULE 2ND RESPONDENT

HENRY SHISIA MATALANGA 3RD RESPONDENT

RULING

The Plaintiff filed a plaint and sought for the following prayers against the defendants jointly and severally that:

- (a) The Public auction purportedly conducted on 14th October 2003 be revoked and the sale be declared null and void.*
- (b) An order that the purported sale of the Plaintiff's Motor vehicles registration number KAM 435 M and KAM 437 M be annulled and transfer if any thereof be revoked and or cancelled.*
- (c) The Motor vehicles be returned to the Plaintiff.*
- (d) Costs to this suit and interest and any other relief this court may deem fit to grant.*

At the same time the plaintiff filed a chamber summons seeking for the following orders pending the hearing and determination of this suit:

- (a) An order of injunction to restrain the 2 nd and 3 rd defendants from dismantling offering for sale and or removing from the jurisdiction of this court the above mentioned motor vehicles and*
- (b) For an order that the custody of the aforesaid motor vehicles be granted to the plaintiff.*

The summons is said to be brought under the provisions of Order XXXIX rules 1, 2, 3 and 9 of the Civil procedure rules and Section 3 A of the Civil Procedure Act.

The application was strenuously opposed by the defendants who filed two separate replying affidavits sworn by Henry Shisia Matalanga and Zachariah Wakhungu Baraza both dated 10.11.2003. The defendants also filed grounds of opposition dated the same date.

The first ground put forward in support of the application is to the effect that the 1st defendant

purportedly sold the plaintiff's Motor vehicles by public auction to the 2nd and 3rd Defendants which auction was unprocedural and illegal.

According to the applicant's advocate the 1st defendant proclaimed and attached the plaintiff's motor vehicles on 4th October 2003 and advertised them for sale in the Daily nation of 7.10.2003. It is further submitted by the applicant that the motor vehicles were finally sold on 14.10.2003 in execution of decrees in Busia S.R.M. C.C Nos. 224 and 225 of 2003. The Plaintiff annexed copies of the advertisement and proclamation notices to the supporting affidavit sworn by Zarah Anwar Cocker the General Manager to the plaintiff. It is contended by the plaintiff that the notice of sale by public auction issued by the 1st defendant was less than 15 days contrary to the provisions of Order XXI rule 62 of the Civil Procedure rules. Consequently it is the submission of the plaintiff/applicant that the sale which took place was illegal.

The 1st defendant's response to this ground was that he proclaimed the motor vehicles on 26.9.2003 and gave the plaintiff 7 days to pay the debt and when it failed to do so the suit Motor vehicles were collected and the same were advertised for sale on the East African Standard of 7.10.2003 and a public auction took place on 14.10.2003 whereby the 2nd and the 3rd Defendants were declared the highest bidders. It is the submission of the 1st defendant that the sale was lawful and in conformity with the law.

The law is very clear when it comes to sale by public auction. Under order XXI rule 62 of the Civil Procedure rules, a sale by Public auction of Moveable property save for perishable goods cannot take place unless 15 days notice has been given from the date of the publication of the intended sale. In this case it is obvious that the notice given comprise of only 7 days which is contrary to the rules. At this stage what is the remedy to an aggrieved party? The answer to this question can be found in the provisions of Order XXI rule 69 which provides:

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

It is clear that the law envisages such lapses to occur when executing decrees. It has provided the relevant remedy but an order of injunction does not lie. The sale cannot also be nullified on the ground of an irregularity on publication or conducting the sale. Consequently this ground must fail, it is overruled. A purchaser can only seek for an order of recovery of the specific property and not the judgment debtor.

The second ground advanced by the applicant is that there was no sale which took place on 14/10/2003 because the Bungoma Municipal Council did not authorize the 1st Defendant to conduct a public auction on that day. It is further submitted that the defendants have not shown any receipts to show that they genuinely bought the plaintiff's motor vehicles on a public auction. It was averred that the 1st Defendant flouted the auctioneers rules.

The defendants advocate's response to these submissions were simple. The 1st defendant denied having flouted rule 12 (f) of the auctioneers rules. He further stated that he was licensed by the Auctioneers Licensing Board to carry out Public auctions and not a local authority. There were two annexures of certificates of sale issued to the 2nd and 3rd defendants by the 1st Defendant.

I think I am in agreement with the submission of Mr. Makokha, the defendants' counsel that the Bungoma Municipal council cannot legally licence an auctioneer. It should be clear to litigants that they should not blow hot and cold at the same time. One cannot say there was an auction which took place and then turn around and say there was no auction. This is creating absurdity in law. The bottom line is that an auction took place whose validity is being challenged.

The other ground which Mr. Mbugua for the plaintiff/applicant submitted at length is that the plaintiff will suffer irreparable loss which cannot be compensated by damages but can only be remedied by an

order of injunction. This ground was dismissed by the defendants' counsel who stated that the plaintiff has not established a prima facie case with chances of success and that if the plaintiff succeeded they can be compensated by an award of damages.

On this issue, the principles of injunctions were stated in the case of **GIELLA VS GASSMAN BROWN & CO. LTD (1973) E.A 358** as follows:

- (i) *An applicant must show a prima facie case with a probability of success.*
- (ii) *An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.*
- (iii) *When the court is in doubt, it will decide the application on the balance of convenience.*

The litigants here only addressed me on the first two principles and I think I should restrict myself to what I was referred to.

First, the applicant says that he has established a prima facie case with high chances of success. I have pointed out earlier that in an action of this nature, the law has prescribed the remedy to a litigant who has been injured under order XXI rule 69 of Civil Procedure rules. The law clearly states that a party who has been aggrieved by an irregularity in publishing and conducting sale of movable property which is the case here can only seek compensation or recovery of the specific property (for a purchaser) or compensation in default. I have perused the plaint and I have come to the conclusion that the same seeks for remedies relating to those stated by the law stated above. However the plaint seeks to vitiate the sale. This is not envisaged by order XXI rule 69 of the civil procedure rules. The Judgment debtor also seeks for recovery or restitution of the movable property allegedly sold. The law only recognizes restitution to a purchaser. In a nutshell, I think I am not convinced that the applicant has made out a prima facie case with a probability of success.

On the second principle that the applicant is likely to suffer irreparable loss which cannot be compensated by damages. I think I do not need to reproduce the provision of order XXI rule 69. It is clear that an award of damages will be sufficient. The applicant even has the value of the motor vehicle in mind, when the plaintiff alleges that they were sold at an under value. The plaintiffs claim can be quantified and be compensated by an award of damages.

Consequently on this ground the plaintiff's applicant cannot succeed.

The final matter which I think is of substance is a peripheral issue raised by the defendants against the plaintiff's application. The defendants did not raise it as a preliminary point but opted to argue as one of the grounds of opposition when the application came up for inter partes hearing. It was the submission of the defendants' counsel that the plaintiff intentionally did not make material disclosure when it stated in its plaint that there was no other suit pending between the parties over the same subject matter. It was the view of Mr. Makokha that this suit is subjudice in view of the existence of Bungoma H.C. Misc. Application No. 214 of 2003. Mr. Mbugua stated though with no certainty that the matter is not subjudice.

I have taken keen interest on this submission and I wish to reproduce the offending paragraph of the plaint. At paragraph 13 of the plaint, the plaintiff avers as follows:

"There is no suit pending before any court between the plaintiff and the defendants touching on the subject matter."

According to the defendants there exists a suit in form of H.C. Mis Appl. No. 214 of 2003 which should have been disclosed by the plaintiff. The learned counsel saw this as an abuse of the court process.

I have perused the replying affidavit of Mr. Henry Shisia Matalanga in which he annexed a copy of the Bungoma H.C. Miscellaneous application No. 214 of 2003. In short it is a Judicial Review application

seeking to quash the decision of the Busia S.R.M releasing the suit Motor vehicles vide Busia S.R.M.C.C No 224 and 225 of 2003.

What is an action or suit?

Section 2 of the Civil Procedure Act defines a 'suit' as follows:

“Means all civil proceedings commenced in any manner prescribed.”

An 'action' is defined under section 3 of the interpretation and General provisions Act, Cap 2. laws of Kenya as follows:

“Means any Civil Proceedings in a court and includes any suit as defined in section 2 of the Civil Procedure Act.”

Can an application for an order of certiorari, Mandamus or prohibition be categorised as a suit or an action?

The court of Appeal of Kenya gave the answer to this question in the case of

THE COMMISSIONER OF LANDS VS KUNSTE HOTEL LTD C.A. NO. 234 OF 1995
(unreported)

It stated that an application for an order of certiorari or any of the prerogative orders is not an action. It further gave full interpretation of Section 8 (I) of the law Reform Act Cap 8 Laws of Kenya. That the High court is denied the power to issue orders of mandamus, prohibition and certiorari while exercising its civil or criminal jurisdiction. Therefore in exercising the power to issue or not to issue an order of certiorari or other prerogative orders the court is neither exercising civil nor criminal jurisdiction. It would be exercising a special jurisdiction.

The court of appeal further went a head to state that Judicial review is not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

The plaintiff in paragraph 13 of the plaint states that there is no pending suit. I think the plaintiff cannot be faulted. Judicial review applications are neither suits nor actions. The defendants submission that this suit is subjudice cannot be sustained.

The upshot therefore is that the plaintiff's chamber summons dated 4th November 2003 is dismissed for the reason earlier advanced with costs to the Defendants Respondents

READ AND DELIVERED THIS 14TH DAY OF January 2004

J.K. SERGON

JUDGE