



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**Civil Appeal 93 of 2010**

**KENYA BUS SERVICE**

**MANAGEMENT LTD.....APPELLANT**

**~VERSUS~**

**MOSES WEKESA BUYAYI.....1<sup>ST</sup> RESPONDENT**

**KENYA BUS SERVICES LIMITED.....2<sup>ND</sup> RESPONDENT**

(Appeal arising from the judgment and decree of the Principal Magistrate J.K. Ng'arng'ar in Bungoma court in civil case no.54 of 2004)

**JUDGMENT**

This case began in 2004 when the 1<sup>st</sup> Respondent filed a claim seeking general and special damages from the 2<sup>nd</sup> Respondent. His case was that on 13/1/2002 he was travelling in the 2<sup>nd</sup> Respondent's bus registration number KAL 229 V along Eldoret – Webuye road and that the bus lost control and overturned thereby injuring him. He blamed the accident on the negligence of the driver of the bus whom he said was an employee and/or the agent of the 2<sup>nd</sup> Respondent. He gave evidence following which the trial court found for him and awarded Ksh.200,000/= in general damages and Ksh.1,700/= in special damages. Then costs and interest. He was represented by Mr. Areba who still acts for him today.

Following the judgment an application for execution of decree was drawn and filed by M/s C. K. Areba & Co. Advocates in which the judgment debtor was indicated as Kenya Bus Services Management Ltd who is the Appellant. This was the beginning of trouble for the Appellant. A decree was issued against it following which warrants to attach and sale its property were drawn and issued by the court. The warrants ultimately led to the attachment of vehicle registration number KBB 184 X which was registered in the name of one Dr. Luke Musyimi Musau. The auctioneers, Siama Traders, found the vehicle with the Appellant. The Appellant and Musau had a franchise agreement in which the latter gave the former the vehicle ( a bus) to operate within the greater Nairobi and especially within the Central Business District of Nairobi.

On 4/9/2009 Musau through Wairagu & Wairagu Advocates filed a notice of objection to

attachment of motor vehicle KBB 184 X. The vehicle had been attached by Siuma Traders. The objector filed an affidavit to support the notice in which he annexed his logbook (“LMM-01”) showing that he was the registered owner of the vehicle, and stated he was not a party in the suit. He also annexed the franchise agreement (“LMM-02”) between him and the Appellant. On 16/9/2009 the objector filed a chamber application under Order 21 rules 56 and 57 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking that the attachment be lifted and the vehicle be released on the basis that he was the owner of the vehicle which had been attached. On 17/9/2009 the Appellant filed a chamber application under Order 1 rules 3, 9, 10 (2) and 22 of the Civil Procedure Rules and section 3A of the Civil Procedure Act which was supported by an affidavit sworn by Ben Imbahalah who is its Claims Manager. He sought stay of execution and injunction pending the hearing and determination of the application. The substance of the application was that they wanted the Appellant removed from the proceedings (i guess the execution proceedings) and in its place the proceedings do proceed against the 2<sup>nd</sup> Defendant who had been sued. The affidavit made reference to the fact that the vehicle belonged to Musau with whom the Appellant had a franchise contract. It indicated that the Appellant and the 2<sup>nd</sup> Respondent were different limited liability companies, the Appellant having been incorporated long after the cause of action arose. The Appellant produced its certificate of incorporation showing it came into being on 27/6/2006.

On 27/10/2009 the Appellant filed a chamber application under Order 21 rules 53 (1), 54 and 56 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking that the attachment be lifted, the vehicle released to Musau, it be found that the attachment against it was null and void as it was not a party to the case. The reasons were that the vehicle belonged to Musau with whom it had a franchise agreement, that it was neither the Defendant nor the judgment debtor in the case for execution to issue against it and that the 1<sup>st</sup> Respondent and it were different limited liability companies.

The 1<sup>st</sup> Respondent filed grounds of opposition/notice of preliminary objection to the application. He alleged the application offended section 7 of the Civil Procedure Act (was *res judicata*), it had been overtaken by events because the attached vehicle had been sold on 12/10/2009 and on the same date the proceeds given to his advocate and the Appellant had entered into a fraudulent franchise agreement with the 1<sup>st</sup> Respondent in order to avoid paying the decretal sum.

The application was heard on 2/6/2010 and ruling delivered on 7/7/2010. The application was basically dismissed with costs because the court found it had been overtaken by events as the attached vehicle had been sold on 12/10/2009 and the proceeds paid to the 1<sup>st</sup> Respondent on the same day. This is the ruling that the Appellant was dissatisfied with and filed the present appeal.

I received written submissions from Singh Gitau Advocates for the Appellant and Areba & Co. Advocates for the 1<sup>st</sup> Respondent.

I have stated in the foregoing that the suit was between the 1<sup>st</sup> Respondent (as Plaintiff) and the 2<sup>nd</sup> Respondent (as Defendant). The judgment was against the 2<sup>nd</sup> Respondent. However, at the request of Areba & Co. Advocates, the decree was issued against the Appellant. A warrant of attachment was issued against the Appellant. I agree with the Appellant that the decree was required by Order 20 rule 6 of the Civil Procedure Rules (now Order 21 and 7) to agree with the judgment. It was required to contain the number of the suit, the names and descriptions of the parties, and the particulars of the claim. Under Order 21 and 7 (2) the application for execution signed by Areba & Co. Advocates was required to reflect the particulars of the judgment, including the parties. Under Order 21 rule 13 the court was duty bound to ascertain that the application of the decree reflected the correct parties of the suit and judgment, among other things. The Appellant is right that both the 1<sup>st</sup> Respondent’s advocates and the court failed it by issuing a decree against it when it had nothing to do with the suit, or the judgment.

Through the various applications that I have outlined in the foregoing, the Appellant and Musau complained, and produced evidence to show, that the vehicle being attached belonged to the latter who had nothing to do with the case.

Regarding the application whose decision aggrieved the Appellant, the response by the 1<sup>st</sup> Respondent did not include a replying affidavit to show, among other things, that the vehicle had been sold to a third party on 12/10/2009. But it is admitted in the submissions of the Appellant that indeed the vehicle was sold to one Simon Chege Kamangu. The Appellant availed the ruling dated 3/3/2010 in HCCC no.66 of 2010 at Nairobi in which this Simon sued Musau and another and this vehicle was one of the issues. He was saying, and the court agreed with him, that he had bought the vehicle in an auction conducted by Siuma Traders on 12/10/2009 and he had since become the registered owner. Musau has filed an appeal to the Court of Appeal in the matter.

The submissions further disclosed that Musau has sued Siuma Traders, Simon and the 1<sup>st</sup> Respondent in HCCC no.47 of 2010 (Central Registry Civil Division) at Nairobi regarding the events that led to the illegal decree being issued, and the subsequent attachment and sale of the vehicle, and the matter is outstanding.

The trial court was correct when it decided that the application dated 27/10/2009 had been overtaken by events as the execution that was sought to be lifted or stayed had taken place and the vehicle sold to a third party. At that stage an order could not have been issued against Simon (the buyer) when he was not a party who had been heard. Of course, the court should have rescued the situation much earlier than the application.

The trial court advised that the Appellant had the remedy of suing those whom it felt had wronged it in connection with the attachment and sale of the vehicle. The advise has been taken and a suit filed. This court cannot deal with the dispute any further, or make any further comment in the matter, as that may compromise the rights of the parties to the suit.

For different reasons, therefore, the court agrees with the trial court. The appeal must fail. In the circumstances of the case, however, I ask that the costs be paid by the 1<sup>st</sup> Respondent whose conduct has led to this despicable and embarrassing scenario.

**Dated, signed and delivered at Bungoma this 11<sup>th</sup> day of July 2012.**

**A. O. MUCHELULE**  
**JUDGE**