



REPUBLIC OF KENYA



**Birundu v Oseko & 2 others (Civil Appeal 51 of 2023)
[2024] KEHC 4448 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 51 OF 2023
JM CHIGITI, J
MARCH 14, 2024**

BETWEEN

EVANS OSORO BIRUNDU APPELLANT

AND

JOSHUA OKARI OSEKO 1ST RESPONDENT

SAMUEL NYAKUNDI 2ND RESPONDENT

WILLIAM ONYIEGO MONGARE 3RD RESPONDENT

JUDGMENT

Brief Background

1. At the trial court, the Appellant herein lodged objector proceedings by way of a Notice of Motion dated 15th November, 2022 seeking restraining orders stopping the disposition and/or sale of the motor vehicle registration number KBT 676W which he alleged belonged to him.
2. The 1st Respondent vehemently opposed the application vide a Replying Affidavit sworn on 24th November, 2022. The trial court gave directions that the application be canvassed by way of written submissions. The trial court further ordered the regional manager NTSA to appear before court and testify and/or clarify on who is the owner of the suit motor vehicle.
3. Upon the close of the proceedings, and submissions having been filed and the trial court on conclusion dismissed the Objector's application (Appellant herein) on the basis that the doubt on ownership of the suit motor vehicle was not resolved to confirm the objector (Appellant herein) owned the suit motor vehicle.



The Appeal

4. Dissatisfied with the said decision, the Appellant lodged this instant Appeal through a Memorandum of Appeal dated 24th May, 2023 - challenging the said decision of the trial court Ruling dated 23rd May, 2023. The Appeal is based on the following grounds:
 1. The learned trial Magistrate erred both in law and fact by failing to recognize the appellant as the beneficial owner of the motor vehicle registration No. KBF 676W.
 2. The learned trial Magistrate erred both in law and fact by failing to recognize that the appellant has both legal and equitable interest in the motor vehicle registration No. KBF 676W.
 3. The learned trial Magistrate erred both in law and fact by failing to allow the objection raised by the appellant.
 4. The learned trial Magistrate erred both in law and fact by allowing a proclamation on the appellant's motor vehicle registration No. KBF 676W despite the appellant not being the judgment debtor in the suit Kisii CMCC NO. 634 OF 2019.
 5. The learned trial Magistrate erred both in Law and fact by giving a ruling that will occasion irreparable loss to the appellant.
5. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

6. The Appellant in his written submissions dated 24th October, 2023 submitted that he produced two sale agreements showing that he purchased the motor vehicle registration no. KBF 676W from Simon Ragira on 9th July, 2022 who purchased the subject motor vehicle from Christopher Mogire Nyangwara on the 24th January, 2022. It was contended that the ownership of the motor vehicle by the Appellant pre-dated the judgment.
7. Also, that there was no sale transaction between the Appellant and the 2nd Respondent concerning the subject motor vehicle. The Appellant and the 2nd Respondent are strangers and the Appellant acquired the subject motor vehicle from Simon Ragira and produced sale agreements to the said effect. Relied on Civil Suit No. 16 of 2017 *Boleyn Magic Wall Panel Ltd v Nesco Services Limited*; Boleyn International (K) Limited (Objector) case.
8. The Appellant maintained that he demonstrates that the first sale of the subject motor vehicle from the 2nd Respondent was on 24th June, 2020 and he purchased the motor vehicle on the 9th July, 2022 two (2) years later.
9. That upon the Appellant producing evidence of his interest in the subject motor vehicle, the burden to contravene his interest shifted to the 1st Respondent who is the decree holder but he never adduced any evidence to the same effect.
10. That no evidence of fraud or illegality in the sale of the subject motor vehicle from Simon Ragira to the Appellant vide the sale agreement dated 9th July, 2022 was adduced before the trial court; and as such has legally equitable interest in the said motor vehicle which interest ought to be protected by allowing the objection placed before the trial court.
11. As per the Appellant, the evidence of the NTSA official was inconclusive and he could not tell the owner of the motor vehicle registration no. KBF 676 Was the NTSA records had not been regularized.



That there had been subsequent transactions and the records had not been updated hence the different results in searches.

12. Also that the Appellant produced a search from the NTSA showing him as the registered owner of the motor vehicle registration no. KBF 676 W coupled with the contract of sale it is clear that the objector is the owner of the subject motor vehicle. Relied on the case of HCCC No. 329 of 2015 *Thatchmaanz Limited v Pride Inn Limited & 2 others*.
13. The Appellant posited that as the beneficial owner of the motor vehicle registration no. KBF 676W, he would suffer irreparable loss if the attachment is allowed. The 1st Respondent/decreed holder failed to discharge his duty to avail evidence negating the legal/ equitable interest of the motor vehicle registration no. KBF 676W by the appellant herein.
14. The Appellant contends that he was not the defendant/judgment debtor before the trial court and he lawfully acquired the ownership of the motor vehicle registration no. KBF 676W from a subsequent sale even before the judgment before the trial court was entered. Relied on case of Civil Appeal No. 51 of 2018 *Bin Omar (Suing as Personal Representative of the Estate of Ismael M. Sholo v Tabmeed Coach Limited)*.

Respondent's Submissions

15. Conversely, the Respondent, in opposing the Appeal, filed their written submissions dated 6th December, 2023. It was contended that at the time of occurrence of the accident on 4/7/2019 the motor vehicle was registered in the name of the 2nd Respondent.
16. Further, that it was the testimony of the regional manager of NTSA that the said motor vehicle was first owned by John Kinoti who transferred it on 21/9/2018 to William Onyiego Mongare (the 2nd Respondent herein). The 2nd Respondent herein subsequently transferred the motor vehicle to Samuel Ongo Nyakundi (the 1st Respondent herein) on 29/4/2020. Therefore, that the copy of records dated 25th July, 2019 filed at the time of institution of the suit indeed confirmed the motor vehicle as that time was owned by the 2nd Respondent.
17. There were two copy of records adduced before the trial court dated 23/11/2022 and 28/11/2022. It was the evidence of the regional manager of NTSA that the objector made an application for transfer of the motor vehicle on 30/8/2022 at Kisumu regional office.
18. That, the copy of records of ownership could only show case the appellant owned the said motor vehicle if a transfer had materialized. Notably, that as of 28/11/2022 the transfer initiated by the Appellant had not materialized. Therefore, ownership rights of the said motor vehicle had still not been conferred to the Appellant. The same can be deemed to have accrued if a transfer is materialized. There is an important notice in the logbook worth which explains when a transfer is deemed to have materialized.
19. It was submitted that the copy of records dated 23/11/2022 was a true reflection of ownership at that time because the transfer had not materialized. This explains the inconsistency. The appellant had still not been registered by the authority as the new owner within fourteen days from the date of the transfer. The registration of the new owner (appellant herein) was thus not effective until the registration certificate bearing the name of the previous owner was surrendered to the Authority.
20. As per the Respondent, having contextualized, when beneficial rights accrued to the appellant herein it can therefore be affirmed that ownership rights of the motor vehicle accrued to the appellant as from 28/11/2022 after the copy of records confirmed his ownership.



21. Therefore, that as of 15/11/2022 when the Application was filed the Appellant had not acquired beneficial rights by virtue of being a registered owner of the suit motor vehicle. Therefore, the appellant as that time had no locus to lodge the said application. The obstruction of auctioning of the said motor vehicle was therefore pre-mature. Thus, that as at the time the suit motor vehicle was being proclaimed and at appellant filed the objector proceedings he didn't have any beneficial rights over the suit motor vehicle.
22. It was posited that Copy of Records from the National Transport and Safety Authority that showed that as at 23/11/ 2022, motor vehicle registration KBF 676W was still registered in the name of one of the 2nd Respondent herein one Samuel Ongo Nyakundi. This was more than a year after judgment had been entered against the 2nd Respondent herein and another 1 month before the proclamation notice was issued to the 2nd Respondent on the 30/8/2022.
23. It is therefore evident from the evidence adduced that the transfer of motor vehicle registration KBF 676W was affected after proclamation had been done in execution of decree of the court, against the judgment debtor. Thus, that as of the time the suit motor vehicle was proclaimed the appellant didn't have both legal and equitable interest over it.
24. In the end, the Respondent asserted that the appellant and the 2nd Respondent colluded to avoid fulfilling the decree issued to the 1st Respondent. Thus, the transfer of motor vehicle registration KBF 676W from the 2nd Respondent to the Appellant herein was an attempt to evade execution of lawful decree of the court. Therefore, that this honorable court ought to dismiss the appeal with cost.
25. I find the only issue for determination is whether the instant Appeal is merited.

Analysis and Determination

26. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.
27. The duty of a first Appellate Court was succinctly stated by Wendoh J. in *JWN v MN* [2019] eKLR in the following words:

“It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.”
28. Further in the case of *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA the court held as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
29. The objection Application was based on the grounds on the face of it and further supported by the Appellant's affidavit. The Respondent's herein vehemently opposed the Application.
30. At the end of the trial court hearing, the learned magistrate held that the Objector's notice of motion application dated 15th November, 2022 is therefore dismissed with costs to the Plaintiff/Respondent.



31. I have relooked at and reconsidered the evidence before trial court. I have also paid due regard to the decision by the learned magistrate. In rendering the impugned ruling/decision, the learned magistrate observed that,

“The question to be answered was who was the registered owner of the attached motor vehicle as at 11.11.2022.

Considering the two varying sellers, the Objector has not demonstrated how he acquired the right, title and interest to the attached motor vehicle capable of being protected by this Court by way of lifting the warrants of attachment. There is no possibility that he acquired ownership of the same motor vehicle from two different sellers on two different dates being 16.07.2017 and 09.07.2022. Such irregularities appear to me to have been used to defeat the attachment of the suit vehicle to satisfy the decretal sum, which was registered in the name of the Objector applicant on the same date that the warrants of attachment were issued. Such doubt resolves in favour of the Plaintiff /Respondent. “

32. I have painstakingly considered the appeal and the submissions by learned counsel for the respective parties. Also, I have considered the authorities cited therein. On analyzing the impugned ruling of the learned magistrate, the appeal as canvased by the parties, the facts, the legal principles, and the law; I find no error of fact or law in the ruling of the trial court. Consequently, the appeal is dismissed for lack of merit. Cost to be borne by the Appellant.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY ON 14TH MARCH, 2024.

CHIGITI (SC)

JUDGE

