



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 575 of 2003

**JAMES KARIUKI NGANGA T/A NDARUGU MERCHANTSPLAINTIFF/JUDGMENT
CREDITOR**

VERSUS

JOSPEH NGAE

NJUGUNA

**CROSSBOW LIMITED.....DEFENDANT/JUDGMENT
DEBTORS**

RULING

The objectors hereof **MICHAEL MUHAI NGAE** and **HOUSING FINANCE CO. OF KENYA LTD** have brought an application dated 16th November 2004 brought under Order 21 Rule 53, 54, 55, 56 and 57 of the Civil Procedure Rules and Section 3A and Section 63 (e) of the Civil Procedure Act.

They seek the following orders: -

- That the Honourable court orders that **MICHAEL MUHIA NGAE** and **HOUSING FINANCE CO.** of Kenya are the joint owners of motor vehicles registration number KAJ 033X.
- That the Decree holder/plaintiff herein his servant/agent including D.W. Mwangi T/A Kenya Shield Auctioneers be ordered to release motor vehicle KAJ 033X to the 1st and 2nd objectors forthwith.

As it is clear from the said prayers the subject of the objection and of this application is motor vehicle registration No. KAJ 033X. It is not denied that the decree holder executed the decree hereof by way of attachment of the judgment debtor's movable goods and the auctioneers proclaimed various goods by a proclamation dated 18th February 2004. In the said proclamation the vehicle registration No. KAJ 033X was included.

This matter has been the subject of chequered allegation, relating to ownership of the proclaimed goods. The first was the wife of the judgment debtor who objected to the aforesaid proclamation on the basis that she was the lawful owner of all the items proclaimed.

The application was dismissed and now is this application by these objectors who allege that the motor vehicle registration No. KAJ 033X belongs to them.

The first objector hereof deponed that the purchased the vehicle from Crown Coffee Ltd evidenced

by an agreement dated 29th April 2004. The purchase price was kshs 850, 000/- and the agreement indicates that kshs 200, 000 was paid on 29th April 2004.

The 1st objector then deponed that he obtained a loan from the 2nd objector of kshs 650, 000 to enable him pay the balance of the purchase price and as security the said vehicle was registered in both objectors names.

The 1st objector further deponed that he uses the said vehicle for performance of his employers job, his employer being Housing Finance Company of Kenya Ltd, the second objector hereof; and to visit relatives who live at a property in Karen owned by a company known as Golden Fleece Ltd.

The later deposition of the 1st objector in the self same affidavit contradicts later assertions where he said it was on 3rd November that he got a telephone call from an employee of Golden Fleece Co. Ltd who informed him that the subject vehicle had been attached by some people. The 1st objector then asserted that he borrowed a vehicle at 4 pm and went to Karen Police Station to get the released of the vehicle. He admits that the judgment debtor resides at the place where the vehicle was attached but adds that he does not own the vehicle.

Joseph Kania swore an affidavit on behalf of the 2nd objector. He described himself, as an employee of the 2nd objector while the 1st objector is a mortgage officer with the 2nd objector.

Mr Kania averred that the 2nd objector granted the 1st objector a loan of kshs 650, 000 and thereafter the vehicle was registered in both objectors' names.

It is pertinent to note that neither the 1st objector nor the 2nd objector annexed the Loan agreement or any other document that could conclusively state that the loan of kshs 650, 000 was made toward the purchase of the subject vehicle.

There is also nothing that connects the loan statement, annexed to the application, with the purchase of the subject vehicle.

The other evidence of chequered claims over the vehicle is that the 1st objector has appending chamber summons in this matter dated 18th November 2004 where the 1st objector deponed in a supporting affidavit that the vehicle KAJ 033X, amongst other items of property, the subject of the proclamation of 18th February 2004, are owned by Tiger Farm Ltd.

One is then indeed left with a question whose vehicle is KAJ 033X. Does it belong to the wife of the judgment debtor; or does it belong to the objector hereof or the Tiger Farm Ltd; or even the judgment debtor.

It is not a surprise with the confusion seen above that the plaintiff depones that the alleged transactions are fictitious and contrived for the sole purpose of defeating the decree hereof.

I accept the plaintiff's counsel's submission that section 14 of the Auctioneers Act forbids the removal or alteration of proclaimed good. That would mean that the sale of the motor vehicle to the 1st objector was illegal.

The objector's counsel argued that the logbook was conclusive evidence of ownership. Yet when one looks at section 5 (1) of the Traffic Act one finds that the evidence of ownership is found in the records kept by the registrar. If that be so then the annexure to the supporting affidavit marked "MMN7" is a copy of record of the Registrar dated 18th June 2004 which shows that the vehicle registration No. KAJ 033X was registered in the judgment debtor's name.

Additionally on 28th July 2004 in the presence and with the consent of counsel now appearing for the objectors, who was then representing the wife of the judgment debtor as the then objector, entered into a consent with the plaintiff's counsel that the attached vehicles, KAJ 033X being of the them, could be sold in satisfaction of the decree.

I have noted that part from the fact that the objectors' failed to exhibit the loan agreement the statement relied upon the evidence of the loan clearly states as pointed out by plaintiff's counsel that the loan account has no collateral. From that it seems that the vehicle is not security for this account. Then the question begging an answer is, is this vehicle security for any account of loan of the 2nd objector.

The objectors have an obligation under Order 21 rule 53 (1) to prove on a balance of probability their legal or equitable interest in the attached vehicle. Having considered the evidence presented before me both in submission and on affidavit I am of the view that the objectors have failed to satisfy the burden of proof. In my view not only have they failed to so satisfy the burden of proof, but having considered the affidavit evidence and other previous and pending applications on record I am of the view that perjury was committed. This I am sorry to state is becoming too frequent an occurrence in these courts where parties are committing perjury without care of the serious consequence thereof.

I will therefore direct that the criminal investigation department do investigate the affidavits sworn by the objectors in this application to ascertain whether **MICHAEL MUHIA NGAE** or **JOSEPH KANIA** have committed perjury and if so necessary action to follow.

The decree holder can proceed with execution and sale of the attached motor vehicle KAJ 033X under the comfort of section 44 (1) of the Civil Procedure Act which provides: -

“ALL property belonging to a judgment debtor including property over which or over the profit of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree”

Having considered the evidence presented before me I am left without a doubt that motor vehicle KAJ 033X is held by the objectors on behalf of the judgment, who had its custody even at the time of attachment.

I have noted that there are various pending applications, which have become a clog on execution of the decree.

I will therefore order that at the reading of this ruling the pending applications be fixed for hearing.

The orders of this court are: -

- (1) That the application dated 16th November 2004 is dismissed with costs to the plaintiff to be paid by Michael Muhia Ngae and Housing Finance Company of Kenya Ltd.**
- (2) That the Criminal Investigation Department do carry out investigation on possible perjury committed by MICHAEL MUHIA NGAE and JOSEPH KANIA in their affidavits in this matter sworn and dated 16th November 2004, the executive officer will assist in this regard.**
- (3) That all the pending objection applications be fixed for hearing at the reading of this ruling to ensure quick disposal.**

Dated and delivered this 14th day of December 2004.

MARY KASANGO

JUDGE