REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 137 OF 2010

SYLVESTER M. MOKOKHA.....APPELLANT

-VERSUS-

JOSEPH KIPTANUI KALYA.....1ST RESPONDENT

FREDRICK MANOAH EGUNZA.....2ND RESPONDENT

(Being An appeal from the Ruling of the Hon. G.M. Mutiso, Resident Magistrate, delivered on 24 June 2010 in Kapsabet PMCC No. 11 of 2010)

JUDGMENT

[1] The 1st Respondent, **Joseph Kiptanui Kalya**, sued the 2nd Respondent, **Fredrick Manoah Egunza** before the Principal Magistrate's Court at Kapsabet in **Civil Case No. 11 of 2010: Joseph Kiptanui Kalya vs. Fredrick Manoah Egunza** seeking, *inter alia*, a Declaration that he had paid the entire purchase price and is therefore the lawful owner of **New Holland Tractor Registration No. KAN 611K** together with its implements. It was his contention that he bought the tractor on or about **14 April 2007** from the 2nd Respondent at an agreed consideration of **Kshs. 1,320,000/=;** but that by trickery and force, the 2nd Respondent took the Tractor from him on **21 December 2009** and was in the process of transferring the same to a third party. Consequently, the 1st Respondent filed **Kapsabet Principal Magistrates Civil Suit No. 11 of 2010** along with an interlocutory application dated **20 January 2010**, under a Certificate of Urgency, seeking a temporary order of attachment before judgment as well as an order of injunction restraining the 2nd Respondent from repossessing or in any way dealing with the tractor pending the hearing and determination of the suit.

[2] The application was heard and allowed *ex parte* on **20 January 2010** by **Hon. M. Mutiso (RM)** who, consequently fixed the same for *inter partes* hearing on **28 January 2018**. In the meantime, the Appellant herein, **Sylvester Makokha**, filed a Notice of Objection to Attachment dated **21 January 2010** under the then **Order XX1 Rule 53** of the **Civil Procedure Rules and Rules 7 and 10** of **Order XXXVIII** of the **Civil Procedure Rules**. His contention was that he is the legal and/or equitable owner of the subject tractor; and that he was not a party to the suit nor was he a guarantor of the 2nd Respondent's liability.

[3] The record of the proceedings of the lower court shows that the Appellant and the 1st Respondent then appeared before the Trial Magistrate on **21 January 2010** and had the following order recorded by consent:

> **"By consent Tractor Reg. No. KAN 611K be held in a yard in Mayoni near Mumias which is owned by the Objector and the Plaintiff to have the keys for the yard. Warrant of Arrest is hereby issued against the Defendant to attend court and show cause why he should not furnish security of Kshs. 1.5 million for the due performance of a likely decree in this matter."**

[4] About one week after the aforementioned Consent Order, an application, by way of Notice of Motion, was filed before the lower court by the 1st Respondent seeking orders that the subject tractor be released to him pending the hearing and determination of the suit; and that in the interim it be removed from the Objector's yard in Mayoni, Mumias and be kept in safe custody at Kapsabet Police Station; and that the Log Book and documents of ownership be deposited in court pending the hearing of the application *inter partes.* That application was ultimately heard *inter partes*, and in a Ruling dated **24 June 2010**, the lower court ordered that the tractor be released to the 1st Respondent on the following terms:

> **[a]** That the 1st Respondent would be responsible for the maintenance of the tractor in good running condition pending the hearing and determination of the suit;

[b] The 1st Respondent would insure and keep the tractor insured until the final determination of the suit;

[c] The 1st Respondent would produce the tractor in court as and when required;

[d] The 1st Respondent was not to sell or otherwise part with possession of the tractor without the leave of the court.

[e] A breach of any of the above conditions would disentitle the 1st Respondent to custody of the tractor.

[5] Thus, feeling aggrieved by the Ruling of the **Hon. M. Mutiso (RM),** dated **24 June 2010,** the Appellant, who was the Objector before the lower court, filed this appeal on **20 July 2010** on the following grounds:

[a] The Learned Trial Magistrate erred both in law and in fact in allowing the application dated **27 January 2010** when the same amounted to determining the suit at an interlocutory stage;

[b]The Learned Trial Magistrate grossly erred in law in allowing an application that had been brought under the wrong provisions of the law;

[c] The decision of the Trial Magistrate is wrong both in law and in fact as it is plainly at variance with the pleadings and orders sought;

[d] The entire procedure adopted is a nullity as it obviously contradicted the position of the law.

[e] The Learned Trial Magistrate technically set aside the consent order recorded when there was no such prayer in the application;

[f] The Learned Trial Magistrate erred in not finding that the suit on which the application was premised was fatally defective;

[g] The decision of the Trial Magistrate is hence plainly wrong.

[6] In the premises, the Appellant prayed that the orders of **24 June 2010** be set aside and in place thereof the application dated **27 January 2010** be dismissed with costs and parties revert to the *status quo* subsisting before **17 January 2010**.

[7] This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was placed before the lower court and make its own conclusions thereon. The words of **Sir Clement de Lestang, VP,** in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** still ring true today as they did then, 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..."**

[8] The Appellant's Grounds of Appeal were urged in three clusters by Learned Counsel vide the written submissions dated **30 August 2017**; namely, Ground 1, Grounds 2, 3, 4 and 5; and lastly Grounds 6 and 7.

Ground 1: On Premature Determination of the Dispute

[9] Ground 1 asserts that the Learned Trial Magistrate erred both in law and in fact in allowing the application dated **27 January 2010** when the same amounted to determining the suit at an interlocutory stage. As has been pointed out herein above, what the 1st Respondent sought from the lower court by way of relief in the main suit was a declaration that he had paid the entire purchase price and is therefore the lawful owner of the subject tractor. He also prayed for a permanent injunction to restrain the 2nd Defendant from claiming the tractor. And all the Court did in the interim was to make orders for the safe custody of the tractor pending the hearing of the dispute between the parties, hence the orders that:

[a] That the 1st Respondent would be responsible for the maintenance of the tractor in good running condition pending the hearing and determination of the suit;

[b] The 1st Respondent would insure and keep the tractor insured until the final determination of the suit;

[c] The 1st Respondent would produce the tractor in court as and when required;

[d] The 1st Respondent was not to sell or otherwise part with possession of the tractor without the leave of the court.

[e] A breach of any of the above conditions would disentitle the 1st Respondent to custody of the tractor.

[10] It could very well be that the 1st Respondent was in arrears at the time of the filing of the lower court matter. However, those are issues that could only be finally resolved by the trial court after hearing the parties and the trial court appears to have appreciated as much. In the

impugned Ruling. Here is what the Learned Magistrate had to say in that regard:

> **"The suit filed herein is between the plaintiff and the defendant. And the issue in the main suit is whether the plaintiff is the owner of the tractor. The issue no. (i) above is whether the tractor should be released to the plaintiff; not whether the plaintiff is the owner of the tractor. So to answer issue no. (ii) above, I hold that releasing the tractor to the plaintiff would not amount to determining this suit at an interlocutory stage."**

[11] I therefore find absolutely no basis for the Appellant's complaint that the lower court had finally determined the suit at an interlocutory stage.

Grounds 2,3,4 and 5: On Setting aside of the Consent Order

[12] The gist of Grounds 2, 3, 4 and 5 is the validity of the process used by the 1st Respondent to have their consent order dated **21 January 2010** set aside. There is no disputation that the consent was entered into between the Appellant and the 1st Respondent to the effect that the tractor be held in the Appellant's yard and that the keys to the yard would be kept by the 1st Respondent. According to the Appellant, the 1st Respondent did not demonstrate that the consent order was incapable of implementation, to warrant its being set aside. Counsel for the Appellant relied on the cases of **Flora N. Wasike vs. Destimo Wamboko [1982-1988] KLR, Sire vs. Municipal Council of Mombasa [1991] KLR** and **Brook Bond Liebig (T) Ltd vs. Mallya [1975] EA 266** for the proposition that a consent order has a contractual effect and can only be set aside on those grounds which would justify the setting aside of a contract, such as fraud, mistake or misrepresentation.

[13] The Appellant's argument that a consent order has a contractual effect cannot be faulted. Hence, in **Flora N. Wasike vs. Destimo Wamboko** (supra) the Court of Appeal approved an opinion expressed in **Setton on Judgments and Orders** (7th Edition) Vol. 1, page 124 that:

> **"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."** (see also **Brooke Bond Liebig (T) vs. Mallya**)

[14] The record of the lower court confirms that the Consent Order of **21 January 2010** was made in the presence of **Mr. Cheruiyot**, Counsel for the Plaintiff (1st Respondent herein), and **Mr. Mukhoyo**, Counsel for the Objector (the Appellant herein). On what basis then was the order set aside? The impugned Ruling of the lower court answers this question thus:

> **"The plaintiff says that the objector's yard at Mayoni is not lockable and the tractor was being vandalized either by the objector or by third parties who had access to the said yard. The defendant vehemently denied this in the replying affidavit. In the supporting affidavit, the plaintiff says the yard is not lockable and, as if to confirm this, says that he walked into the yard with his advocate on 26.1.2010 in the absence of the objector. The objector confirms that the plaintiff did in fact go to his yard in his absence. When the consent dated 21.1.2010 was entered, it was on the understanding that the objector's yard was lockable. The objector confirms that the plaintiff just walked into the yard. This buttresses the plaintiff's statement that the objector's yard is not lockable. Third parties can access the yard in the same way the plaintiff accessed it without the objector's permission. This court cannot rule out the danger of vandalism of the tractor by third parties in the circumstances...For the above reasons, I hold that the consent entered by the parties on 21.1.2010 was through deliberate material misrepresentation and fraud on the part of the objector who claimed that his yard at Mayoni was lockable when he knew that the said yard was not lockable and the tractor could not be safely preserved at the said yard. The said consent is hereby discharged..."**

[15] Clearly therefore, the Learned Magistrate cannot be faulted in the circumstances, granted that he was satisfied that the consent order had been premised on material misrepresentation. It is important to bear in mind the objective of the order and the intention of the trial court and the parties in coming up with the consent order; it was not to finally compromise the suit, as was the situation in cases of **Flora N. Wasike vs. Destimo Wamboko, Sire vs. Municipal Council of Mombasa** and **Brook Bond Liebig (T) Ltd vs. Mallya (supra),** but to preserve the subject matter, the tractor, pending the hearing and determination of the suit before the lower court. Accordingly, the Learned Magistrate was entitled, and indeed obliged, to make such orders as would give efficacy to that objective.

[16] Regarding the Appellant's submissions that the application dated **27 January 2010** had been brought under the wrong provisions of the law and that the entire procedure adopted is a nullity for contradicting the position of the law, it is noteworthy that the application was expressed to have been filed under **Section 3 and 3A** of the **Civil Procedure Act**, **Chapter 21** of the **Laws of Kenya** as well as **Order 1 Rule 1** of the **Civil Procedure Rules.** Whereas **Order 1 Rule 1** of the **Civil Procedure Rules** may not be appropriate for purposes of the application, with the amendment of the **Civil Procedure Rules, 2010,** it is no longer tenable for technical objections to be taken on the basis of form; for **Order 51 Rule 10** of the **Civil Procedure Rules** is now explicit that no objection shall be made and no application shall be refused merely by reason of a failure to state the provision under or by virtue of which an application is made.

[17] Moreover, if it is permissible for an application for setting aside a consent order compromising the entire suit to be made in the suit itself; how much more so a consent order in respect of an interlocutory application? With the promulgation of the Constitution of Kenya 2010, it is now manifest to everyone that the duty of a court of law is to do justice. Indeed, in the **Brooke Bond Liebig (T) Ltd Case**, one of the grounds of appeal was that the application for setting aside the consent order was incompetent and should not have been entertained for having been filed under the wrong provision of the law. The Court of Appeal adopted the position expressed in the case of **Mawji vs. Arusha General Store [1970] EA 137** that:

> **"...the rules of procedure are designed to give effect to the rights of parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of**

> **procedure would not result in vitiation of the proceedings...this does not mean that the rules of procedure should not be complied with -- indeed they should be. But non- compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties."**

[18] The Court proceeded to hold that a court is not precluded from giving effect to its decisions under its inherent powers, especially where time and expense can be saved. In the premises, being in no doubt as I am that the trial court had the inherent jurisdiction to make such orders as would meet the ends of justice in the case before him, there is no merit in the argument that the application was brought under the wrong provision of the law; or that the decision of the Trial Magistrate in the Ruling dated **24 June 2010** is at variance with the pleadings and orders sought, noting that the prayer of the 1st Respondent was simply to have the tractor preserved pending the hearing of the suit.

Grounds 6 and 7: On attachment before Judgment:

[19] In support of Grounds 6 and 7 of the Appellants Grounds of Appeal, it was his argument that the consent order recorded on **21 January 2010** was made pursuant to an application which sought for an order of attachment before judgment; and that the 2nd Respondent having furnished security in the form of **Land Parcel No. NANDI/KAPKANGANI/1012,** it was improper for the Trial Magistrate to release the Tractor to the 1st Respondent because he was yet to prove his claim. Having found that the Trial Magistrate was justified in coming to the conclusion he came to in his Ruling dated **24 June 2010**, this ground is similarly untenable. It bears repeating that an appellate court can only disturb the decision of a lower court if it is shown that the Trial Magistrate misdirected himself or acted on wrong principles. Hence, I would adopt the instructive words of **Sir Kenneth O'Connor** in **Peters vs. Sunday Post Limited [1958] EA 424** that:

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that geevidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[20] In the result, 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 13TH DAY OF JULY, 2018

OLGA SEWE

JUDGE