



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. E004 OF 2020

SABRIN BUS SERVICES LIMITED.....APPELLANT

VERSUS

BALLOW W. NANGALAMA

T/A HEBROS AUCTIONEERS.....1ST RESPONDENT

KENNEDY OCHOLA KAOKA.....2ND RESPONDENT

RULING

1. The 2nd Respondent **Kennedy Ochola Kaoka** succeeded in Chief Magistrate's Court Civil Suit No. 2 of 2015 where Judgement was entered in his favour against the Appellant/Applicant, on the 3rd of December 2020.
2. Pursuant to the said Judgement and decree, the respondent made application before the trial court seeking for the court's assistance to attach vehicles belonging to the applicant as had been proclaimed by the 1st Respondent on the 11th of September. In the said proclamation the vehicle in contention being vehicle registration number KBU 396C was not mentioned.
3. As a result of the said application, the trial court issued an order dated 25th September 2020 allowing intervention of the police in removal of the following motor vehicles;

KCF 299Y

KCF 343Y

KCK 423G

KCK412G
4. The current application dated 9th December 2020 seeks a stay of the warrant of sale dated 3rd September 2020 of motor vehicle KBU 396U pending hearing of the appeal on grounds that the attachment of motor vehicle registration KBU 396C, an Isuzu Bus was unprocedural and illegally as the said vehicle was not among the specified properties in the order of 25th September 2020; no decree was served; further since 1 year had lapsed between the date of the decree and date of the purported attachment the Decree-holder ought to have moved the court by way of a Notice to Show Cause why the judgement debtor's property should not be attached and which notice ought to have been served upon the Judgement-debtor. Further the said vehicle is worth much more than the decretal sum as it is worth Kshs. 6 million.
5. The application was opposed vide the affidavit of the 2nd Respondent who stated that the same is fatally defective, misconceived, bad in law, fictitious, vexatious, scandalous and lacks in merit. Further it is a deliberate attempt and a fraud in order to deny the 2nd Respondent fruits of the Judgement in his favour; the 2nd Respondent should not suffer due to non-payment of the decretal sum by the Applicant insisting the application is an afterthought and also the court is *functus officio*.
6. Before delving into the application before court, it is prudent to look at the pending appeal. The same came about as the Appellant was aggrieved by the decision of the magistrate not to stay the warrants of attachment of the said motor vehicle for reasons similar to the ones supporting the current application.
7. Order 22 of the Civil Procedure Act extensively provides on the issue of execution and attachment following a decree. In particular Rule 7(2) provides that an application for execution of a decree will give details and particulars that will include, the decretal sum and interest, the

amount of costs, assistance of the court required including the attachment and sale of any immovable property.

8. Rule 18 of Order 22 require that where an application for execution is made more than 1 year after the date of the decree a Notice to Show Cause be issued against the person whom execution is applied for requiring him to show cause on a date to be fixed why execution should not issue.

9. Order 42 rules 6(1) and (2) speak to when an order for stay of execution of a decree or order may be stayed.

Rule (2) has set the yardstick to be considered. Firstly, the court must be satisfied that substantial loss may result if the order is not made, secondly, the application was made without unreasonable delay and such security as the court may order for due performance of such decree or order as may ultimately be binding is made.

10. The applicant takes issue with process of execution. He does not deny the decree. Neither the 1st or 2nd Respondent have challenged the allegation directed against them for failure to adhere to the laid down processes. Firstly, the fact that in the application and order seeking assistance for purposes of execution, the motor vehicle in question was neither mentioned nor included in the court order. Secondly no notice to show cause was filed and served, thirdly the notification of sale in itself is defective as condition and value of the attached vehicle were not indicated neither the amount claimed.

11. The Rules referred to above set clear processes that lead to attachment and eventual sale of attached property. These set rules have a history and purpose. Unscrupulous litigants including notorious auctioneers have over the years purposed to break the law by failing to follow the laid down procedure thus denying litigants fair deals in the process of auctioning attached items. The rules were put in place to protect the process of execution as both litigants, the decree-holder and judgement-debtors look up to the law to protect them as the axe of justice cuts both ways. Judgement debtors too have an interest even as their properties are being auctioned!

12. In the case of Moses Mwicigi & 14 Others v IEBC & 5 Others [2016] eKLR the Supreme Court stated thus:

“This court has a number of occasions remarked the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredient of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent, yet procedure, in general terms, is not an end to itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (b) of the Constitution, which proclaims that “...courts and tribunals shall be guided by...(the principle that) justice shall be administered without procedural technicalities.” This provision, however, is not a panacea for all situations befitting judicial intervention, and inevitably, a significant scope of discretion devolves to the courts.”

13. Notable also is that no concrete documents of the alleged were filed in court. The documents at the Registrar of Motor Vehicles obtained several months later attributes ownership of the same to the applicant.

14. Based on the above analysis the application succeeds.

15. Costs to abide the outcome of the appeal.

DELIVERED AND SIGNED AT GARISSA THIS 14th DAY OF OCTOBER, 2021.

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ALI ARONI

JUDGE