



REPUBLIC OF KENYA



KENYA LAW
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**Kamau & another v Wasike (Civil Appeal E070 of 2021)
[2024] KEHC 9913 (KLR) (7 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E070 OF 2021
RE ABURILI, J
AUGUST 7, 2024**

BETWEEN

KATHANGA PETER KAMAU 1ST APPELLANT

NOAH OTEKO OSUMBA 2ND APPELLANT

AND

JANET MASITSA WASIKE RESPONDENT

RULING

1. Vide Notice of motion dated 19th March, 2024 brought under certificate of urgency, the 2nd appellant Noah Otek Osumba seeks from this court orders for stay of execution of decree passed on 27th November, 2023 pending hearing and determination of the application; an unconditional release of motor vehicle registration number KBS 555D to the applicant; that the attachment of motor vehicle above stated was irregular and contrary to the mandatory provisions of the law as the vehicle was not among those vehicles proclaimed by the auctioneers; that decree passed on 27th November, 2023 and any consequential order be set aside and that this order do apply to HCCA E078 of 2021.
2. According to the 2nd appellant/ applicant, he is a stranger to these proceedings because he was never served with any pleadings or judgment. That he is the owner of the attached motor vehicle which he bought through NIC Bank who have a charge of the same and that he stands to suffer substantial loss since the vehicle is the source of his livelihood. That he learnt of the sale of his motor vehicle on 13th March 2024 when he was served with Notification of sale and proclamation. That he has never participated in proceedings giving rise to the execution process. That in 2017, he sold the accident motor vehicle KBN 966A Isuzu Bus to the 1st appellant Kathanga Peter Kamau hence the accident motor vehicle never belonged to the applicant as at the time of the said accident. That because he was never served with any court process, the suit proceeded without his involvement while the 1st appellant defended the suit as if he was also defending the 2nd appellant which was not the case.



3. In the supporting affidavit of the second appellant Noah Oteko Osumba, he reiterates the grounds on the face of the application and deposes further, annexing copy of sale of motor vehicle agreement between him and the 1st appellant, notification of sale. He deposes that he was never served with any proclamation for his motor vehicle KBS 555D which the auctioneer later attached for sale to recover costs in various cases listed in the Notification of sale dated 13th March, 2024, leaving out the other motor vehicles which had been proclaimed as per the annexed copy of proclamation dated 16th February, 2024.
4. He deposes that the attached motor vehicle was a source of his livelihood and the livelihood of his family of school going children hence he will suffer irreparable loss unless the vehicle is released to him.
5. Opposing the application, the respondent filed a replying affidavit sworn by Bernard Okoth Otieno the proprietor of Bridge Lake Auctioneer Services, giving the background of the dispute between the parties and annexing the certificate of costs dated 16th February, 2024, warrants of attachment dated 16/2/2024, proclamation dated 19th February, 2024, notification of sale, copy of newspaper advertisement for sale of motor vehicle, certificate of sale dated 28th March, 2024 and email on advertisement among other documents relating to the dispute between the parties to this appeal in the lower court.
6. According to the auctioneer, he followed due process in execution and that therefore the application by the 2nd appellant has no merit since the motor vehicle in question has already been sold.
7. Parties counsel argued the application orally. Mr. Odhiambo Gwada advocate submitted on behalf of the applicant, reiterating the grounds and the depositions by the applicant and maintaining that the applicant was never made aware of the court proceedings involving him and the 1st appellant. That he had sold the accident motor vehicle to the 1st appellant prior to the accident and that he never instructed any advocate to represent or defend him in the suit giving rise to the appeal herein. He maintained that his client's motor vehicle was never proclaimed.
8. The 1st appellant's counsel Ms Ongonga submitted that his client did not oppose the application by the 2nd appellant as they had filed a similar application vide HCCA E075 of 2021. She submitted that the proclamation was never served on the 2nd appellant and that on their part, they only received an advertisement for sale. Counsel prayed that the orders in HCCA E075 of 2021 do apply to this file.
9. On behalf of the respondent, Mr. Owuor advocate submitted opposing the application by the 2nd appellant, relying on the replying affidavit sworn by the auctioneer, focusing on service of court process in the lower court and the negotiations that went on between the appellants and the respondent's counsel on settlement of the decree. Further, he asserted that the proclamation was served on the 2nd appellant in execution for costs on appeal as taxed on 30th October, 2024. That there other nine files related to this matter and that the vehicle attached was sold to Erick Oduor at Kshs 789,000 and a certificate of sale issued dated 28th March, 2024. He maintained that due process was followed.
10. In a rejoinder, Mr. Odhiambo Gwada submitted that the proclamation notice annexed to the applicant's affidavit is clear that it does not have the motor vehicle KBS 555D as one of the properties proclaimed and that a motor vehicle which was not proclaimed could not be attached and sold. Counsel maintained that no service of process was made to the 2nd appellant hence he never instructed the firm of Kimondo & Gachoka advocates to represent him jointly with the 1st appellant.



Determination

11. I have considered all the foregoing and perused the court file. The main issue to be determined is whether the application by the 2nd appellant has merit.
12. The applicant has deposed that the accident motor vehicle initially belonged to him but that he sold it to the 1st appellant and that as at the time of the material accident, he had parted with possession in favour of the said vehicle. He annexed copy of sale agreement to that effect.
13. According to the applicant, he only learnt of the suit against him when his vehicle was being sold as he was never served with any summons to enter appearance or any other court process relating to the suit which was defended by the firm of Kimondo & Gachoka advocates on the instructions of the insurance company. He denies being served with any proclamation or warrants of attachment of his motor vehicle. He has also asserted quite strongly that when he accessed the proclamation dated 19th February, 2024 leading to the attachment and sale of his motor vehicle KBS 555D, he could not find his said motor vehicle listed as one of the properties proclaimed. He contended that the respondent through the auctioneer could not attach and sell a motor vehicle which was never proclaimed.
14. The respondent through the auctioneer opposed the application contending that the applicant was all along aware of the suit in the court below, having been served with summons to enter appearance as per the annexed affidavit of service sworn by Nadebu P.Caleb dated 16th November, 2018 and that the applicant claimed on being served that he had long sold the accident motor vehicle hence he was not connected with the accident subject of the suit.
15. The 1st appellant through counsel submitted that they supported the 2nd appellant's application that is why they did not file any replying affidavit.
16. From the documents contained in the record of appeal, it is clear that the Motor vehicle registration number KBN 966A Isuzu Bus was a public service vehicle which was involved in an accident when carrying fare paying passengers of whom the respondent was one and on 28/12/2017, along Kisumu-Kakamega Road at Mamboleo area.
17. It is also not in dispute that the said motor vehicle was then registered in the name of the 2nd appellant Noah Oteko Osumba, the applicant herein hence his joinder to the suit was not by accident but by default.
18. However, registration as owner of a motor vehicle is not proof of ownership but only prima facie evidence of title to a motor vehicle. This is because there are other recognized modes of ownership including beneficial ownership which need not necessarily be through registration. One may prove ownership as a special owner or by purchase and possession and use. A sale agreement is sufficient evidence of ownership unless the contrary is proved and in addition, one has to examine the certificate of insurance to establish the ownership as at the time of accident since the insured is deemed to be the owner thereof.
19. The other facts which come out clearly from the record of appeal are that the demand notice issued to the appellants herein jointly dated 12th February 2017 was sent to Box 37xxx -00100 Nairobi. It is not clear if the two appellants shared their postal address. However, the police abstract dated 28th December, 2017 states that the owner of the accident motor vehicle KBN 966A was Kathanga Peter of telephone number 0728xxxx, (which phone number the process server used to call him as per the affidavit of service dated 16th November, 2018) of P.O. Box 37xxx-00100 Nairobi while the said vehicle was insured by Directline Assurance. The policy number quoted is 0004xxxx.



20. the above information on ownership of the accident motor vehicle is corroborated by the sale of motor vehicle agreement dated 9/12/2017 between the two appellants herein wherein the 2nd appellant/applicant herein sold and parted with possession of the accident motor vehicle before the occurrence of the accident and therefore there was absolutely no reason why he was sued or remained a party to the proceedings until the appellate stage herein.
21. It is also not disputed and it is not uncommon to find that where a motor vehicle is insured, once summons to enter appearance are served upon a party and they hand over to the insurance company as required by law to defend the claim, the insurance company engages their pool of advocates to undertake the defence and unless the owner of the vehicle or the insured is a witness in the case, the matter may be settled without their involvement. It is therefore not surprising that the 2nd appellant, though not involved in the litigation in the lower court and on appeal, because he knew that he was not the owner of the motor vehicle, was surprised when his vehicle was attached and sold for recovery of costs on appeal. He has now demonstrated that indeed, he ought not to have been sued and therefore any action taken against him and his property was not justified and I fully agree with him.
22. There is something very interesting about this case that makes me write a longer ruling than anticipated. The proclamation that gave rise to the attachment and sale of the motor vehicle subject of this application is dated 19/2/2024. The amount claimed was Kshs 861,075 yet costs assessed in the appeal herein were 90,025. There was no order for interest to accrue on costs yet the application for execution dated 5th February, 2024 added interest on assessed costs.
23. Further, the certificate of costs is not dated though signed and sealed by the court. Neither are the warrants of attachment and sale signed.
24. More significantly, the vehicles proclaimed are listed as follows:
 1. KBN 96A which is the accident motor vehicle
 2. KCY 952A
 3. KDA 049H
 4. Any other movable properties that belong to the defendant and other motor vehicles.
25. Motor vehicle KBS 555D was never proclaimed and there is no contrary evidence. Onto the Notification of sale dated 13/3/2024, the motor vehicle listed for public auction on 21/3/2024 at 10.40 am at 'own yard' is KBS 555D with an estimated value of Kshs 1 million.
26. The question is, even assuming the applicant was correctly sued, would the auctioneer attach and sell property that was never proclaimed in the first instance? And therefore, is the certificate of sale dated 28th March 2024 valid?
27. The answer is a clear NO. Rule 12 (b) of the Auctioneers Rules, 1997 provides that the person whose goods are to be sold must be served with a Proclamation and that if he refuses to sign the same, then the auctioneer shall sign a certificate to that effect.
28. Further, Rule 15 (c) of the Auctioneers Rule provides that the owner of the goods must be given seven (7) days' notice to redeem the goods so proclaimed failing which the auctioneer shall attach the same in accordance with Rule 15 (d) of the Auctioneers Rules. In addition, Rule 15 (f) of the Auctioneers Rules provides that an auctioneer shall arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter.



29. None of the proclaimed motor vehicles are being claimed to be owned by the applicant and none of them were attached and sold for recovery of the assessed costs in this matter. It follows that the attachment and sale of the applicant's motor vehicle was illegal and irregular. Additionally, the certificate of sale is null and void.
30. An Auctioneer is an officer of this court and he ought to know the law and procedure for execution of decrees of the court and follow the law and process strictly without violating rights of any person. Failure to comply with the law renders all the acts of an auctioneer null and void.
31. Section 23 of the *Auctioneers Act* provides for duties of auctioneers as follows:
23. Duties of auctioneers
- A licensed auctioneer shall—
- (a) at all times act in a manner befitting an officer of the court and shall ensure that his employees, servants or agents act in like manner;
 - (b) act in accordance with such rules as may be prescribed when repossessing, attaching, storing or selling any property pursuant to the provisions of any written law or contract;
 - (c) maintain such books, accounts, records or other documents as may be prescribed and furnish the same to the Board at such time and in such manner as may be prescribed.
32. The Auctioneer is not expected to attach and sell goods that were never proclaimed in the first instance before proclaiming the same goods and then issuing the time bound Notice of proclamation to the judgment debtor.
33. Consequently, impugned warrants of attachment, sale and certificate of sale dated 28th March 2024 are hereby declared null and void ab initio and are hereby set aside and vacated.
34. The motor vehicle registration No. KBS 55D is hereby ordered restituted to its owner, the applicant second appellant herein upon service of this order upon the auctioneer who purported to sell it.
35. The auctioneer shall pay to the applicant costs of the application herein. This ruling shall apply mutatis mutandis to HCCA E078 of 2021 as prayed wherein the 2nd appellant is a party, and is affected by the illegal attachment and sale of his motor vehicle KBS 555D.
36. Mention on 26/9/2024 before the Deputy Registrar to confirm filing of bill of costs and compliance with these order on restitution to the 2nd appellant/applicant of the motor vehicle illegally attached.
37. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

