



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 120 OF 2010

HARUMMUTHOMI.....APPELLANT

VERSUS

NICHOLAS MURIUNGIKINOTI.....1ST RESPONDENT

BEATRICE GACHERI.....2ND RESPONDENT

GEOFFREY KOOMEKINOTI.....3RD RESPONDENT

REBECCA KENDI for and

on behalf of KENNETH MUTHAURA.....4TH RESPONDENT

JUDGMENT

No order of consolidation

[1] This court saw the direct nexus between this appeal and appeal No 145 of 2010 and delivered the following ruling with specific directions, that;

The terse statement in the opening paragraph of the submissions filed in appeal no. 120 of 2010 read;

“...that this appeal is dependent on the outcome of HCCA NO.145 of 2010”.

Except that submission, parties did not address themselves on Appeal No. 145 of 2010.

I am aware the major arguments in Appeal No 120 of 2010 revolve upon allegations of concealment of material and important matter; [to wit] that the Respondent did not inform the trial court that his objection proceedings on the attachment of motor vehicle registration Number KAG 945F had been dismissed in case Number 463 of 2010. Appeal Number 145 of 2010 arose from case number 463 of 2010. Without determining whether the decision of Appeal No 145 of 2010 will affect Appeal No 120 of 2010, but in light of these facts, I must deal with these appeals in a manner that avoids any possibility of falling into error or placing myself in a situation which may become embarrassing- similar to the one obtaining in the matters before me. Therefore, out of abundance of caution, I direct parties to file submissions on Appeal No. 145 of 2010 within such time as shall be agreed among the parties. I will then decide both

appeals at once either in a single judgment or separate judgments. The judgment in Appeal No 120 of 2010 is hereby arrested for a short while. It is so ordered.

[2] But, although counsels for the parties informed the court on 18th August, 2016 that they have filed their clients' respective submissions on Appeal No 145 of 2010, I have perused through the two files herein and I find no such submissions. I am not lost that there was no order of consolidation of the two appeals despite directions that the two should be heard together. Again, appeal number 145 of 2010 is not ready for hearing at all. Therefore, nothing binds the court into rendering a single judgment in these appeals as each one of them is capable of being disposed of separately. Moreover, much time has passed by on this matter. Accordingly, I will take that the parties do not wish to comply with the directions of the court and proceed to determine the appeals separately. This judgment is therefore in respect of Appeal No 120 of 2010.

Amended Memorandum of Appeal

[3] By the Amended Memorandum of Appeal dated 12th October, 2010, the Appellant proffered the following 4 grounds of Appeal:-

- 1. The Honourable Magistrate erred in law and in fact in failing to review and set aside his earlier orders issued on 20/7/2010 and that of 6/8/2010.***
- 2. The honourable Magistrate erred in failing to order that the motor vehicle be released to the Appellant in view of the fact that the Appellant had bought the motor vehicle in a public auction sanctioned by the court in separate proceedings being Meru CMCC NO.463 of 2009.***
- 3. The Honourable Magistrate erred in law in failing to consider the submissions of the Appellant and the affidavit evidence and the annexures in support of the chamber summons that gave rise tot he ruling.***
- 4. The Honourable Magistrate erred in law by failing to take into consideration the applicable law in an application for review and setting aside.***

[4] Essentially, the appeal is directed at the decision by **K. W. KIARIE, SPM** (as he then was) delivered on 5th October, 2010 in case number **MERU C.M.C.C NO 504 OF 2009**. The said ruling is hereby reproduced *in extenso*, to wit:-

The interested party herein has moved the court by way of notice of motion under order 1 rule (2) sections 1A and 3A CPA and is seeking for the revision of the ruling of 20/7/2010. The main contention is that the objector in the ruling delivered on 20/7/2010 misled the court for there was no previous ruling unfavourable to the objector.

I have perused the ruling in civil 462/2005 delivered by Hon. Mrs Andriessen on 6th July 2010 and it's indeed over the same subject matter. Her ruling does not agree with mine and this throws the court into an awkward position. Mr. Ringera and Mr. Mugambi were in that matter but unfortunately the court was not informed of what had transpired.

In my view, the only recourse in this matter is for the parties to appeal against the orders they feel dissatisfied with. I will therefore vacate the order made exparte on 31/8/2010 and give any aggrieved party a right to appeal against this order or my previous order within 30 days from the date hereof.

K.W. KIARIE – SPM

5/10/2010

Arguments by the Appellant

[5] In the submissions filed on 23rd April 2013, the Appellant argued that, on 18th June 2010, he purchased motor vehicle registration number KAG 945F, ISUZU LORRY, in a public auction conducted by M/S CLEAR REAL AUCTIONEERS pursuant to the decree of the court in case number MERU CMCC NO 463 OF 2009. He observed all rules under the Auctioneers Act and became absolute owner of the said lorry. He even took possession of the said lorry. But, to his dismay, the court in case number 504 of 2009 issued orders of unconditional release of the said lorry to the 1st Respondent. When the Appellant became aware of these offensive orders, he moved the court to review those orders but the court declined hence this appeal against that refusal to review the orders. His main contention, therefore, is that, since the said lorry had already been sold in a public auction pursuant to a lawful decree of the court in case number MERU CMCC NO 463 OF 2009 after the 1st Respondent's objection proceedings to attachment and sale of the said lorry in that case were dismissed, the court could not have lawfully issued orders of release of the vehicle to the 1st Respondent in case number 504 of 2009. According to the Appellant, the trial court therefore, erred in not reviewing its orders of release of the lorry to the 1st Respondent. He contended further that the trial court was unaware of the state of affairs in relation to the lorry in question at the time it made the impugned orders of 20th July, 2010 and 6th August, 2010. He was of the view that, had this information been supplied to, the court may not have issued those orders. He accused the 1st Respondent of abusing the process of the court in moving the court in case number 504 of 2009 to get relief which he lost in case number 463 Of 2009; by concealment of such important facts and points of law from the court. But, he stated that these matters were brought to the trial magistrate during the review application but the magistrate did not consider them at all- except a mention of them in passing- in making his decision on the request for review. This he said is a serious misdirection and failure on the part of the trial court to exercise discretion judicially as he did not consider important materials placed before him and as a result an injustice was committed upon the Appellant. In that sense, the Appellant was convinced that the trial magistrate did not exercise his discretion judicially for he did not apply the law on review on the facts of the case and his decision made on 5th October, 2010 was, therefore, in error and devoid of merit and should be set aside.

Arguments by the Respondents

[6] The 1st and 4th Respondents filed submissions on 10th May 2013 and 25th April, 2013 respectively. The 1st Respondent urged that this appeal is dependent upon appeal number 145 of 2009 and if that appeal fails, this one will fail too. The said appeal is on the attachment and sale of the lorry in issue. He argued that warrants of attachment were issued simultaneously and objections to attachment were also made simultaneously in the two cases. Orders of stay were also made in similar manner and were served upon the Appellant and the auctioneer. Except, however, the two matters were placed before different magistrates and heard as such. The ruling in case number 463 of 2009 was delivered on 6th July 2010 in which the objection proceedings were dismissed whilst the ruling in case number 504 of 2009 was delivered on 20th August 2010 allowing the objection and raising the attachment. But when these ruling were being delivered, there were stay orders in place in both matters. The 1st Respondent therefore was of the view that the only option was for the Appellant to appeal against the orders lifting the attachment. The 1st Respondent posed the question whether there could have been a proper sale of the lorry on 18th June 2010 when the stay order was in place. He gave a negative answer to the question. He concluded by stating that, the appeal was the correct channel the Appellant ought to have taken, and that the request for review was therefore, without basis. He urged the court to dismiss this appeal.

[7] The 4th Respondent argued that the 1st, 2nd and 3rd Respondents colluded in the filing of the objection proceedings in order to defeat both these claims. She submitted that the ruling dismissing their objection in case number 463 of 2009 came earlier than the one in case number 504 of 2009. The 1st, 2nd and 3rd Respondents ought therefore to have appealed against dismissal of their objection rather than file other objection proceedings. The 4th Respondent saw abuse of process of the court by the Respondents in concealing the said fact of dismissal of their objection by one court of competent jurisdiction. She said

that the lorry had already been sold by the time the order in 504 of 2009 was issued. She urged that the appeal herein is merited and should be granted.

Analysis and Determination of Appeal

[8] The tenor of and arguments in this appeal reveal one thing; that the court is being asked to interfere with the exercise of discretion by the trial magistrate in rejecting an application for review. I need not re-invent the wheel here as this area is replete with judicial decisions which I need not multiply. For the appellate court to interfere with exercise of discretion by the trial court, the trial court must have committed an error in principle in that; it acted capriciously or on no legal principle, or took into account irrelevant factors or failed to take into account relevant ones in reaching its decision. I note that, in considering the request before him, the trial magistrate stated that he had perused the ruling of Mrs Andriessen of 6th July 2010 in Meru CMCC NO 463 OF 2009 on the same subject matter that was before the trial magistrate herein. The learned trial magistrate also observed that the ruling by Mrs Andriessen on the matter did not agree with his decision in case number 504 of 2009; and ***this throws the court into an awkward position***. The trial magistrate lamented that both counsels before him were also in the other matter but unfortunately they did not inform the court of what had transpired in that other case. He therefore, took the view that the only recourse in the matter was for the parties to appeal against the orders they feel dissatisfied with. He only vacated the orders he had made ex parte on 31st August, 2010 in which he had declined to extend interim orders. By that order, it is not clear whether the interim orders had been extended but that is not the issue here. That notwithstanding, it is clear that the trial magistrate was aware of the awkward position the court was put into by non-disclosure of material facts by the 1st Respondent especially on the dismissal of his objection to attachment of the lorry herein in case number 463 of 2009 and also about the sale of the said lorry in a decree issued in that case. It is immaterial that the sale could have been illegal or capable of impeachment as those are arguments that should have been used to challenge the said sale but not an excuse for the 1st Respondent to conceal such material facts from the court. Accordingly, the trial magistrate neither considered the facts of the case nor applied the legal threshold for review in reaching his decision. His decision was, therefore, capricious and was not based on any law or principle of law in the exercise of discretion in the application for review. There is, therefore, a robust case made out to support my intervention and to disturb the exercise of discretion by the trial magistrate. I also note that the 1st Respondent could be guilty of abusing the court process in not disclosing the fact that his objection to attachment had been dismissed in Meru CMCC NO 463 OF 2009. As a result, I set aside the orders made on 5th October, 2010 and remit the matter for the hearing of the application dated 16th August 2010 by a court of competent jurisdiction within shortest time possible not later than 60 days from today. The foregoing order explains why I have said only enough for purposes of my decision in this appeal; so that to avoid causing any prejudice to the trial court in considering the application dated 16th August, 2010. This appeal therefore succeeds to the extent expressly stated above and I award costs of the appeal to the Appellant. It is so ordered.

Dated, signed and delivered in open court at Meru this 1st day of November 2016

F. GIKONYO

JUDGE

In the presence of:

Ringera for 1st Respondent

Oyieko for Murango for Appellant

Kimondo for Mugambi for 4th Respondent

Mithega for 2nd and 3rd Respondent

Mr. Mbogo advocate for respondent

F. GIKONYO

JUDGE