



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 70 OF 2018

BEN KOMEN.....APPELLANT

-VERSUS-

VINCENT KIPTANUI KIPTALAM.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Nyaberi, Principal Magistrate, delivered on 20 June 2018 in Iten PMCC No.24 of 2016)

JUDGMENT

[1] This is an interlocutory appeal from the Ruling and Order of the Principal Magistrate's Court (**Hon. Nyaberi**) delivered on **20 June 2018** in **Iten Principal Magistrate's Civil Case No. 24 of 2016: Vincent Kiptanui Kiptalam vs. Philip Kalu & Others**. The brief background to the matter is that the Appellant was the Objector in that suit in which the Plaintiff had claimed general and special damages for injuries suffered in a road traffic accident that occurred on **10 February 2014** along the Eldoret-Iten Road. As the Defendants opted not to defend the suit, interlocutory judgment was entered therein on **20 February 2017** that paved the way for assessment of damages. Ultimately, the lower court entered judgment in favour of the Plaintiff, **Vincent Kiptanui Kiptalam**, in the total sum of **Kshs. 790,585/=** together with interest and costs.

[2] In a bid to realize his decree, the Plaintiff applied for execution by way of attachment and sale of the Defendants' movable property; whereupon warrants of attachment and sale were issued to **Lifewood Traders Auctioneers** for enforcement. As one of the proclaimed items was **Motor Vehicle Registration No. KAG 556X Pick up**, the Appellant filed a Notice of Objection along with the Notice of Motion dated **16 April 2018**, through the firm of **M/s Bundotich Korir & Company Advocates**, objecting to the attachment thereof on the basis that the Appellant was the beneficial owner of the said motor vehicle.

[3] The Objection application was accordingly canvassed before the lower court and a Ruling delivered on **20 June 2018**, dismissing the said application with costs. Being aggrieved by that outcome, the Appellant filed this appeal on the following grounds:

[a] That the learned magistrate erred in law and in fact by dismissing the objection proceedings;

[b] That the learned magistrate erred in law and in fact by not finding that **Motor Vehicle Registration No. KAG 556X** belongs to the Appellant and not the Defendants;

[c] That the learned magistrate erred in law and fact in failing to take into consideration matters that he ought to have taken into consideration and taking into consideration matters which he ought not to have taken into consideration in arriving at his decision;

[d] That the learned magistrate erred in law and fact in failing to address pertinent issues raised in the pleadings, trial and submissions.

[4] Accordingly, the Appellant prayed that the appeal be allowed and that the orders dismissing his Objection application dated **16 April 2018** be set aside and the said application be allowed. He, likewise, prayed that **Motor Vehicle Registration No. KAG 556X** (hereinafter "the Suit Property") be released; and that the Respondent be ordered to meet the costs before the subordinate court as well as the costs of this appeal.

[5] Contemporaneously with the appeal, the Appellant filed an application dated **20 June 2018**, seeking stay of execution and/or sale of the Suit Property. However, Counsel for the parties agreed to abandon the application and prioritize the appeal. Accordingly, the appeal was canvassed by way of written submissions pursuant to the directions given herein on **6 March 2019**. Thus, the Appellant's written submissions were filed herein on **20 May 2019**; while the Respondent's written submissions were filed thereafter on **22 May 2019**.

[6] The stance taken by Counsel for the Appellant was that, since a Sale Agreement had been exhibited by the Appellant in the Objection Proceedings, the trial magistrate erred by arriving at the conclusion that ownership had not been proved for purposes of **Order 22 Rule 51(1)** of the **Civil Procedure Rules**. He relied on **Samuel Mukunya Kamunge vs. John Mwangi Kamaru [2005] KLR** and **Charles Nyambuto Mageto vs. Peter Njuguna Njathi [2013] eKLR** to buttress his argument that the courts have over the years recognized various forms of ownership, such as actual, possessory and beneficial, which may be proved in various way; and therefore that the lower court erred in dismissing the Objection application. Counsel thus urged the Court to allow the appeal and grant the orders sought herein.

[7] On behalf of the Respondent, submissions were filed herein on **22 May 2019** by M/s **Mwakio, Kirwa & Company Advocates** to the effect that, although the Appellant laid claim to the Suit Property by virtue of the Sale Agreement dated **10 April 2016**, the document shows that the seller is one **Leonard Kemboi Koech**; and that no affidavit was sworn by the said **Leonard Kemboi Koech** to confirm that he bought the said motor vehicle from the registered owner, who is the Respondent herein; or that he sold the motor vehicle to the Appellant. Counsel relied on **Sections 8 and 9** of the **Traffic Act, Chapter 403** of the **Laws of Kenya** and the cases of **Ignatius Makau Mutisya vs. Reuben Musyoki Muli** and **Joel Muga Opinja vs. East Africa Sea Food Ltd [2013] eKLR** to support the argument that the best way of proving ownership is by production of a document from the Registrar of Motor Vehicles; and therefore that the lower court committed no error in dismissing the Appellant's Objection application. Counsel consequently urged for the dismissal of this appeal with costs.

[8] I have thus, carefully perused and considered the record of the lower court; and in particular the Objection Proceedings that gave rise to the impugned Ruling and Order in the light of the principle laid down in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, namely, that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[9] The application before the lower court was filed pursuant to **Order 22 Rule 51(1)** of the **Civil Procedure Rules**, which provides that:

"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 parties and to the decree holder of his objection to the attachment of such property."

[10] Thus, in the light of the Grounds of Appeal aforementioned, the only issue for determination is the question whether the Appellant, as the Objector before the lower court, demonstrated to the requisite standard, that he had a justiciable interest in the attached **Motor Vehicle Registration No. KAG 556X** as at **7 November 2017** when attachment was proclaimed over it in execution of the decree passed in **Iten SPMCC No. 24 of 2016**. **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** is explicit enough in providing that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[11] Also pertinent are the provisions of **Sections 109** and **112** of the **Evidence Act** which state that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[12] **Section 8** of the **Traffic Act** gives guidance on what amounts to acceptable proof of ownership of a motor vehicle, namely evidence of registration as an owner. It provides that:

"The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the motor vehicle."

[13] However, as is manifest from the above provision, a Certificate of Registration of a motor vehicle is not conclusive proof of ownership; and therefore, I would endorse the position taken by **Hon. Emukule, J.** in **Charles Nyambuto Mageto vs. Peter Njuguna Njathi [2013] eKLR** that:

"From the interpretation of section 8 of the traffic Act as elucidated above, a person claiming or asserting ownership need not necessarily produce a logbook or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say actual, possessory and beneficial all of which may be proved in other ways including by oral or documentary evidence such as the police abstract report even as held in the Thuranira and Mageto cases that the police abstract report is not of its own, proof of ownership of a motor vehicle. If however there is other evidence to corroborate the contents of police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership."

[14] In this instance, the Appellant did not produce a logbook or certificate of registration to prove his ownership. Instead he relied on a Sale

Agreement dated **10 April 2016** which, no doubt, is an acceptable proof of ownership in its own right. Indeed, in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru [2005] eKLR**, it was acknowledged that:

“It is true that a certificate of search from registrar of motor vehicles would have shown who was registered owner of the motor vehicle according to the records held by the registrar of motor vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved as vehicles often times change hands but the records are not amended.”

[15] I however note that the Sale Agreement dated **10 April 2016** was made between the Appellant, as the buyer, and one **Leonard Kemboi Koech**; and not any of the Defendants before the lower court. On his part, the Attaching Creditor, the Respondent herein, relied on a Police Abstract dated **1 July 2016** which shows that, as at the date of the accident, on **10 February 2014**, **Motor Vehicle KAG 556X** Nissan Pick-up belonged to **Magrima Kimoi Koech**, the 2nd Defendant before the lower court. The Respondent further produced copies of the Motor Vehicles Records as at **15 August 2016** and **21 February 2018** (Annexures VKK V and VKK-5). Both documents show that the owner of the Suit motor vehicle at those points in time was **Kalu Kokwalo Philip**, who was the 1st Defendant before the lower court. What that means is that by the time the Proclamation dated **7 November 2017** was issued in respect of the subject motor vehicle, it evidently belonged to **Philip Kalu Kokwalo**, the 1st Defendant/Judgment debtor and not the Appellant.

[16] In the premises, the lower court cannot be faulted for coming to the conclusion that the Appellant’s objection to attachment was unwarranted. As was stated in the persuasive authority of **Miller vs. Minister of Pensions [1947] 2 All E R 372** with regard to the burden and degree of proof in such cases:

“That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

[17] Accordingly, I find no merit in this appeal and would dismiss the same with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER 2019

OLGA SEWE

JUDGE