



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E026 OF 2021

HABIL NANJERO BUSHURU.....APPELLANT

VERSUS

ALEX MUTULI.....1ST RESPONDENT

CHARLES JAMES KARANI.....2ND RESPONDENT

(An appeal from the ruling of Hon. F Makoyo, Principal

Magistrate, in Butere PMCCC No. 34 of 2014, delivered on 8th June 2021)

RULING

1. There are two applications, according to Mr. Amasakha, Advocate, for simultaneous disposal. One is dated 15th June 2021 and the other 2nd July 2021. Directions were given on 6th July 2021, that applications dated 9th June 2021, 15th June 2021 and 2nd July 2021 be heard on 14th July 2021. They were argued orally on 14th July 2021, and the 2nd respondent was cross-examined on 29th September 2021.

2. The Motion dated 9th June 2021, seeks stay of advertisement and sale of a motor vehicle belonging to the appellant, pending *inter partes* hearing of the application, and release of the motor vehicle on a running attachment. He disclosed that he had obtained stay orders at the trial court, but his application for stay had subsequently been dismissed without affording him a hearing, and he was coming to the High Court to forestall sale of the motor vehicle attached. He averred further that he had deposited Kshs 200, 000.00 in court as part payment of the decree. The said Motion application was filed in court on 10th June 2021, simultaneously with the memorandum of appeal.

3. Although there has been reference to an application dated 15th June 2021, in the orders of the court of 6th July 2021, and by Mr Amasakha, during argument on 14th July 2021, I have very closely perused the file of papers before me, and I have not come across any application on record of that date.

4. The application dated 2nd July 2021, is also by the appellant. It seeks the “enjoining” of the 2nd respondent to these proceedings, and a variety of other orders, which include release of the subject motor vehicle, directions to the 2nd respondent to file his bill of costs, among others. The application dated 2nd July 2021 was apparently provoked by the filing of the summons dated 1st July 2021, by the respondent, in which application the respondent was seeking setting aside of orders that the court had made on 24th June 2021, and which the respondent was saying had been overtaken by events. The orders of 24th June 2021 were on the application dated 9th June 2021. I had allowed that application as it was unopposed. The effect of the order was that the motor vehicle was to be realised to the appellant on a running attachment pending the *inter partes* hearing of the application. The respondent, in the application of 24th June 2021, says that by the time I was making those orders, the motor vehicle had been sold in an auction that took place on 18th June 2021. He asserted that the appellant had been granted orders on 3rd June 2021, by the trial court, which had directed him to deposit a sum of Kshs.200, 000.00 by 7th July 2021. He explained that there was no compliance, and on 8th June 2021, the appellant did not attend court for a scheduled appearance for directions, and his application was dismissed. He says that it was upon that dismissal that the vehicle was disposed of by way of public auction for a sum of Kshs. 500, 000.00. There is attached to that affidavit an affidavit by the 2nd respondent, detailing the steps that he took to enforce the decree after the appellant’s application was dismissed at the trial court. The advertisement was done on 11th June 2021, and sale was conducted on 19th June 2021.

5. The appellant replied to the application dated 1st July 2021, vide his affidavit of 13th July 2021. He concedes that the motor vehicle was advertised for sale by public auction, but according to him, there was no proof of sale. He concedes further that as at the date of the mention on 8th June 2021 at the trial court he had not yet deposited the sum of Kshs. 200, 000.00, but he says that there were good reasons and explanations for the delay. He states that if the 2nd respondent had sold the motor vehicle, then he should deposit the decretal amount in court. He further says that the 2nd respondent received an amount in excess of the decretal amount and he should pass it to the trial court.

6. The 2nd respondent swore his own affidavit, on 13th July 2021. He avers that he proclaimed and sold the subject motor vehicle in accordance with warrants obtained from the trial court. After he proclaimed and attached it, the appellant got orders from the trial court for conditional stay. The appellant was directed to deposit a sum of Kshs. 200, 000.00 by 7th June 2021, but he failed to. His application for stay was dismissed on 8th July 2021 after the appellant failed to attend court. He contends that thereafter the appellant rushed to court and deposited the amount ordered after the orders had lapsed. He says that he advertised the motor vehicle for sale, and he sold it on 18th July 2021, and by the time the orders of 24th June 2021 were being made, the motor vehicle had already been sold. He avers that the appellant had not completed paying the decretal amount.

7. The advocates for both sides addressed me on 14th July 2021. They largely regurgitated the averments made in their respective applications. None of them cited any statutory provisions or case law to support their oral submissions. The 2nd respondent was presented on 29th September 2021 for cross-examination, and his testimony largely mirrored what he had disposed in his affidavits.

8. The appeal that has been presented before me, by way of memorandum of appeal, turns on orders made by the trial court on 8th June 2021, when an application that the appellant had filed in that court was dismissed. Am told because of non-attendance by the appellant and his advocate. The grounds listed are that the trial court breached the right of the appellant to be heard on his application, the respondent had not responded to the application, the amount to be deposited was substantial, judicial discretion was not properly exercised, and the court failed to take judicial notice of challenges presented by technology. That is what is for trial on appeal.

9. The applications that I am invited to determine largely turn on execution of the orders of the trial court, and the taking of accounts. What emerges is that a conditional stay order lapsed after the appellant failed to comply with it, and the application on which the stay orders were predicated on was dismissed on 8th June 2021. That paved way for execution to proceed, and it did proceed, and the motor vehicle was sold. As I was making further stay orders on 24th June 2021, the horse had already bolted. What remains is for the parties to take accounts on how much has been paid so far by the appellant in settlement of the decree, whether there is a balance, what was realised from the public auction, and how the said moneys were applied, among others.

10. The decree being executed is of the trial court. It is not of this court. The court that should oversee that execution and the taking of accounts relating to that process should be the court which made the decree being executed. The High Court has no mandate over that, unless it is on appeal. Consequently, I do not find merit in the applications before me, and I hereby dismiss all of them. The parties shall take accounts at the court below. Let each party bear their own costs. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY, 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Amasakha, instructed by Amasakha & Company, Advocates, for the appellant.

Ms. Mukhwana, instructed by Alitalia Mukhwana & Co., Advocates, for the respondent.

Mr. Charles Karani, in person.