



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Olwochi & another v Nekesa; Wafula & another (Interested Parties) (Civil Appeal 58 of 2019) [2023] KEHC 17541 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 58 OF 2019**

DK KEMEL, J

MAY 22, 2023

BETWEEN

ROSE NAKHUNGU OLWOCHI 1ST APPELLANT

YVET OLWOCHI 2ND APPELLANT

AND

RUTH NEKESA RESPONDENT

AND

DELAILA NASIMIYU WAFULA INTERESTED PARTY

SAMSON ITONDE TUMBO T/A DOMINION YARDS

AUCTIONEERS INTERESTED PARTY

*(Being an appeal against the ruling delivered by Hon G.P. Omondi
(SRM) on 28th June 2019 in Bungoma CMCC No. 450 of 2018)*

JUDGMENT

1. This is an appeal by the two Appellants from the decision of the Chief Magistrate's Court at Bungoma, on the application dated 21st March 2019 delivered on 28th June 2019 by Hon. G.P. Omondi (SRM) whereby the learned Magistrate, among other orders, allowed the objection application dated 21st March 2019, that the goods/properties as proclaimed by Samson Itonde Tumbo t/a Dominion Yards Auctioneers were the properties of the Objector, the Respondent herein, the proclamation and/or attachment be lifted and the costs of the application awarded to the Objector, Respondent herein.
2. Dissatisfied with the ruling of the trial Court, the Appellants herein preferred this appeal premised on the following grounds:



- i. That the learned Magistrate erred in law and fact by allowing the objection application whilst disregarding the fact that the Plaintiff had laid claim of the goods and the business.
 - ii. The learned Magistrate erred in law by allowing the objection application whilst the supporting affidavit to the application was commissioned by a person who did not have a practicing certificate.
 - iii. The learned Magistrate erred in fact and law by holding the goods belonged to the objector when the agreement as adduced had a lot of inconsistency and was full of contradictions.
 - iv. The learned Magistrate erred in fact and in law by disregarding the fact that the objection application was geared towards defeating justice and halting execution.
 - v. The learned Magistrate erred in fact and in law by disregarding the further affidavit filed by the Appellants and the issues raised therein.
 - vi. The learned Magistrate erred in fact and in law by disregarding the issues raised by the Appellants in their submissions.
 - vii. The learned Magistrate erred in fact and in law by granting orders lifting the attachment when it was not pleaded by the Objector.
3. The Appellants prayed for orders that the 28th June 2019 ruling allowing the objection application dated 21st March 2019 delivered on 28th June 2019 be set aside and substituted with one dismissing the same with costs and that the costs of the appeal be awarded to the Respondent.
 4. The subject matter of the objection application was that the Respondent on 23rd January 2019 bought the Plaintiff's fast food business situated at Havana Stalls at Lusaka road Junction Bungoma. According to the Respondent, the Plaintiff/Interested Party sold the business together with the items which were inside the premises and that on occupation she brought her full Meko gas, sub-woofer, fridge and 19-inch television. She operated the business peacefully until 19th March 2019 when the auctioneers herein came and took her items destroying them in the process. It was her evidence that on purchasing the business, she did not know that there was an existing case in Court between the Plaintiff and the Appellants.
 5. In response, the Appellants alleged that the Plaintiff/Interested Party was the one operating the business and that she was their tenant till her goods were taken by the auctioneers and thus the agreement of sale as annexed by the Respondent herein was a fabrication. They further alleged that the advocate that prepared the Objector's application had no practicing certificate and that the instant application ought to be struck out.
 6. In response the Respondent alleged that no tangible proof was availed to show that her advocate lacked the recent practicing certificate and that it was not against the law for an advocate to draft with no practicing certificate to draft pleadings.
 7. In its ruling, the trial Court found that the Objector did prove to the Court that the property proclaimed by the auctioneers was hers and that she bought the same from the Plaintiff/Interested Party and that the same was corroborated. On the issue of the supporting affidavit being commissioned by an advocate without a practicing certificate, the trial Court held that the attached evidence was not conclusive proof that the advocate who commissioned the same was not practicing in that respective year.



8. This appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
9. I have considered the record of appeal and the submissions of counsels. I have also given due consideration to the authorities cited and the applicable law. This is a first appeal. The duty of the first appellate Court was well stated in *Selle and another v Association Motor Boat Co. Ltd and other* [1968] EA 123 where the Court of Appeal stated: -

“Briefly put this court must consider the evidence evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
10. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented at the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.
11. However, as was appreciated in *Peter v Sunday Post Ltd* (1958) EA 424 the Court stated: -

“While an appellate court has jurisdiction to review the evidence, to determine whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion or it’s shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellate court will not hesitate to decide....”
12. I have carefully considered the pleadings, evidence and submissions by the respective parties. The issues to be determined by this Court are;
 - i. Whether the grounds set out in the notice of Preliminary Objection are points of law?
 - ii. Who should pay costs of this appeal, if any?
13. On the first issue, what constitutes a Preliminary Objection is set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where it was held that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
14. The first ground in the notice of Preliminary Objection was that the moveable properties attached by the auctioneers are the properties of the Respondent, the objector then. The second ground was that the Respondent, the objector then, will suffer prejudice and great financial loss if the attachment was not stopped. The third ground was that the Respondent, the Objector, had bought some of the items from the Plaintiff and was not party to the suit.
15. The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is



binding on this court and all courts below it by virtue of Article 163 (7) of the Constitution of Kenya 2010.

16. The Respondent, Objector then, told the Court that the proclaimed and attached properties belonged to her and not the Plaintiff as alleged by the Appellants. The onus lies on the Respondent, Objector then, to prove to the satisfaction of the Court that the attached property was wrongly attached and that it was owned by her. The Respondent availed before the trial Court the requisite agreement of sale of Business duly executed and witnessed. The same was corroborated by the Plaintiff in her submissions where she submitted that she did sell the business and all the items in it to the objector.
17. One thing is clear to me on the evidence on record. The judgement debtor, Plaintiff, did sell the proclaimed/attached property to the Respondent. This means that the decree holder, the Appellants, were expected to execute their decree on the Plaintiff's property and not the Respondent's newly acquired property.
18. That the burden of proof was on the Appellants to prove their case is in doubt. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
19. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
20. The Appellants failed to avail any evidence to show that the goods /properties as proclaimed belonged to the Plaintiff and not the Respondent, Objector then. The appellants also failed to establish that the Judgement debtor had connived with the Respondent and came up with a sale agreement so as to defeat the decree.
21. On the aspect of the supporting affidavit to the application dated 21st March 2019 being commissioned by an advocate who lacked a current practicing certificate, the Appellants failed to discharge their burden of proof as claimed. From my perusal of the trial Court record, it is certain that the person who drafted the pleadings and the person who commissioned the pleadings were different counsels. The Appellants failed to avail any evidence to show that the documents were commissioned by an advocate who lacked the requisite current practicing certificate. I concur with the trial Court that no conclusive proof was availed to warrant the court to expunge the document from the record and dismissal of the application. Indeed, the 4 appellants failed to avail any document from the Law Society of Kenya to the effect that the advocate who commissioned the objector's affidavit did not have a valid practicing certificate. As the appellants who had the burden of proof on their shoulders failed to discharge the said burden on a balance of probabilities, the finding of the trial court was sound and I see no need to disturb the same. The Respondent proved that the properties that had been attached lawfully belonged to her as she was an innocent purchaser herein and who produced before the Court a competent agreement of sale duly executed as per the dictates of the Law of Contract. The objector therefore convinced the trial court to raise or lift the attachment of her properties.



22. In view of the foregoing observations, it is my finding that the appeal is devoid of any merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of:

No appearance Anwar for Appellants

No appearance Wamalwa R for Respondent

No appearance Interested Parties

Kizito Court Assistant

