



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 92 OF 2019

A.G. RIUNGU & CO. ADVOCATES.....APPELLANT

VERSUS

MICHIMIKURU TEA GROWERS SACCO (FORMERLY)

THANANGA TEA GROWERS SACCO.....RESPONDENT

KCB BANK LIMITED.....INTERESTED PARTY

(Being an appeal from the Ruling and Order of Honourable H. Ndungu (Miss) CM delivered on 31st day of January 2019 in Meru Cmcc no. 109 of 2018 formerly Pmcc No. 36 of 2015 A.g.Riungu & Co. Advocates versus Michimikuru Tea Growers Sacco (formerly) Thananga Tea Growers Sacco & Anor.)

JUDGMENT

1. The appellant herein was the judgement creditor against the Respondent. The Appellant initially hired the services of Josephat Nkonge, Auctioneer who issued a proclamation notice to the Respondent on 21/12.2015. The same would be impeded by various applications of stay of execution. Subsequently the Appellant obtained warrants of attachment on 15/08/2016 which were allocated to M/S Viewline auctioneers who proceeded to proclaim the Respondents movable properties including Motor vehicle Registration No. KAW 182 V.

2. On 19/9/2016 the Appellant filed an application in the trial Court seeking the following Orders;

(i) That this Honourable Court be pleased to Order the C.M.C Meru Branch not to release the motor vehicle registration No. Kaw 182v Toyota van engine number 5L-5658556 Chassis Number AHTDK22GX0002326 which is held in their yard at Meru to any other person (s) or entity until further Orders of this Court.

(ii) That it is Honourable court be pleased to Order Kenya Commercial Bank to stop taking possession of Motor vehicle registration Number Kaw 182V the property of Thananga Tea Growers Sacco Ltd formerly Michimikuru Tea Growers Sacco and/or alienate, sell or dispose in any other way the said motor vehicle until further orders of this court.

(iii) That this honourable court be pleased to order the C.M.C Meru Branch manager to release the motor vehicle registration number Kaw 182v To View Line Auctioneers for sale in execution of the decree in the suit as proclaimed on 17/08/2016.

3. The appellant averred that on 17/08/2016 Viewline auctioneers proceeded to the premises of the judgement/debtor and proclaimed goods belonging to it. That when the Auctioneer went to collect the proclaimed goods after the expiry of seven (7) days the judgement/ debtor had removed all the proclaimed goods and hidden them to defeat the attachment and execution exercise.

4. That on making a search of the immovable properties the auctioneers found the motor vehicle at the premises of C.M.C Motors Meru Branch. That on inquiry they were informed that the motor vehicle was delivered to them by Kenya Commercial Bank, Meru Branch who were claiming lien over the motor vehicle. That on conducting a search at the directorate and licensing office the registration ownership as at 19/08/2018 was owned by the Judgement debtor the Respondent herein.

5. The application was opposed by **Doris Nchekei Manager of the Respondent** where she deponed that on 18/8/2016 through a general resolution meeting the Sacco was wound up. She attached copies of the Resolution. That the Sacco had no locus to be sued or to sue. That the Respondent had taken up a loan facility with the interested party on 8/3/2013 to which they has offered the motor vehicle as security. That upon their failure to facilitate the loan facility the motor vehicle was repossessed by the interested party.

6. The interested party also opposed to the application vide Replying affidavit dated 24/10/2016 sworn by **Charles Kiariathe Branch**

Manager, Meru. He deponed that the Respondent had taken out a loan facility with the interested party for a sum of Kenya Shillings One Million only (1,000,000/=) 26/04/2016 to be paid on 20/04/2016. That the same was renewed to 31/07/2016. The motor vehicle was used as a security by passing the original log book to the interested party. That at 8/08/2016 the Respondent had not paid its account which stood at Kshs. 1,037,844.35 hence the interested party moved to repossess the motor vehicle. They later wrote a request to CMC motors for storage of the motor vehicle at their yard. That the Appellant should therefore embark on tracing the other assets that belonged to the Respondent.

7. The applicant herein had equally filed **Misc Application No. 90 of 2006 A.g.Riungu & Co. Advocates versus Michiminkuru Tea Growers Sacco & Anor.** He sought a stay of execution of the Orders issued on 15/11/2016 in Tigania Pmcc No. 36 of 2015 pending the hearing and determination of the intended appeal against the said orders.

8. The gist of the application were inter alia that the learned Magistrate had denied the applicant a chance to be heard before delving to dismiss the applicants application dated 19/9/2020. In his determination Gikonyo J. held as follows;

“I note with concern that the trial court did not record what the parties said on 1/11/2016; it simply gave a ruling and ordered that the status quo be maintained. Those proceedings are obscure; their property and legality is in doubt.....This was a careless and fatal lapse on the part of the trial court but no evidence of any bias; but sufficient cure has been administered as I have set it aside. I also order that the application dated 19/09/2016 be heard interparties and expeditiously. In addition, the trial court shall inquire into the allegations and establish whether or not the vehicle herein (1) has been sold and when; (2) it was the subject of proclamation at the time of sale. And then make its decision on the matters as by law.”

9. On 4/04/2017 still in Misc. Application No. 90 of 2016 this court ordered the transfer of Civil Suit Number Tigania Pmcc No. 36 of 2015 from Tigania Law Courts and transferring the same to the Chief Magistrate’s Court at Meru for allocation of any Magistrate Court in Meru Law Courts with jurisdiction to hear and determine the same.

10. The matter was finally heard by Hon. Hannah Ndung’u (Miss) CM who moved to dismiss the application dated 19/9/2016. In her determination she held as follows;

“ After looking at all the pleadings it seems to me that this application was bound to fail from the word go for the simple reason that by the time the applicant purported to proclaim the subject motor vehicle the defendant Sacco (if at all the Sacco is in existence the court having been told the Sacco was wound up on 18/8/2016 and does not exist) but that notwithstanding, as a the time of proclamation the Sacco had already taken a loan with KCB as at 8/3/2013 using the motor vehicle Kaw 182v as its security. In other words the owner’s interest i.e. that of the bank the moment, the logbook was used as security for a loan. The vehicle in issue was therefore never available for proclamation and subsequent auction by the applicant in the first instance.”

11. Aggrieved by the foretasted determination the appellant herein filed its memorandum of appeal on 29/07/2019 enumerating nine (9) grounds of appeal that may ostensibly be summarised as follows;

a) The learned Magistrate erred in law and in fact in failing to make any finding or inquire or try to establish whether or not the motor vehicle in question had been sold and when directed by the high Court in Misc Application No. 90 of 2016.

b) The learned Trial Magistrate erred in law in failing to find that the motor vehicle was subject to proclamation and could not be seized by any other body or authority as it was already in the custody of the law.

c) The learned Trial Magistrate erred in law by failing to find that the interested party could not seize the motor vehicle subject matter in the impugned application without following the requirements as laid down by Order 22 Rule 51 1,2,3 of the Civil Procedure Rules.

d) The learned Trial magistrate erred in law in failing to consider the effects of Rule 14 of the Auctioneers Rules as regards goods compromised in the proclamation as in the case of the motor vehicle the subject matter herein.

12. On 14/10/2019 this Honourable Court directed the parties to canvass the appeal through written submissions. At the time of writing this judgement only the appellant and the interested party have filed their written submissions. The appellant has relied on the provisions of Order 22 Rule 51, Section 38 of the Civil Procedure at and Rule 14 of the Auctioneers Rules. It was his submission that the motor vehicle was first proclaimed by **Japheth Nkonge Auctioneers** on 21/12/2015 and that proclamation has never been lifted. That a plethora of applications followed by the judgement debtor but they never disclosed that they had offered the same as collateral. He also relied on the cited cases of **Maliha Ali Seikh vrs Arvind Kash Mirilal Byutiyani & Anor [2016] eklr.** In the case the vehicle in issue was proclaimed in the process of execution of the decree. The proclamation took place on 28th January 2016. The judgement debtor took out a loan with the objector on 30th January 2016. The court found that the rights of the objector and the judgement debtor cannot supersede the proclamation. The appellant also relied on **Josephat Munke Ole Mpoe v David Waiganjo Koinange [2015] eklr.** In the case the Respondent had indicated to court that he had sold the motor vehicle to a 3rd party. He was however unable to prove this claim since the registration details were still in his name. The court directed him to present the motor vehicle in court.

13. The respondent on his part relied on the cited case of **Palm Health care International Ltd (in receivership) vrs Development Bank of Kenya Ltd [2013] eklr** where the court held that a banks lien gives it an effective security against the interest of competing creditors.

Analysis and Determination

14. The duty of the 1st appellate court was explained in the case of **SELLE AND ANOTHER VERSUS ASSOCIATED MOTOR BOAT**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

15. I shall first delve in the Respondents Contention that it had wound up as of 18/8/2016 through a general resolution meeting. The general Resolution alleged do not in any way touch on the winding up of the Sacco but includes measures the Sacco wished to undertake to save the interests held by the Sacco.

16. Again a general Resolution cannot in any way wind up a Sacco. **Section 64 of the Co-operative Societies Act** states that certain sections of the Companies Act specified in Part I and Part II of the Schedule to the Co-operative Societies Act shall apply mutatis mutandis in relation to the winding up of a Co-operative Society as they apply to a company registered under the Companies Act. The procedure will then be If the registrar after holding an inquiry or making an inspection or receiving an application made by at least three quarters of the members is of the opinion that the society ought to be dissolved he may in writing order its dissolution and subsequent cancellation of registration. Any member who feels aggrieved by this order may within two months after its making appeal against it to the Minister with a final appeal to the tribunal. Where no appeal is filed within the prescribed time the order shall take effect on the expiry of that period but where an appeal is filed within time the order shall not take effect unless confirmed by the minister or by the tribunal.

17. When the Registrar makes that order, he must make a further order relating to the custody of the books and documents of the society and the protection of its assets. It should be noted that no society shall be dissolved or wound up except by an order of the Registrar. Where a society has less than the prescribed number of members the Registrar may in writing order its dissolution and that order takes effect immediately and where registration is cancelled the society ceases to exist as a corporate body from the date the order takes effect.

18. The issue as to the winding up of the society was not considered exhaustively by the Trial magistrate and it was not an issue before her for determination. she was not certain whether the Society was wound up or was not wound up.

19. Having considered the grounds of Appeal the submissions by the Appellant and the Interested Party as well as the ruling by Honourable Hannah Ndung’u CM delivered on 31st January 2019 the issues for consideration are as follows:-

(i) Whether Viewline Auctioneers had proclaimed motor vehicle registration KAW 182 V Toyota Hilux Pick up before the same was used as a collateral for an overdraft advanced to the Society by the Interested Party or whether the said motor vehicle had been used to secure the overdraft prior to the proclamation.

(ii) Whether (If the Interested Party had advanced an overdraft on account of motor vehicle as security) the motor vehicle could be attached in execution of a decree of the court.

20. It is not in doubt that the Branch Manager for the Interested party requested the Manager CMC Motors Meru by a letter dated 24th August 2016 to provide storage for the motor vehicle in question. As at 24th August 2016, the Appellant had already taken out warrants of attachment and instructed Viewline Auctioneers to attach the Respondents goods in execution of the decree in Tigania SPM court Case No. 36 of 2015. By a proclamation dated 17th August 2016 motor vehicle registration KAW 182 V was proclaimed among many other goods which condition and values were not indicated in the Proclamation form. It is also not in dispute that when the Proclaimed goods were due for attachment the Auctioneer is said to have found the goods missing from the Respondents premises.

21. It is possible that the Interested party got wind of the Proclamation and decided to secure the motor vehicle which according to Doris Nchekei Kirika the CEO of the Respondent had been used to secure an overdraft from the interested party. The Interested party Charles Kihara annexed to his affidavit sworn on 24th October 2016 a credit application form by the Directors of the Respondent in which they were applying for an overdraft facility of Ksh. 1000,000/- and they were granted the facility by a letter dated 26th April 2013. The said facility was to be repaid in full by 31st July 2013 or earlier upon receipt of proceeds from KCC. The facility was to be secured as per clause 8.1.1. Although the facility offered by the letter dated 26th April 2013 did not specifically provide that the motor vehicle was a security clauses 8.2, 8.3, 8.4 and 8.5 indicates that the bank had lien over security previously offered by the defendant.

22. Prior to the offer made on 26th April 2013 the Respondent society had also sought for a temporary overdraft of Ksh. 500,000/- and the same was allowed by the letter of offer dated 13th March 2013 for purposes of paying the Respondents workers and motor vehicle registration KAW 182 V was offered as one of the securities and clause 8.3 provided that the same shall be a continuing security until all monies secured by the charge is paid in full. The Respondent continued borrowing based on the understanding between it and the Interested Party including on the overdraft advanced by a letter dated 3rd September 2014 and 30th November 2015 which was the subject of communication in the letter dated 20th April 2016.

23. It is therefore clear that although the Appellant/decree holder herein had caused the Motor vehicle registration KAW 182 V to be proclaimed the Interested Party had all along held its log book as security for the overdraft facility advanced to the Respondent and as at 16th March 2016 when the Subcounty Cooperative officer wrote to the Interested Party, the Respondent Sacco was still owing an outstanding overdraft Ksh. 1 M. It is the view of this court that this Motor vehicle was not available for proclamation and the Appellant should therefore look for other properties belonging to the Respondent and execute the decree which was issued in his favour. The Interested Party had lien

over the motor vehicle in question and the several letters of offer of overdraft facilities to the Respondent is very clear.

24. This Appeal therefore, cannot stand and the same is dismissed with no orders as to costs.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 6th DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti :-

Appellant :- Mr Riungu Advocate - Present

Respondent: M/S Kaume & Co. Advocate – No appearance

Interested Party:-MS Murithi Advocate for Interested Party

HON A. ONG'INJO

JUDGE