IN THE COURT OF APPEAL

AT KISUMU

(Coram:Gicheru, Tunoi & Shah JJ A)

CIVIL APPEAL NO 39 OF 1995

BETWEEN

EARNEST ORWA MWAI.....APPELLANT

AND

ABDUL S. HASHID.....1ST RESPONDENT

VICTORIA ENTERPRISES LTD.....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kisumu (Justice J. A. Mango) dated 24th August, 1993

in

H.C.C.C. NO. 338 OF 1991)

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JUDGMENT

This appeal has had, prior to its being filed, chequered history and it would be convenient first to set out all such history before we deal with the merits of the appeal.

The second respondent (hereinafter referred to as Victoria Enterprises) filed a suit against one Peter Brown Ogola trading as Homa Bay African Building Contractors claiming a sum of Shs 499,001/75 plus costs and interest for recovery of value of goods sold and delivered by Victoria Enterprises to Peter Ogola. This was HCCC No 108 of 1989.

The superior court entered judgment against Peter Ogola in HCCC No 108 of 1989 on 3rd May, 1990. Victoria Enterprises executed the decree in HCCC No 108 of 1989 by attachment of motor vehicle registration number KDY 883. This attachment was objected to by Ernest Orwa Mwai (the present appellant) on the grounds that the said vehicle KDY

883 (hereinafter referred to as “the lorry”) was his (Mwai’s) property, he having purchased the same from Peter Ogola in 1989. He relied on a written agreement dated 5th November, 1989 (made between him and Peter Ogola) to show his title to the lorry.

On 6th September, 1990 JM Khamoni, J dismissed the objection proceedings filed by Mwai and ordered

that that the execution do proceed as a result of which ruling Victoria Enterprises proceeded with the attachment and the lorry was sold to Abdul S Hashid (the present first respondent – hereinafter referred to as "Hashid").

The auction sale of the lorry took place on 29th September, 1990 when Hashid was declared the highest bidder; he paid Shs 110,000/= for the lorry. Having obtained delivery (possession) of the lorry Hashid towed the vehicle to his garage at Yala. The lorry was not in working order. Hashid then proceeded to repair the lorry and put it on the road and used it for some time.

On 25th November,1991 Mwaga Auctioneers, armed with an order of this Court, made on 20th day of November, 1991 took possession of the lorry for, and in the name of Ernest Orwa Mwai.

What had happened, after the dismissal of the objection proceedings on 6th September, 1990 was that the objector lodged an appeal against such dismissal. This was Civil Appeal No 14 of 1991. It is to be remembered that the parties to Civil Appeal No 14 of 1991 were Mwayi and Victoria Enterprises and this Court, on the material before it (emphasis added), allowed Mwai's objection, set aside the attachment of the lorry and ordered the same released to the appellant (Mwai). It is reiterated that Hashid was not a party to Civil Appeal No 14 of 1991.

After Hashid came to be dispossessed of the lorry as a result of orders made by this Court on 20th day of November, 1991 he (Hashid) applied for "review and interpretation" of the said orders and this Court in Civil Application No NAI 15 of 1991, after making certain observations, proceeded to dismiss the application for such "review and interpretation" on the grounds that it had no power to review its own decisions. It would be proper at this stage to set out some of the observations made by this Court in Civil Application No NAI 15 of 1991; at page 2 of the typewritten judgment the Court says:

> "It is very unfortunate that the fact that the lorry has already been sold and delivered to the applicant (Hashid) was not disclosed to this Court when the said Civil Appeal No 15 of 1991 was heard. It was the duty of the objector (Mwai) in the first instance (who was the appellant under rule 76 of the Court of Appeal Rules) and also of the 2nd respondent herein, not only to have disclosed that fact, but also to have taken appropriate steps to have the applicant joined in the appeal as an interested party".

This Court also said:

> "The judgment that was given by this Court on 20th November, 1991, is merely a finding of facts affecting the rights between the objector, the judgment-debtor therein (Agola), and the second respondent Victoria Enterprises limited only in relation to the lorry KDY
>
> 883 and no more. As the applicant (Hashid) was not made a party to that appeal, that finding of facts is no bar to him to pursue his remedy and seek appropriate redress in the appropriate lower court against either or both respondents".

What this Court said in Civil Application No 15 of 1992 is clear and leaves no room for doubt. In that judgment there was criticism to the effect that Hashid should have been made a party, which he was not and that Hashid could follow up his remedy as law allows.

Reverting to what happened earlier, it must be pointed out that Hashid was buying the lorry when there was no stay of execution of orders made by Khamoni, J on 6th September, 1990 in HCCC No 108 of 1990. Nor was there any attempt to move this Court to stay further execution. Only an appeal was filed as against orders of Khamoni, J and an appeal does not automatically operate as a stay.

Mr Odhiambo who appeared for the appellant argued the first two grounds of this appeal together. In substance, his argument was that Victoria Enterprises could not pass title to Hashid. He relied on order 21 rule 61(2) to say that all encumbrances to which the property sold in execution of the decree ought to be stated by the auctioneer. That is an argument which, with great respect to Mr Odhiambo, does not hold

water. The lorry was attached. Attachment was objected to. Objection proceedings determined the right of Victoria Enterprises to sell the lorry. It was a lawful court order. It was not a "nullity" as Mr Odhiambo put it.

Hashid was a *bona fide* purchaser, at a court auction sale of the lorry without notice of any encumbrances to the title of the lorry. Order 21 rule 62(2) only enjoins upon the auctioneer the duty to specify as fairly and accurately as possible the property to be sold and encumbrances to title thereto amongst other matters not relevant here.

Section 58 of Sale of Goods Act (cap 31) lays down clearly the law in case of sale by auction. That is that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner. Such was the case in so far as Hashid was concerned. He obtained title to the lorry at a lawfully held auction sale. He had obtained title to the lorry when this Court in CA No 14 of 1991 on 20th November, 1991 announced its decision. As Hashid was not a party to CA No 14 of 1991, that decision did not bind him. Property in the lorry passed to Hashid prior to 20th November, 1991 and, with respect, this Court was absolutely correct in saying (upon review application) that Hashid could follow up his other remedies.

First two grounds of appeal therefore fail.

The third ground of appeal cannot succeed for the simple reason that at the time the lorry was sold to Hashid, Court of Appeal judgment (in CA No 14 of 1991) was not given; there was no stay and Hashid was not a party to it.

We have already held that Hashid was a *bona fide* purchaser of the lorry for value at a court auction sale properly held, when Hashid was not aware of Civil Appeal No 14 of 1991 and hence the fourth ground of appeal fails.

The fifth ground of appeal also fails as there was correct attachment and sale as per orders of Khamoni, J before this Court had deliberated (in the absence before this Court of Hashid) upon the appeal against orders of Khamoni, J.

Mr Odhiambo attacked the award of special damages firstly on the basis that the value of the lorry found by the superior court at Shs 585,000/= was incorrect in that Hashid should only have been awarded what he paid at the auction sale plus value of what he added to the lorry to make it roadworthy.

This is, in our view, not (in this case) a proper way to ascertain damages. Hashid has lost a lorry. Value for the lorry cannot necessarily be what was paid for it at the auction sale plus what was put in it. Forced auction sales are no guide to real market value of an article like that. The evidence of the value of lorry given by Mr Khan (PW 20) was not effectively challenged. It was not suggested to him that his valuation was "over the mark" or above the correct value. We see no reason to differ with the learned judge on that point.

But on the issue of damages for loss of user, we have to differ with the learned judge.

It has been stated time and again by this Court that special damages must be pleaded and strictly proved. This Court has so held in the case of *Shabani vs Nairobi City Council & another*, CA No 52 of 1984 wherein, this Court quoted from what Goddard CJ said in *Bonham Carter vs Hyde Park Hotel Limited* (1948) 64 TLR 117 Lord Goddard said at page 178: "The plaintiffs must understand that if they bring actions

> for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it".

See also *Ouma vs NCC* [1976] KLR 297. Also see *KBS & another vs*

Mayende [1988-92] 2 KAR page 232.

In this suit, the first respondent simply said that his gross lose per day was Shs 10,000/= and hence his net loss was Shs 5000/= and the learned judge proceeded to award Shs 2,500/= a day for 365 days. There was no tangible evidence upon which such a figure could be based. We must therefore disallow this item of damages.

We now come to Mr Nyamori's cross-appeal. He, quite properly, in our view, abandoned grounds 2,3, and 4 of his client's'(Hashid's) cross- appeal. We have already made our views known on his fifth ground of cross-appeal. Mr Nyamori complained of his client having been ordered to pay costs of second and third defendants. That complaint, in our view, is not justified. Hashid, in cross-examination, conceded that he had no claim against second defendant. He also conceded that he had no claim against Nyaluoyo Auctioneers. He brought proceedings against them. He conceded he did so wrongly. He must therefore pay their costs.

The cross-appeal is dismissed with costs.

Mr Kasamani for Victoria Enterprises attempted to argue on the issue of costs but he abandoned the same.

The result therefore is that this appeal on issue of ownership or title to the lorry is dismissed. It is also dismissed on the issue of value of the lorry. On issue of special damages for loss of user this appeal is allowed and the loss of user figure as awarded is set aside. There will be judgment for the first respondent as against the appellant in the sum of Kshs 585,000/= with interest thereon at 14% per annum from the 27th day of November, 1991 until date of payment in full.

Considering all aspects of this appeal, we order that the appellant pays two-thirds of the costs of appeal to the first respondent. There will be no order as to costs of the second respondent.

Dated and delivered at Kisumuthis 24th day of March, 1995

J.E GICHERU

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.B SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR