



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 7 OF 2013

O.M. ROBINSON & CO. ADVOCATES.....APPLICANT

VERSUS

OMARI ALI SHAHBALRESPONDENT

RULING

By way of a Notice of Motion application dated 7th March, 2013 and expressed to be brought under order 22 rule 51 order 51 rule 1 of the Civil Procedure rules 2010 section 1A, 1B and 3A of the Civil Procedure Act the applicant seeks a mandatory injunction compelling M/s Kinyua & Co. Auctioneers to deliver motor vehicle Registration No. KBE 012 M Mitsubishi Fuso Fighter currently in its possession to the objector forthwith.

The grounds are that the applicant had taken out warrants in respect of the subject motor vehicle.

That M/s Kinyua & Co. Auctioneers under instructions from the applicant have taken the subject matter motor vehicle into its possession in execution of a decree.

That the motor vehicle belongs to the objector.

It is submitted for the objector that he purchased the motor vehicle from the Respondent on 23rd November, 2012 and paid consideration as per the terms of the sale agreement and further that he has legal interest and a proprietary right to the motor vehicle in question and hence the attachment is not lawful. Further that the objector is an innocent purchaser without notice or knowledge of any irregularities or defects on the ownership documents.

This application is opposed on the grounds that it is incapable of being granted under order 22 rule 51 of the Civil Procedure Rules. In that the objector has not sought for an order raising the attachment as to the whole or a portion of a property subject to the attachment but has instead sought for a mandatory injunction.

Secondly, that he has not proved that he is entitled to have legal or equitable interest in the whole or part of any property attached.

It is submitted that warrants for the attachment of motor vehicle Registration Number KBE 012M Mitsubishi Fuso Fighter were first issued on 21st June, 2012. Subsequently to that issuance, the

Respondent Omari Ali Shahbal hid the motor vehicle and it took an order of this court for the motor vehicle to be traced and handed over to the auctioneer and that Omari Ali Shahbal had no capacity to sell the attached motor vehicle which was in the control of the court and the objector could not legally purchase the said motor vehicle.

Further that the objector lays claim to ownership of the vehicle vide a sale agreement dated 23rd November, 2012.

The salient issues in that sale agreement were;

(a) That the purchase price was Ksh. 730,000/= and payment of Ksh. 100,000/= had been acknowledged.

(b) The balance was shown as Ksh. 550,000/= and was payable within 2 months from the date of the sale agreement which was 23rd November, 2012.

(c) If the purchase Price was Ksh. 730,000/= and a payment of Ksh. 100,000/=. Balance should be Ksh. 630,000/=.

(d) Clause 8 of the agreement provides that if the balance is not paid as agreed then the motor vehicle would be subject to repossession by the vendor.

It is submitted that the sale agreement is a shan because the objector has not shown that he paid the balance of Ksh. 550,000/= by January 23rd 2013 for him to lay a claim on the whole of the vehicle.

Secondly, that the sale agreement was made in a hurry for purposes of this application thus showing a balance of Ksh. 550,000/= instead of Ksh. 630,000/=.

Thirdly, that the objector has not exhibited evidence of title in the form of a registration book or a copy of the records at the Registrar of motor vehicles.

That there is no evidence that Omari Ali Shahbal signed any transfer forms to prove that he had relinquished his interest in the attached property. I have perused this courts record of proceedings and it is found correct as observed and or argued by the applicant that an order was issued by Tuiyott, Judge instructing the OCS Nyahururu to provide the Auctioneer with security during the execution of warrants and physical removal of motor vehicle registration Number KBE 012M Mitsubishi Fuso.

It is also a matter of fact that warrants of attachment of motor vehicle Registration No. KBE 012M Mitsubishi Fuso were first issued on 21st June, 2012. The sale agreement is dated 23rd November, 2012.

I concur with counsel for the applicant that the respondent had no capacity to sell the vehicle which was already attached and was under the control of the Court process.

As for the purported sale itself as argued by counsel for the applicant there is no evidence to show that the objector paid the alleged balance of Ksh. 550,000/= by 23rd January, 2013.

The sale agreement itself contains an error which shows the balance of the purchase price as Ksh. 550,000/= whereas the correct figure should read Ksh. 630,000/=.

The court also finds that the objector has not exhibited any document of title in the form of a registration book(logbook) and or copy of records at the Registrar of motor vehicles.

Further there is no evidence that there was signing of the transfer forms for the Respondent to relinquish title of ownership.

The court is satisfied that there was no legal transfer of motor vehicle Registration No. KBE 012M to

any third party and the vehicle legally belongs to the Respondent.

The application is found to be without merit and its dismissed accordingly with costs.

Ruling delivered dated and signed this **7th** day of **November, 2013**.

.....

M. MUYA

JUDGE

7TH NOVEMBER, 2013

In the presence of:-

Learned Counsel for applicant Mr. Robinson

Learned Counsel for the Respondent absent

Court clerk Musundi.