



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 258 OF 2010

ABIGAEL SHIGANGA.....1ST APPELLANT

DAVID MANASSES KURIA.....2ND APPELLANT

- V E R S U S -

PASTOR MESHACK GACHAO

ALFRED J. KIRUBI

FRANCIS A. MUNANE

GEOFFREY KIRUINGI as office bearers of CLIP

INVESTMENT CO-OPERATIVE SOCIETY LIMITED ...1ST RESPONDENT

PETER NDAKWE 2ND RESPONDENT

HARRISON MBABU MARETE3RD RESPONDENT

(Being an appeal from the ruling and order of Honourable Mrs. Gichohi SRM delivered on 22nd June, 2010 in Nairobi (Milimani Commercial courts) CMCC no. 9207 of 2007.)

JUDGEMENT

1) The appellants herein are before this court seeking to have the order of Hon. P. Gichohi (Mrs), learned Senior Principal Magistrate issued on 22.06.2010 in which she allowed the 3rd Respondent's summons dated 23rd January 2010. The appellants put forward the following grounds on appeal.

1. THAT the learned magistrate erred in law by failing to have due regard and to take into account the various issues raised in the replying affidavit and the supplementary affidavit of David Manasses Kuria sworn on 1st February, 2010 and 26th February 2010 respectively.

2. THAT as a consequence of ground 1 above, the learned magistrate failed to appreciate that there are very substantial issues of fact and law disclosed by the said affidavits and the annexures on record.

3. THAT the learned magistrate misdirected herself by finding that the 3rd Respondent was the owner of the motor vehicle registration no.KAW 371B when there was in fact no evidence to

support the 3rd Respondent's allegations.

4. THAT as a consequence of ground 3 above, the learned magistrate erred when she found that the proclamation of the said suit motor vehicle was unlawful when the same was lawful.

5. THAT the learned magistrate erred when she failed to find that, contrary to all the uncontroverted evidence available, the 1st Respondent was one and the same entity as the registered owner of the motor vehicle KAW 371B when the evidence on record shows that they are indeed one and the same entity with the registered owner being an investment arm of the 1st Respondent.

6. THAT the learned magistrate erred in law and in fact by finding the 3rd Respondent's application meritorious and allowing the same with costs of the auctioneer's being borne by the appellants.

7. THAT in all the circumstances of the case, the learned magistrate failed to do justice before her.

2) When the appeal came up for hearing, this court made orders directing the appeal to be disposed of by written submissions.

3) I have re-evaluated the arguments presented before the trial court and the rival written submissions. The history behind this appeal is short and straightforward. The appellants herein filed an action against the 1st and 2nd Respondents before the Chief Magistrate's Court, Commercial Courts, Nairobi in which they sought for specific performance of a contract and for a refund of the monies paid to the 1st and 2nd Respondents. Judgement in default of appearance and defence was entered against the 1st and 2nd Respondents. The appellants thereafter commenced execution proceedings to enforce the judgement. In the course of execution the auctioneers attached motor vehicle registration no. KAW 371B. Harrison Mbaabu Marete, the 3rd Respondent herein took out objection proceedings vide the chamber summons dated 23rd January 2010. The 3rd Respondent averred that the attached motor vehicle belonged to him hence it was wrongly attached. The appellants vehemently opposed the 3rd Respondent's chamber summons claiming that the 3rd Respondent was not the registered owner and that he had not tendered any credible evidence to establish that he was the owner. The learned Senior Principal Magistrate considered the dispositions of both sides over the summons and she eventually allowed the 3rd Respondent's application on the basis that the Respondent had proved that he was the owner of the attached motor vehicle. She also proceeded to declare the proclamation unlawful and ordered the appellants to bear the auctioneers' charges.

4) Though the appellants put forward a total of 7 grounds in their memorandum, those grounds may be summarised to two main grounds revolving around the determination of the ownership of motor vehicle registration KAW 371B and secondly, the question on the lawfulness of the attachment. It is the appellants' submission that the 3rd Respondent did not prove ownership of the aforesaid motor vehicle therefore the proclamation and or attachment was lawful. The 3rd Respondent on the other hand is of the view that he demonstrated that the motor vehicle was his property both in law and in equity. I have carefully re-examined the material placed before the trial court by both sides. The 3rd Respondent stated that he bought the motor vehicle from Kings' Script Publishers Ltd and was given the original log book. The 3rd Respondent attached to the supporting affidavit a copy of the sale agreement and a copy of the logbook. The appellants challenged the 3rd Respondent's averments by filing the replying affidavit of David Manasses Kuria, the 2nd appellant herein. It was the averments of the 2nd appellant that the 3rd Respondent was not the owner of motor vehicle registration no. KAW 371B. A copy of the records from the registrar of motor vehicles attached to the replying affidavit indicated that the motor vehicle is registered in the name of Kings' Script Publishers. The appellants further queried the genuinity of the sale agreement between the 3rd Respondent and Kings' Script Publishers. The appellants further argued

that Clip Investments Cooperative Society Ltd is the same entity as Kings' Script Publishers. They annexed to the replying affidavit of the 2nd appellant a copy of an agreement executed by Clip Investment Cooperative Society Ltd and the 2nd appellant. In Clause B of the aforesaid agreement, it is stated that Clip Investments Cooperative Society Limited has entered into an agreement with Kings' Script Publishers Ltd in which Clip Investment Cooperative Society Ltd committed itself to invest its members investment funds into Kings' Script Publishing business in return for a profit.

5) In response to these averments the 3rd Respondent stated that The attachment cannot be allowed to stand because neither the 3rd Respondent nor Kings' Script Publishers Ltd are parties to the suit. It is also argued that there was no evidence to show that Clip Investment Cooperative Society Ltd and Kings' Script Publishers Ltd are one and the same entity.

6) The appellants further appreciated the import of Section 8 of the Traffic Act which clearly provides that the court can accept other evidence other than the records of the register kept by the Registrar of motor vehicles to prove evidence of ownership. The appellants argued that there was no compelling reasons to show that the 3rd Respondent was the registered owner. It is pointed out that the agreement did not have a revenue stamp contrary to Section 5 of the Stamp Duties Act therefore the same remains inadmissible in evidence. It is said that the agreement does not have a signature of any of the directors who should have affixed the company's seal pursuant to the provisions of Section 34(1) (a) and 38 of the Companies Act (now repealed). The appellants were very critical in detail in rubbishing the agreement of sale of the motor vehicle to the 3rd Respondent. It is argued that the same does not have an explanation on whether the person who signed the agreement had authority to do so. The learned Senior Principal Magistrate considered the material placed before her and the rival submissions and came to the following conclusions:

7) First, that Kings' Script Publishers Ltd is not a party to the suit and does not deny selling the motor vehicle to the 3rd Respondent. The learned Senior Principal Magistrate also pointed out that the 1st Respondent is not claiming ownership of the motor vehicle. The trial magistrate further stated that the appellants not being privy to the sale agreement between the 3rd Respondent and Kings' Script Publishers Ltd could not lawfully challenge the agreement. The learned senior principal magistrate ruled that the 3rd Respondent has established the interest he had over the motor vehicle.

8) On my part, I have considered the rival submissions and the authorities cited. It is not in dispute that motor vehicle registration no. KAW 371B is registered in the name of Kings' Script Publishers Ltd. The appellants have alluded that he Clip Investment Cooperative Society Ltd (1st Respondent) and Kings Script Publishers Ltd are one and the same entity. I am not persuaded by that argument. The evidence presented before the trial court indicate that the two entities had a close working relationship. There is no cogent evidence to show that the two entities are one and the same thing. Even before considering the authenticity of the agreement, it is important to point out at this stage that at the time of attachment, motor vehicle registration no. KAW 371B was registered in the name of Kings' Script Publishers Ltd. The aforesaid party is not a party to the suit hence attachment could not have been levied against the motor vehicle. The 3rd Respondent has put forward an agreement he entered with Kings' Script Publishers Ltd whereof the later sold to the former motor vehicle registration no. KAW 371B. The appellants were not privy to the agreement hence they do not have locus to challenge the validity of the agreement. The vendor i.e Kings' Script Publishers Ltd has not come forward to challenge the agreement nor claim back the motor vehicle.

9) The appellants have pointed out some imperfections of the sale Agreement. However, in my humble view that cannot change the fact that the 3rd Respondent and Kings Script Publishers Ltd entered into an agreement whereof Kings Script Publishers Ltd sold motor vehicle registration no. KAW 371B to the 3rd Respondent who in turn took possession of the aforesaid motor vehicle. I am convinced that the 3rd Respondent tendered credible affidavit evidence to show he bought the aforesaid motor vehicle. In the end the decision of the learned senior principal magistrate cannot be faulted.

10) Having disposed of the question of ownership over motor vehicle registration no. KAW 371B, let me now determine the validity of the attachment. The appellants have beseeched this court to find that the attachment is lawful. It was pointed out that the 1st Respondent and Kings Script Publishers Ltd shared the same officials. It is also stated that Kings Script Publishers Ltd, is the investment arm of the 1st Respondent therefore they were right to attach the motor vehicle. I have already formed the opinion that the 1st Respondent and Kings Script Publishers Ltd are separate entities which closely worked together. It cannot be said that they are one and the same entity. Motor vehicle registration no. KAW 371B, at the time of attachment, was registered in the name of Kings' Script Publishers Ltd which was not a party to these proceedings.

11) The 3rd Respondent had already purchased and taken possession of the aforesaid motor vehicle at the time of attachment. The 3rd Respondent was not a party to the proceedings, therefore the attachment of the motor vehicle could not be justified in law. The decision of the learned Senior Principal Magistrate cannot be faulted.

12) In the end, I find no merit in the appeal. The same is dismissed in its entirety with costs to the Respondent.

Dated, Signed and Delivered in open court this 2nd day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent