



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 112 OF 2019

DAMACLINE KWAMBOKA KUNGA.....APPELLANT

VERSUS

CAROLINE BOSIBORI ONCHEKA &

ROSELYNE KEMUNTO MOSO (Suing as the legal representative of the estate of

HENRY AKARA ONSOMU).....RESPONDENT

AND

MARY KERUBO KUNGA.....RESPONDENT

AND

HEZRON ONSONGO ^{T/A} HEGEONS AUCTIONEERS.....INTERESTED PARTY/RESPONDENT

JAMES ODHIAMBO OTWENYO.....INTERESTED PARTY /RESPONDENT

(Being an appeal from the ruling of Hon. N.S. Lutta

dated the 2nd day of October 2019 arising out of Kisii CMCC No. 441 of 2015)

JUDGEMENT

1. This appeal relates to objection proceedings commenced by the appellant by an application dated 6th August 2019. In the affidavit in support of her application, the appellant deposed that as the registered owner of motor vehicle registration No. KCC 814S (“the vehicle”) she was surprised to learn that it had been sold to one James Otwenyo (herein “the 2nd interested party”) in execution of a decree yet she had not been a party to the suit. She averred that she had purchased the vehicle from Mary Kerubo Kunga (herein “the defendant”) on 10th April 2015 for a purchase price of Kshs. 1,800,000/= and complained that she had not been notified of the sale of its sale to the 2nd interested party. She thus sought orders that;

1) Spent;

2) Pending the hearing and determination of this application, the Honourable Court be pleased to order the unconditional release of Motor Vehicle Registration Number KCC 814S to the Objector/Applicant herein.

3) That pending the hearing and determination of this application, Motor Vehicle Registration Number KCC 814S be detained at Kisii Police Station or any other Police station that is nearest to its location;

4) Pending the hearing and determination of this application, Motor Vehicle Registration Number KCC 814S the court files in respect of this matter and Kisii CMCC No. 177 of 2014 be in the custody of the executive officer of this Honourable Court;

- 5) The Honourable court be pleased to declare and/ or pronounce the attachment and sale of motor vehicle registration number KCC 814S that belongs to the objector is illegal and unlawful;
- 6) The Honourable court be pleased to set aside the said sale of motor vehicle registration number KCC 814S to James Odhiambo Otwenyo;
- 7) The Honourable court be pleased to enjoin Hezron Onsongo^{T/A} Hegeons Auctioneers and James Odhiambo Otwenyo in this proceedings as interested parties;
- 8) This suit be consolidated with Civil Suit No. 177 of 2014 for expeditious hearing and determination;
- 9) Hezron Onsongo^{T/A} Hegeons Auctioneers be compelled to file returns as per the warrants issued to him herein;
- 10) Such further and/or other orders be granted as the court may deem fit and expedient.

2. After the trial court had granted orders (3) and (4) pending *interpartes* hearing of the application, Caroline Bosibori (herein “the plaintiff”) filed an application dated 13th August 2019 urging the court to grant a stay of the interim orders. She averred that since judgment had been entered in her favour on 25th April 2017, the defendant had not satisfied the decree which prompted her to instruct Hegeons Auctioneers to carry out execution. She claimed that when the instructed auctioneers attached the vehicle, the defendant attempted to stall the execution process by applying for stay of execution. It later became apparent that the defendant was not going to settle the decree and her advocates applied for attachment and sale of the suit vehicle which was eventually sold to the 2nd interested party through public auction.

3. The plaintiff added that as the execution process progressed, the defendant illegally transferred the vehicle to the appellant who was her sister. She also averred that the delay in lodging the objection proceedings was too inordinate, given that the vehicle had been attached in July 2017. For these reasons, the plaintiff urged the court to order the release of the vehicle to the interested parties. She reiterated these averments in her reply to the application dated 6th August 2019.

4. The 2nd interested party also filed an application dated 14th August 2019 protesting the detainment of his vehicle at Kericho Police Station. He deposed that title to the vehicle moved to him from the defendant once he purchased it for value at a public auction. He accused the appellant of colluding with her sister the plaintiff in an attempt to subvert the course of justice. He therefore urged the trial court to set aside the interim orders granted pursuant to the application dated 6th August 2019.

5. Having considered the applications dated 6th, 13th and 14th August 2019 simultaneously, the trial magistrate found that the transfer of the vehicle from the plaintiff to the appellant was improperly effected when execution proceedings had already commenced. He dismissed the application dated 6th August 2019 and allowed the applications dated 13th and 14th August 2019.

6. Aggrieved by that decision, the appellant filed the instant appeal which was canvassed by way of written submissions. In her submissions, the appellant challenged the trial court’s finding that she had purchased the vehicle to defeat the ends of justice. She contended that no evidence had been brought forward to prove the alleged collusion. The appellant asserted that she was the registered and rightful owner of the vehicle at the time the sale by public auction took place. She argued that it was wrong to attach and sell her vehicle as she was not a party to the suit. Reliance was placed on the case of *Michael Kwena v Raza Properties Limited & Another [2008]eKLR* in support of the argument that there had to be proof that the transfer of attached property was a match on the execution process and even where the transfer was a match against the execution, the transferee remained the *prima facie* owner of the property until the transfer was set aside.

7. For their part, the respondents insisted that at the time the execution of the decree commenced, the defendant was the owner of the vehicle. They argued that when the defendant realized that the vehicle was the subject of execution, she colluded with the appellant to circumvent the process. It was their submissions that the defendant’s act of transferring the vehicle to the appellant was unlawful and contrary to **Rule 14** of the **Auctioneers Rules**. The respondents also submitted that all legal procedures were followed in the transfer of suit vehicle to the 2nd interested party and this appeal should be dismissed as it is only aimed at prolonging the plaintiff’s enjoyment of the fruits of justice.

8. The issues arising for determination in this appeal are twofold. The first is whether the appellant had a legal or equitable interest over motor vehicle registration no. KCC 814S and the second is whether the transfer of the vehicle to the 2nd interested party was lawful.

9. The primary suit giving rise to the applications dated 6th, 13th and 14th August 2019 was brought by the plaintiff for special and general damages under the Fatal Accidents Act and the Law Reform Act. It was the plaintiff’s case that the defendant’s vehicle Registration No. KAP 028L had knocked down the plaintiff’s husband injuring him fatally. The trial court entered judgment in favour of the plaintiff on 26th April 2017 and awarded her a total of Kshs. 1,071,700/= in damages.

10. It is apparent from the proceedings that the defendant was unable to settle the judgment debt since execution proceedings were commenced against her. The defendant filed an application dated 24th July 2017 in a bid to stop the attachment of motor vehicle registration number KCC 814S, which is the subject vehicle herein. For undisclosed reasons, the defendant withdrew the application dated 24th July 2017 and filed a similar application on 8th November 2017. That application was allowed on condition that the entire decretal sum would be deposited in an interest earning account in the name of both counsels on record within 14 days.

11. On 14th February 2018, the parties entered a consent that the vehicle would be released to the defendant upon payment of the decretal sum and the auctioneer’s charges. It is against this backdrop that the appellant instituted the objection proceedings through the application dated 6th August 2019. I agree with the trial court that there had been an inordinate delay on the part of the appellant in bringing the

application as the same was filed more than two years after the proclamation of the vehicle on 7th June 2017.

12. I am also convinced by the respondents' argument that the transfer of the suit vehicle from the defendant to the appellant was an ill advised attempt to circumvent the course of justice. This finding is informed by several observations. First, the appellant's assertion that she had purchased the vehicle from the defendant at a purchase price of Kshs. 1,800,000/= was not supported by an agreement or relevant documentation to show that consideration passed from the appellant to the defendant. Secondly, no proof was adduced before the trial court to show that the suit vehicle was transferred to the appellant on 10th April 2015 before the execution process began.

13. It can also be inferred from the applications for stay filed by the defendant on 24th July 2017 and 7th November 2017 that the suit vehicle belonged to the defendant when the execution process commenced. Given that the vehicle had been proclaimed by the auctioneer on 7th June 2017, any subsequent transfer of the vehicle to the appellant was a contravention of **Rule 14** of the **Auctioneers Rules** which provides that, "A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence."

14. Consequently, such an agreement to transfer attached goods would be illegal *ab initio* and unenforceable. (See **Njogu & Company Advocates v National Bank of Kenya Limited Civil Appeal No.165 of 2007 [2016] eKLR**, **Patel v Singh (2)[1987] KLR 585** and **Archbolds (Freightage) Ltd v S Spanglett Ltd[1961] 1 QB 374**)

15. In objection proceedings, the burden of proof rests on the objector to prove that he is entitled or has a legal or equitable interest in whole or part of the property attached in execution of a decree. The court in **Precast Portal Structures v Kenya Pencil Company Ltd & 2 others Civil Case No. 969 Of 1990 [1993] eKLR** expounded on this as follows;

The burden is on the objector to prove and establish his right to have the attached property released from the attachment.

...

But where the Court is satisfied that the property was, at the time of attachment, held by the judgment – debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-debtor, or that ownership has changed whereby the judgment – debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the Court shall dismiss the objection.

16. The circumstances under which the vehicle was transferred to the appellant by the defendant are unclear. The appellant did not produce a sale agreement, application for transfer or other relevant documents to shed light on this. The material before this court shows that the vehicle still belonged to the defendant at the time of its proclamation by the auctioneer. The appellant did not refute the claim that she is the defendant's sister. Taken holistically, the evidence points to a scheme orchestrated by the defendant to evade execution.

17. Nothing demonstrates this well calculated scheme and collusion, than the defendants own averments in two affidavits sworn by herself in support of previous applications before the trial being her affidavit sworn on the 24/7/2017 at paragraph 2 and one sworn on 7/11/2017, again at paragraph 2, where she is categorical in her sworn averment that motor vehicle Registration No. KCC 814S belonged to her.

18. These averments by the defendant lay bare and take away any credibility that the assertions by the appellant in paragraph 7 of her affidavit sworn on 26/8/2019 and filed before the trial court could have bought the vehicle from the defendant in the year 2015 yet as at July and November 2017, the plaintiff herself swore on oath that the motor vehicle was hers. In any event evidence of such a sale, if at all, is not tendered.

19. To borrow from the words of **Warsame J (as he then was) in Miema Enterprises Ltd –vs- Njoka Tanners Ltd [2007] eKLR**;

“Having head the submissions of both advocates and having read the various materials presented, I am satisfied that the objection has no legal basis. I hold that there is no evidence to show that the 2nd objector owns the machinery that were attached by the plaintiff. I am satisfied beyond doubt that the goods attached are the property of the defendant disguised in a manner to defeat the claim of the plaintiff. It is my decision that the objection is based on distortion, deceit and deception with a view to distract the cause of justice.

This court has the eyes, mind and ears to see through that deceit and deception.

Indeed the assets of the defendant company is held by this dummy company called Zingo Investments Ltd in order to defeat or derail the liabilities that had accrued to the company.”

20. The circumstances in this case are distinguishable from the case of **Naftali Onchweri Nyangwachi v Meshack Osiemeo Nyagwach & 3 Others Civil Appeal No. 170 of 1991 [1993]eKLR** which was cited by the appellant. In that case the attached vehicle had all along belonged to the objector. There had been no transfer of title to the attached vehicle from the judgment debtor to the objector as in this case. The case of **Atogo v Agricultural Finance Corporation Civil Appeal No. 165 of 1989 [1991]eKLR** was also distinguishable from the present case as in that matter the vehicle had belonged to the objector long before its attachment, which is not the case here.

21. For all the reasons given above, I find that the appellant failed to discharge her burden of proving that she was entitled to the vehicle.

22. When the defendant failed to pay the decretal sum, the vehicle was sold to the 2nd interested party on 17th May 2019, by public auction. Having paid the full purchase price, the vehicle was transferred to the 2nd interested party by an order of the court in Civil Miscellaneous Application No. 72 of 2019. Since the due process was followed in the transfer of the title to the 2nd interested party, the trial court was properly exercised its discretion in allowing the applications dated 13th and 14th August 2019 both of which sought the release of the suit vehicle to the 2nd interested party.

23. In the end, I find this appeal to be lacking in merit and the same is dismissed with costs to the respondents.

Dated, Signed and Delivered at Kisii this 8th day of July, 2020.

A. K. NDUNG'U

JUDGE