



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 51 OF 2018**

**BIN OMAR** (Suing as personal representative of

**THE ESTATE OF ISMAEL M. SHOLO** ..... **APELLANT**

**VERSUS**

**TAHMEED COACH LIMITED** ..... **1<sup>ST</sup> RESPONDENT**

**NASORO HAMDU AHMED** ..... **2<sup>ND</sup> RESPONDENT**

**TAHMEED EXPRESS LIMITED** ..... **3<sup>RD</sup> RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**M. K. Mulei Advocates for the appellant**

**Mouko Advocates for the 3<sup>rd</sup> respondent**

**JUDGMENT**

Before me is an appeal by the appellants against a ruling determined on 7.11.2018 by **Hon. Ndungi** (Senior Resident Magistrate) in which he ruled the objection proceedings in favor of the respondents by releasing attached motor vehicles namely KBT 452F and KBT536U.

**Background facts**

The appellant in an original suit filed on 4.2.2015 brought on behalf of the Estate of the deceased **Ismael Mshamba Sholo** sued **Tahmeed Coach Ltd** and **Nasoro Hamdu Ahmed** seeking general damages under the Law Reform Act and Fatal Accidents. The circumstances leading to the filing of the suit by the appellant were that on or about 30<sup>th</sup> June 2013 along Voi- Mombasa Road, the appellant's husband was riding motor cycle Registration Number KMCV 326V along the said road, when the 2<sup>nd</sup> respondent drove motor vehicle registration number KBT 536U so dangerously, carelessly that it veered off the road and hit the deceased and fatally causing his death.

The appellant administratrix of the Estate sued the respondents on vicarious liability on behalf of and for the benefit of the estate of the deceased.

In a considered Judgment dated 31.1.2018, the Learned trial Magistrate found in favor of the appellant and made the following declarations:

**Liability at 100%**

**Pain and Suffering Kshs. 10,000/=**

**Loss of expectation of life Kshs. 200,000/=**

**Loss of dependency Kshs.3,300,000/=**

**Funeral expenses Kshs. 20,000/=**

**Total quantum    Kshs.3,500,000/=**

**Plus costs and interest.**

The appellant moved to execute the Judgment and through instructions issued to **Jakim Auctioneers** an order attaching the respondents motor vehicles namely KBT 452F and KBT 536U was effected to satisfy the Judgment sum aforementioned above.

The objector being aggrieved with the attachment filed objection proceedings vide a notice of motion dated 13.9.2018 filed in court on 14.9.2018. The notice of motion was heard interpartes and the Learned trial Magistrate ordered as follows:

- 1) The objector is the legal and equitable owner of motor vehicles Registration No. KBT 452F and KBT 536U.**
- 2) The attachment of motor vehicles Registration Numbers KBT 452F and KBT 536U is hereby lifted and valeted.**
- 3) Motor vehicles Registration Number KBT 452F and KBT 536U be released and given to the objector Tahmeed express Limited.**
- 4) The defendants to pay Auctioneer charges to be agreed or taxed by the court. This order be extracted and served upon Jakim Auctioneers**

Being aggrieved with the decision the appellant filed this appeal challenging the lifting of the attachment.

The issue to be addressed in this appeal is whether the Judgment for the sufficiency of the decree can be enforced by way of attachment of the movable properties of the objector which were subject matter of the objection.

For the present purposes, the appellant filed twelve grounds of appeal dated 12.11.2018 as hereunder:

- 1. The Learned Magistrate erred in law and in fact by failing to consider the appellant's submissions.**
- 2. The Learned Magistrate erred in finding that the objector had a legal and equitable interest in the attached motor vehicles.**
- 3. The Learned Magistrate erred in law by allowing the 3<sup>rd</sup> respondent's objection despite over whelming evidence of collusion between the 1<sup>st</sup> respondent's directors and those of the 3<sup>rd</sup> respondent.**
- 4. The Learned Magistrate erred in law and fact by finding that there was a lawful sale and transfer without any evidence of a consideration.**
- 5. The Learned Magistrate erred in law by finding that the objector was a bonafide purchaser for value without notice.**
- 6. The Learned Magistrate erred in law and fact by finding that the objector never knew about existence of the case when it purchased the motor vehicles subject matter hereof contrary to available evidence.**
- 7. The Learned Magistrate erred in law by failing to consider the effect of the lack of authority to act on the part of the 3<sup>rd</sup> respondent's manage.**
- 8. The Learned Magistrate erred in fact by failing to appreciate the shared office space, addresses and names of the directors of the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent.**
- 9. The Learned Magistrate erred in law by finding that police assistance is a perquisite for removal by auctioneers.**
- 10. The Learned Magistrate erred in law and fact by finding that the transfers for the motor vehicles were paid for without any evidence of such payments.**
- 11. The Learned Magistrate erred in law and fact by failing to appreciate that fact that the 3<sup>rd</sup> respondent annexed two different sets of log-books for the same motor vehicles in its affidavits.**
- 12. That the Learned Magistrate erred in law and in fact by making a holding contrary to the pleadings filed by the parties and going into unpleaded issues.**

The appeal was agreed to be disposed of by way of written submissions. The primary case by counsel for the appellant was that upon delivery of Judgment there was collusion between the defendants Tahmeed Coach Ltd and Tahmeed Express (objector) to defeat the enforcement and execution process to satisfy the Judgment of the trial court in favor of the appellant. It was expounded with considerable judicial precedents that the Learned trial Magistrate erred in fact and Law to lift the attachment. This step as taken is to persuade this court to allow the appeal relying on the following authorities: **New Nyanza Wholesalers v Muhammed Rizaka Umal [2013] eKLR, Abdalla Ali Hussein Mohamed and Clement A. Ojiambo v Faruk Ali Hussein CA 118 of 1997** Learned counsel engaged in a historical examination of the transfer of the two buses in question against the position taken by the objector that they are bona fide purchasers for value from the 1<sup>st</sup>

respondent/defendant.

According to Learned counsel, it is relevant to add in this appeal that the primary stipulation of the transfer of the movable property was to defeat the course of justice. Learned counsel argued and contended that the appeal on lifting the attachment ought to be allowed to enable the appellant to complete execution process against the Judgment debtor.

On the other hand, Learned counsel **Mr. Mouko** for the objector submitted that the appellant has failed sufficiently to show any collusion or fraudulent dealings in respect of the transfer and purchase for value of motor vehicles from the original owner of the assets. It was Learned counsel submission, that the appellant's appeal is meant to stifle and deprive the objector of his right to private property. On this argument Learned counsel asked this court to go further and be guided by the principles in the land mark case of **Salomon v Salomon 1897 A. C 22 H. L.** The position taken by Learned counsel in opposing the appeal is that Tahmeed Coach Limited the 1<sup>st</sup> respondent and Tahmeed Express Limited (3<sup>rd</sup> respondent) are separate corporate legal entities, therefore submitted Learned counsel the appellant and Tahmeed Express are non-suited parties in Civil Case No. 18 of 2018. That the purported submissions from the bar that there is a close knit relationship between the directors of the 1<sup>st</sup> respondent company and the 3<sup>rd</sup> respondent is not supported with any cogent evidence.

In dealing with the legal issues arising from the appeal, Learned Counsel cited the following cases **Kolaba Enterprises Ltd v Sham Sudan Hussein Var Vani [2014] eKLR, Hanna Maina T/A Taa Flowers v Rift Valley Bottlers Ltd [2016] eKLR** in all these Learned counsel argued and submitted that the appeal ought to be dismissed.

It is against this backdrop that I must analyze the evidence on record a fresh to come to my own conclusion in respect of the appeal and the grounds that were raised against the Ruling of the trial court.

### **The Law and determination**

With this background its relevant to recapitulate the provisions on execution of decrees upon delivery of Judgment. The law relating to execution of decrees is found in Order 22 of the Civil Procedure Rules. Under Order 22 Rule 7 and subject to the provision Section 38 of the Civil Procedure Act the court has powers to enforce execution of a Judgment and the decree on any one of the following electives or both.

- 1) By delivery of any property specifically decreed;**
- 2) By attachment and sale, or by sale without attachment, of any property;**
- 3) By attachment of debts;**
- 4) By arrest and detention in prison of any person;**
- 5) By appointing a receiver; or**
- 6) In such other manner as the nature of the relief granted may require;**

Order 22 Rule 8 of the Rules provides for execution of decrees for movable property not in possession of the Judgment debtor:

***“When the application is made for attachment of any movable property belonging to a Judgment debtor but not in his possession, the decree holder shall annex to the application on liability of the property to be attached consisting of a custody description of the property.”***

Order 22 Rule 51 (1) of the Civil Procedure Rules provides as follows:

***“Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 the objection to the attachment of such property.”***

### **Who was at fault?**

The Learned trial Magistrate found that there was an oral agreement for the sale of the subject motor vehicle between the objector and the 1<sup>st</sup> respondent on 30.8.2018. The objector claims that despite the delay for NTSA (National Transport Safety Authority) effecting the transfer with the 1<sup>st</sup> respondent it had taken vacant possession of vehicles. From the proclamation and attachment, the auctioneers moved in and executed the order over the disputed buses on 13.9.2018. The question under consideration is whether the Learned trial Magistrate exercised discretion judiciously to lift the attachment which was adverse to the appellant mode of execution process to realize the fruits of her Judgment. The degree of certainty and proof required depends on the circumstances before the trial court. This has been adumbrated in the persuasive authority of **Sebi v Top Finance Ltd 17021 of 2015** where the court stated:

***“The question to be decided is whether on the date of attachment, the Judgment debtor or the objector was in possession, where court is satisfied that the property was in possession of the objector, the court has to determine whether it was held on the objectors own account or in frost for the Judgment debtor.”***

***“Questioning of legal right and title are not relevant except in so far as they may affect the decision as to whether possession is on his own account or on trust for the Judgment debtor or some other person.”***

It is apparent from the appellant submissions that the 3<sup>rd</sup> respondent and the 1<sup>st</sup> respondent engaged in a sale agreement of the two vehicles in order to offend or defeat the imminent execution process. Though fraud was not pleaded before the trial court what the appellant sets out hinges on collusion and fraudulent conduct between the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent. I will agree with the submissions only that the Court of Appeal statement in the case of **Hamhal & Co. v Buganda Industries Ltd 196 01EA 318** and **Richard Akwesera Onditi v Kenya Commercial Finance Co Ltd CA 329 of 2009** did point out the test on this concepts that:

***“Needless to say fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability.”***

The appellants while defending the objection proceedings at the trial court did not allege fraud but relied on some documentary evidence on transfer of sale of the motor vehicles from the 1<sup>st</sup> respondent to the 3<sup>rd</sup> respondent.

The approach that could have been adopted by the appellant was to specifically plead fraud and particulars thereof as held in the case of **Vivo Energy Kenya Ltd v Malaba Petrol Station Ltd & 3 Others [2015] KLR**

In the absence of a proper pleading on fraud there is no finding by the trial court or on appeal that the 1<sup>st</sup> respondent engaged in a fraudulent transaction. It is my humble view that even on appeal under Section 78 (1) of the Civil Procedure Act a party is permitted to adduce new evidence which might not been available at the initial trial. I also tend to think in addressing this appeal there is considerable merit in view of the fact that the 1<sup>st</sup> respondent was aware of the existence of the Judgment following the determination of the claim with the appellant.

In response to the matters arising from the evidence and submissions on appeal there are clear factual which stand out undisputed.

- 1) That the objection had created some legal, beneficial or equitable interest in the movable property attached by Jakim Auctioneers.***
- 2) That the property attached was no longer in possession of or control of the 1<sup>st</sup> respondent the vendor.***
- 3) That in executing the oral sale agreement and subsequent transfer the attached property (refer to (buses) were on the account of the 1<sup>st</sup> respondent and not the objectors in the trial court proceedings.***
- 4) That in alienating the two buses by way of sale, the Judgment debtor (1<sup>st</sup> respondent was doing so to defeat the execution and enforcement of the decree issued by the trial court on 31.1.2018.***
- 5) That although the sale transaction had taken place between the 1<sup>st</sup> respondent and the objector it was for the purpose of the objector holding the property in trust of and on behalf of the 1<sup>st</sup> respondent Judgment debtor.***

The issues decided by the court on execution under the Civil Procedure Act and the interplay between the 3<sup>rd</sup> respondent and the 1<sup>st</sup> respondent herein the Judgment debtor was purely decided on exercise of discretion and the available evidence. There is no evidence that the Judgment debtor is insolvent and the two disputed movable assets are the only properties at their disposal to satisfy the decree issued in favor of the appellant. This court has not been told at what time the legal counsel served the decree upon the 1<sup>st</sup> respondent to demonstrate that the sale of the buses was for an attachment of the properties to defeat and obstruct justice for enforcing a valid Judgment of the court.

By reason of the jurisdiction of the appellate court to interfere with the findings of the trial court the principles as laid down in the case of **United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898**, at pg 908 where **Madan JA** stated:

***“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”***

In the circumstances of this case, I am fortified with Law the trial court which determined the objection proceedings has not been shown to have misdirected or applied wrong principles in reaching the decision of lifting the objection.

It is not out of the way to draw some inferences and conclusion on the transaction between the 1<sup>st</sup> respondent (Judgment debtor) and the 3<sup>rd</sup> respondent. The court relies on prima facie evidence which paints the Judgment debtor in bad light. From the record, Judgment in **CMCC NO. 28 OF 2015** was delivered on 31.1.2018 awarding quantum of Kshs.3,530,000/= plus costs and interest. The decree has remained unsettled by the Judgment debtor and in the course of it a process to alienate, sale, transfer of some of the assets was commenced.

That Jakim Auctioneers was required to conduct due diligence to ascertain the ownership of the proclaimed movable properties before proceeding with attachment but the documentary evidence appeared to be conflicting as to the ownership of 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent companies. Undoubtedly, though the period between the transfer and attachment establishes that on or about 13.9.2018 the

attached properties were legally in possession of the Judgment debtor as the transfer documents by NTSA had not been effected. Whether the objector was in physical control of attached assets or had a legal interest remains moot.

This court under the power on inherent jurisdiction provided for in Section 3 A of the Civil Procedure Act must come to the aid of the parties. The features of this residual power is applicable to ensure fairness and to meet the ends of justice, not to render judicial proceedings ineffective and to prevent an abuse of the process.

It is quite plain that on the issues for appeal arising from the pleadings there is a valid Judgment in personam against the 1<sup>st</sup> respondent. There was no reason to join Tahmeed Express the 2<sup>nd</sup> respondent to this appeal as they cannot be properly treated as a party to the initial suit between the appellant and the 1<sup>st</sup> respondent.

There is only one precept in point as defined in **Stroud's Judicial Dictionary** and **Jowitt's Dictionary of English Law** which states respectively:

*“A Judgment in personam binds only the parties to the proceedings as distinguished from one in rem which fixes the status of the matter in litigation once for all, and concludes all persons.”*

*“A Judgment in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the court having in certain cases a right to condemn goods, its Judgment is conclusive against all-the world that the goods so declared were liable to seizure. So a declaration of legitimacy is in effect a Judgment in rem..... Judgments in personam are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a Judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it.”*

Having laid this foundation, itself leads me to the question whether the third respondent Tahmeed Express would be allowed to settle the Judgment which demand notice of its existence and particulars were never served upon it. I am not sure that the view taken by the appellant counsel supposedly established or demonstrated collusion or fraud between the 1<sup>st</sup> and 2<sup>nd</sup> respondent on the contract of sale of the two motor vehicles.

So in this case it was incumbent upon the Judgment creditor to show that by the 1<sup>st</sup> respondent disposing off part of his assets he was committing an act of bankruptcy or insolvency so as not to honor the binding decree in **CMCC 28 of 2015**.

As provided for in Section 38 of the Civil Procedure Act on the Order 22 (7)(8) & (51) of the Civil Procedure Rule there are other remedies for the appellant to execute and enforce the Judgment against the 1<sup>st</sup> respondent than allowing herself to re-litigate with the 3<sup>rd</sup> respondent pertaining to the pending decree.

**What shall this court do now?** It seems that the order of attachment was all precipitated by the 1<sup>st</sup> appellant not settling the decree and no evidence that he had exercised his constitutional right of appeal with stay of execution in place. The Judgment in personam on this aspect of the case has been pending for over eight months necessitating the appellant to invoke the provisions of the Law on execution. There was prima facie evidence that a binding contract of sale of the disputed motor vehicles was initiated during the pendency of the decree against the Judgment debtor. Those documents in variably seen by the trial court and the appeal court cannot amount to good faith on the part of the 1<sup>st</sup> respondent on the Judgment debtor in **CMCC 28 of 2015**.

These are important considerations as the Judgment debtor has an obligation to the appellant to deal and settle the Judgment in lieu, due and pending execution. At the core is the enforcement of matters arising out of the objection proceedings and on appeal to this court. There is the question to be settled as to the liabilities and costs which have arisen on the issue of interpretation of the sale agreement dated 30.8.2018 between the Judgment debtor (1<sup>st</sup> respondent) and 2<sup>nd</sup> respondent.

My understanding, this whole transaction taking the situation broadly ought to be remedied by an order of this court invoking inherent jurisdiction to grant a remedy which was not part of the appeal. In the English case of **Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd Lord Diplock** described *“the court's inherent jurisdiction appears to apply to an almost limitless set of circumstances. There are four general categories for use of the court's inherent jurisdiction:*

- 1. To ensure convenience and fairness in legal proceedings.*
- 2. To prevent steps being taken that would render judicial proceedings inefficacious.*
- 3. To prevent abuses of process.*
- 4. To act in aid of superior courts and in aid or control of inferior courts and tribunals.”*

Inevitably, in reference to this case it will be manifestly and erroneous for this court not to issue an order to guide the issue of auctioneers costs incurred as a result of the disputed attachment. In this regard and in full view of the matter the 1<sup>st</sup> respondent should be held responsible for costs and incidentals flowing from the attachment. It should suffice for me to say that the earlier order by the Deputy Registrar on Jakim Auctioneers costs be varied in tandem with the findings of this court.

For the above reasons the appeal lodged by the appellant fails for lack of merit. As a consequence, the stay on attachment is lifted and the proclaimed and attached buses be released to the 3<sup>rd</sup> respondent.

The costs of this appeal be borne by the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 10<sup>TH</sup> DAY OF DECEMBER 2019.**

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Mouko for the 3<sup>rd</sup> respondent