



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 649 OF 2008

MUGUNDA WASULWA T/A KEYSIAN AUCTIONEERSAPPELLANT

- V E R S U S -

RICHARD OMBAYE MOTOGWA.....RESPONDENT

(Being an appeal from the ruling and order of the Hon. W. Mokaya (S.R.M) dated 22nd October 2007 in CMCC No. 6175 of 2005)

JUDGEMENT

1. On 22.10.2007, Hon. Mokaya, learned Senior Resident Magistrate dismissed the appellant's application dated 13.3.2006 in which the appellant had sought for its name to be struck out as a party to the suit before the trial court. Being aggrieved the appellant filed this appeal.

2. On appeal, the appellant put forward the following grounds:

1. The learned magistrate failed to appreciate sufficiently or at all the legal effect of the consent order dated 29th March 2005 recorded in Nairobi CMCC NO. 9044 of 2004.

2. The learned magistrate erred in law and in fact in finding and holding that the appellant is a necessary party to the proceedings in CMCC NO. 6175 of 2005.

3. The learned magistrate misdirected herself and erred in law and in fact in finding and holding that to strike out the proceedings as against the appellant would be prejudicial to the respondent's case.

4. The learned magistrate erred in law and grossly misdirected herself when she held that it is after full trial that the court will have to determine whether the 2nd defendant/appellant should be held liable or not.

3. When the appeal came up for hearing, this court gave directions requiring the parties to file and exchange submissions to dispose of the appeal. At the time of writing this judgment, the appellant was the only party who had filed his submissions.

4. I have re-evaluated the arguments presented before the trial court. I have also considered the written submissions presented to this court. The history behind this appeal is short. Muganda Wasulwa t/a Keysian Auctioneers had been assigned the warrants of attachment pursuant to the decree issued vide C.M.C.C. no. 9044 of 2004. In the process of executing the warrants, the appellant attached motor vehicle registration no. KAN 650Z belonging to Richard Ombaye Matogwa, who thereafter filed

objection proceedings to challenge the attachment. The objection proceedings were compromised vide a consent order recorded as follows *inter alia*:

a. By consent the applicant's motor vehicle registration number KAN 650Z attached by Keysian Investments on 18th February, 2005 be released to the objector/applicant unconditionally.

b. That the decree holder do pay the costs of this application and damages to the objector/applicant.

5. The decree/holder before the trial court was Colgate Palmolive (EA) Ltd while the appellant herein was the court bailiff. The parties failed to agree on the amount of costs and damages payable to the objector forcing the objector to file Nairobi C.M.C.C. 6175 of 2005 against Colgate Palm Olive (E.A) Ltd as the 1st defendant. While the appellant was named the 2nd defendant to seek for damages for wrongful attachment of motor vehicle registration KAN 650Z. The appellant filed an appearance and a defence. He thereafter filed an application seeking to have his name struck out as the 2nd defendant. The application was heard and eventually dismissed prompting the appellant to prefer this appeal.

6. On appeal, the appellant argued that the trial magistrate failed to appreciate that he was not a necessary party to the suit filed by the objector since it was not the decree/holder. In her ruling, Hon. Mokaya expressly stated that it was premature to deal with the issue at that stage. She was of the view the issues raised in the application were matters which could be decided in a full trial. I have on my part re-evaluated the arguments put forward before the trial court. There is no dispute that the attachment was carried out by the appellant herein on the instructions of Colgate Palmolive (E.A) Ltd.

7. It is also not in dispute that the attachment led to the seizure of motor vehicle registration no. KAN 650Z. It is further not in dispute that a consent order was recorded lifting the attachment and to have the aforesaid motor vehicle released to the objector. The question which the learned Senior Resident Magistrate grappled with is whether or not the appellant was a necessary party to the suit in the court below. In my view I think the learned Senior Resident magistrate came to the correct conclusion that the appellant was a necessary party. He participated in executing the warrants which led to the attachment of motor vehicle registration No. KAN 650Z. The question as to who is liable between the appellant and the decree holder will have to be determined in the trial court. The appellant's application was therefore properly dismissed.

8. In the end, I see no merit in this appeal. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 9th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent