



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 30 OF 2019

EZEKIEL KEMUE ORINA.....APPELLANT

VERSUS

ASKA NYABOKE KOBIRO.....1ST RESPONDENT

BERNARD ONKOBA T/A BETICO AUCTIONEERS.....2ND RESPONDENT

HEGEONS AUCTIONEERS.....3RD RESPONDENT

(Being an appeal from the Ruling of Hon. S.N. Makila SRM delivered

on 22nd February, 2019 in Kisii CMCC No. 192 of 2013)

JUDGMENT

1. The background of the matter giving rise to this appeal is as follows; Aska Nyaboke Kobira, the 1st respondent herein had sued the defendants, Jeran General Contractors Limited and Evans Omwoyo Onsongo in Civil Suit No. 192 of 2013 for damages after she sustained in a road traffic accident involving the defendants' vehicles and the motorcycle she was riding on. She claimed that Jeran General Contractors Limited was the owner of motor vehicle registration number KBK 805 D Isuzu Bus and Evans Omwoyo Onsongo was the owner of motor vehicle registration number KAY 648 J Toyota Matatu (herein "the subject vehicle"). The 1st respondent's suit against the defendants was successful. On being awarded damages, the 1st respondent proceeded to execute the decree.

2. On 5th December 2018, the appellant in this matter filed an application under a certificate of urgency claiming that he was the beneficial owner of the subject vehicle, which he claimed had been attached in satisfaction of the decree. He averred that he had bought the vehicle from Evans Omwoyo Onsongo in 2010 and attached a copy of the agreement in support of this. The appellant thus urged the court to grant him the following orders;

a. Spent

b. *That the applicant herein be admitted as an interested party in this suit;*

c. *That the honorable court be pleased to grant stay of intended sale of motor vehicle KAY 646 J currently being held by the firm of Hegeons Auctioneers PO Box 1835 Kericho for being offered for sale until this application is heard and disposed of;*

d. *That the alleged warrants of attachment of this court dated 14th of July 2016 and notification of sale by the interested party be declared null and void and same be set aside;*

e. *That the firms of Hegeons Auctioneers do release the subject motor vehicle to the applicant and cease any act of interfering with the operation of the said motor vehicle until this application is heard and disposed of;*

f. *That the honorable court be pleased to strike out the whole process pertaining to the instant case for being spurious, fraudulent and obtained by material non-disclosure.*

g. *That the respondents pay for the cost of loss of user for the illegal seizure of his motor vehicle;*

IN THE ALTERNATIVE if the alleged sale has already taken place, the said subject motor vehicle be impounded by the OCS Kisii Police and be handed to the applicant pending the hearing and the determination of this application and suit.

h. *Costs of this application be borne by the respondent.*

3. The 1st respondent swore a replying affidavit deposing that when judgment was entered in her favour in Civil Suit No. 192 of 2013, the defendants failed to satisfy the judgment, so she instructed the 3rd respondent to commence execution proceedings against them. The 3rd respondent obtained warrants of attachment and sale on 14th July 2016. Later, the 1st respondent's advocate received a cheque being payment of the decretal sum but the auctioneer's charges owed to the 3rd respondent were not paid. She averred that the attachment of the vehicle took place in Miscellaneous Application No. 137 of 2016 therefore, the appellant ought to have filed his application in that matter.

4. The 1st respondent also refuted the appellant's claim that he was the owner of the subject vehicle and questioned his delay in challenging the warrants of attachment and sale which had been issued in 2016. She insisted that the entire execution process had been above board and urged the trial court to dismiss the application.

5. The trial court dismissed the appellant's application in a ruling dated 22nd February 2019. Aggrieved by that decision, the appellant filed the instant appeal.

SUBMISSIONS

6. The parties took directions to canvass the appeal by way of written submissions. The appellant's counsel began by assailing the entire execution process on the grounds that it had not been recorded in the court proceedings. He relied on an article in the *Scholarship and Works in African Human Rights Journal* by Catherine S Namakula a lecturer at the Faculty of Law, University of Fort Hare, Head of Department, Adjectival Law, Nelson Mandela School of Law, East London South Africa, who emphasized that any determination of a court had to be placed and preserved on the face of the record. That the duty of the first appellate court to evaluate and scrutinize the evidence afresh and come to its own conclusion was facilitated by competent and reliable court records. The appellant claimed that in this case, he was denied an opportunity to challenge the execution as there were no records of it before the lower court.

7. The appellant faulted the court for finding that he was guilty of laches as he was of the view that the party asserting laches had the burden of proving it. Reverting to an issue he had raised in another application before this court, the appellant claimed that the decree was incapable of execution as further court fees had not been paid. He also claimed that he was not given proper notice before proclamation and therefore the entire execution process was irregular.

8. The appellant further assailed the trial court's interpretation on the law for ownership of the vehicle. In his view, the lower court dismissed his application without giving him an opportunity to adduce evidence and prove that he was the owner of the vehicle. He relied on the cases of *Ignatius Makau Mutisya vs Reuben Musyoki Muia; Securicor Kenya Limited vs Kyumba Holdings Civil Appeal No. 73 of 2002; Joel Muga Opinja vs East African Sea Food Limited [2013] eKLR; Thurania Karauri vs Agnes Mocheche [1997] eKLR and Alfred Moffat Michira vs James Omwong'a Ombati & 2 Others [2019] eKLR* in support of his submissions that the presumption that the registered owner of the vehicle in the logbook is the actual owner is rebuttable and where there exists other compelling evidence to prove otherwise then the court could make a finding of ownership that was different from that contained in the logbook. The appellant claimed that the trial court did not consider the evidence in reaching its conclusion that the appellant had not proved ownership on a balance of probabilities.

9. The respondents' counsel countered that the matter before the lower court began after the defendants failed to remit auctioneer's fees assessed in favour of the 3rd respondent in Kisii Civil Miscellaneous Application No. 137 of 2016. So, the 3rd respondent instructed the 2nd respondent to commence the recovery of the sum. Counsel submitted that it was in those proceedings that the subject vehicle had been sold and if at all the appellant sought to challenge the sale then he ought to have done so in Miscellaneous Application No. 137 of 2016.

10. As to whether the appellant was the owner of the subject vehicle, counsel argued that before filing her suit, the 1st respondent had obtained a police abstract and conducted a motor vehicle search which revealed that the owner of the vehicle was Evans, the 2nd defendant in the original Civil Suit No. 192 of 2013. While he agreed with the appellant's argument that being the registered owner of a vehicle was not conclusive proof of ownership, he asserted that there had to be compelling evidence to disprove that the registered owner of a car was not the actual owner. Counsel submitted that the appellant never tendered any evidence to prove ownership of the subject vehicle.

11. Counsel also noted that the said Evans had, in an affidavit seeking stay of execution, averred emphatically that he was the owner of the vehicle. He submitted that the appellant in this matter was simply a driver of the subject vehicle who, upon receipt of the proclamation notice dated 20th August 2016 and the Notification of Sale dated 18th November 2016, had signed indicating that he was a driver of the vehicle. In addition, the signature by the appellant also showed that he was aware of the execution process before it began.

12. The respondents' counsel also contended that the only way in which the appellant could be joined to proceedings that had reached execution stage was through objection proceedings under **Order 22 Rule 51 (1)** of the **Civil Procedure Rules** which states;

Objection to attachment [Order 22, rule 51.]

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

13. He relied on the case of *Stanley Ngethe Kinyanjui v Tony Ketter & 5 Others [2015] eKLR* to support his argument that the rules of

procedure under Order 22 called for strict compliance and the proceedings by the appellant were therefore a nullity *ab initio*.

14. Lastly, counsel submitted that the aspect of time laches was quite conspicuous from the face of the record as the appellant had filed his application to set aside the sale, two years after it had taken place. He thus urged this court to uphold the application of the maxim of equity that equity aids the vigilant, not the indolent.

ISSUES FOR DETERMINATION

15. From the grounds of appeal, the parties' depositions before the lower court, the impugned decision and the submissions before me, I find the that issues for determination are;

- a. **Whether there were valid orders of execution and whether the execution process was irregular;**
- b. **Whether the appellant proved that he was the owner of the subject vehicle; and**
- c. **Whether the appellant was guilty of laches.**

ANALYSIS AND DETERMINATION

16. On the first issue, the appellant contended that the execution process that led to the sale of the subject vehicle was done outside court proceedings as there was no record of it in the trial court file.

17. As indicated at the introduction of this decision, the execution proceedings that the appellant sought to challenge before the trial court arose from Miscellaneous Application No. 137 of 2016 and not Kisii Civil Suit No. 192 of 2013. In the original Civil Suit No. 192 of 2013, the 1st respondent successfully sued the defendants, Jeran General Contractors Limited and Evans Omwoyo Onsongo for damages. In her affidavit sworn in response to the appellant's application before the trial court, the 1st respondent annexed a copy of warrants of attachment and warrants of sale that had been issued against the defendants in that matter when they failed to settle the decretal sum. She averred that the defendants in Civil Suit No. 192 of 2013 were prompted by the imminent attachment of their properties to settle the judgment debt but did not pay the 3rd respondent's auctioneer's charges.

18. The documents attached to the 1st respondent's replying affidavit show that, in a bid to recover his charges, the 3rd Respondent filed Miscellaneous Application No. 137 of 2016 against Evans Omwoyo Onsongo, the 2nd defendant in the original suit. His charges were assessed at Kshs. 188,464/= after which the 3rd respondent instructed the 2nd respondent to commence execution proceedings on his behalf against the said Evans Omwoyo Onsongo. The 2nd respondent obtained warrants of attachment and sale against Evans for settlement of the auctioneer's charges.

19. The appellant's argument that the trial court did not record the execution proceedings is therefore misplaced as the same took place in Miscellaneous Application No. 137 of 2016 which related to auctioneer's fees and not Civil Suit No. 192 of 2013.

20. His contention that the execution was irregular because the respondents did not pay further court fees to obtain the decree in Civil Suit No. 192 of 2013 was dealt with by this court in the ruling dated 12th July 2019, where this court held that the 1st respondent had paid further court fees on 14th July 2017. Since no appeal was preferred against that decision, the ruling stands. In any event, the sale of the subject vehicle was based on proceedings in Miscellaneous Application No. 137 of 2016 and not Civil Suit No. 192 of 2013.

21. From the record, it was evident that Evans Omwoyo Onsongo was the registered owner of the subject vehicle when it was attached in Miscellaneous Application No. 137 of 2016. The appellant did not illustrate how the execution process that led to the sale of the subject vehicle was irregular. The first issue is thus answered in the negative.

22. The second issue raised by the appellant related to the ownership of the subject vehicle. The appellant relied on, among other authorities, the decision of the court in *Ignatius Makau Mutisya vs Reuben Musyoki Muia [eKLR] 2015* where the Court of Appeal held thus;

"In the case of Osapil vs Kaddy [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only prima-facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise."

23. I am in agreement with the above decision on proof of ownership of a motor vehicle. In the application before the trial court, the appellant produced a copy of an agreement dated 25th August 2010 for the purchase of the subject vehicle from Evans Omwoyo Onsongo. A review of the trial court's judgment shows that, contrary to the appellant's allegation that the trial court did not give him a chance to establish his case, the subordinate court took into account the appellant's claim that he owned the subject vehicle.

24. The lower court clearly considered the copy of the agreement annexed to the appellant's application in coming to the finding, that it was likely that the appellant had purchased the subject vehicle from the 2nd defendant, Evans Omwoyo Onsongo, but had never taken steps to register himself as the owner of the vehicle. The court went on to hold that as at the time the accident took place, the subject vehicle was registered in the name of Evans and the execution against him was proper.

25. The 1st respondent's counsel argued that the appellant did not follow the procedure laid out under **Order 22 Rule 51** of the **Civil**

Procedure Rules in challenging the execution proceedings. The rule provides the means by which a person claiming a legal or equitable interest on attached property is to give notice of his objection to the attachment of the property. The appellant's application was not filed in compliance with the rules of procedure. However, the respondent did not raise the issue before the trial court and he cannot now raise it on appeal.

26. My summary of the evidence is that, although the appellant may have had an interest on the vehicle, he brought his application too late in the day. The respondent demonstrated that the appellant had been served with the Notification of Sale of the subject vehicle on 18th November 2016 but he took no steps to protect his interest. He filed his application in December 2018, more than 2 years later. According to the 1st respondent, the appellant signed the Notification of Sale as the driver and not an owner of the subject vehicle. The respondent illustrated that when, Evans Omwoyo Onsongo, the 2nd defendant in the original suit sought to stay execution proceedings in Civil Suit No. 192 of 2013, he had severally averred that the subject vehicle belonged to him. Oddly, the appellant herein claims that he bought the vehicle from Evans Omwoyo Onsongo in 2010, before the original suit had been filed.

27. Laches is defined in the **Black's Law Dictionary 9th Edition** at **page 953** as;

“Unreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought.”

28. The Court of Appeal in **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR** cited with approval the case of *The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221* where the concept of laches was defined thus;

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material....”

29. The 1st respondent averred that the subject vehicle had been sold in satisfaction of the auctioneer's charges in December 2016. The fact that the appellant signed the Notification of Sale of the subject vehicle shows that he was aware of the impending sale well before he filed his application in 2018. He gave no reason for the delay in filing his application. Due to his inaction, the orders he sought in the application had long been overtaken by events. The trial court was therefore justified in its finding that the appellant was guilty of laches.

30. In the end, I find no merit in this appeal. It is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF OCTOBER 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Ezekiel Kemue Orina Appellant in Person

Mr. Gichana For the Respondent

Ms. Rael Court Assistant