



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & G. B. M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 127 OF 2005

BETWEEN

PALACE INVESTMENTS LIMITED.....APPELLANT

AND

GEOFFREY KARIUKI MWENDA.....1ST RESPONDENT

DOLLAR AUCTIONS.....2ND RESPONDENT

(An appeal from the Ruling & decree of the High Court of Kenya at Nairobi (Kasango, J) dated 20th day of April, 2005

in

(H.C.C.C. NO. 1260 OF 2002)

JUDGMENT OF THE COURT

George Gikubu Mbutia was the plaintiff in Milimani Commercial Court HCC No. 1260 of 2002, where he had sued one Peter Njeru Mugo and three others for various reliefs. His suit against the 2nd, 3rd and 4th defendants was struck out with costs and a decree issued against him.

In a bid to satisfy the said decree, the 2nd defendant who is the 1st respondent in this appeal, through Dollar Auctions (2nd respondent) moved to attach the plaintiff's moveable properties. The 2nd respondent attached a motor vehicle reg **No. KVE 001** which used to be driven by the plaintiff. The motor vehicle and other movable properties were proclaimed on 23rd November, 2004.

Following this proclamation, Palace Investment Limited (the appellant) initiated objection proceedings under **Order 21 rule 56 and 57 of the repealed Civil Procedure Rules**. In its application, the appellant claimed that it was the registered owner of the attached vehicle and therefore urged the court to lift the attachment terming it illegal.

The Application was supported by an affidavit sworn on 21st January, 2005 by **Pauline Wanjiru Njuguna** who described herself as the director of the appellant. She deponed that the appellant was the

legal and registered owner of the motor vehicle in question. She deponed that despite service of a Notice of Objection and Notice of Stay of Execution, the 1st and 2nd respondents continued with the illegal attachment. The appellant therefore sought that the attachment be raised and that it be compensated for loss of use of the motor vehicle incurred as a result of the illegal attachment.

Annexed to the affidavit was a Certificate of Incorporation of the appellant, the motor vehicle's logbook and a letter to the respondents intimating ownership of the motor vehicle and demanding that the respondent either stops or raises the attachment.

The appellant further filed a supplementary affidavit sworn on 28th February, 2005 by the same **Pauline Wanjiru Njuguna**, who explained that she was appointed as a director of the appellant during its Annual General Meeting held on 27th December, 2004, but that the appointment was to take effect from 3rd January, 2005. She further explained that the motor-vehicle initially belonged to **Shabbir Brothers**. However, the motor vehicle was later transferred to **Mohamed Afzal** who sold it to the appellant. She further deponed that the attachment was illegal as the warrants of attachment issued to the 2nd Respondent expired on 7th November 2004 and they were to be returned to court by then. The 1st respondent opposed the application vide a replying affidavit sworn on 17th

February, 2005. The 1st respondent deponed that the motor vehicle had been in the possession, use and control of the judgment-debtor since the commencement of the suit that resulted in the judgment. He stated that as per the records with the Registrar of motor vehicles, the motor vehicle was registered in the name of **M/s Shabbir Brothers** since 1978.

Upon conducting a further official search with the registrar of companies he was able to obtain a copy of records, receipt of official search and a letter from the Registrar of companies. These showed that the ownership of the vehicle was registered to Shabbir Brothers and that in 2004 **Pauline Wanjiru Njuguna** was neither a director nor a shareholder of the appellant. He deponed that he believed that the majority of the appellant's shareholders only facilitated the transfer of the said motor vehicle from **Mohamed Afzal** to the appellant to defeat the execution process.

In opposition to the application, the 2nd Respondent also filed a replying affidavit sworn on 17th February, 2005 by **Simon Ngomonge** of **Dollar Auctions**. He stated that they attached the motor-vehicle following instructions from the 1st respondent and the receipt of warrants of attachment and sale. He deponed that he proceeded to proclaim the judgment debtor's goods on and as per the proclamation dated 23rd November, 2004. The 2nd respondent explained that he was only able to acquire actual possession of the motor-vehicle on 22nd December, 2004.

The Application was heard by Kasango J, who upon consideration of the matter found that as at the time of attachment, as evidenced in the logbook entries, the motor vehicle did not belong to the appellant. The learned Judge also found that it was highly probable that **Pauline Wanjiru Njuguna**, the deponent of the affidavit in support of the application, was not a director of the appellant company as at the end of the year 2004.

As a result of the finding, she dismissed the application with costs to the respondents herein.

Aggrieved by the dismissal, the appellant instituted this appeal and by a memorandum of appeal dated 16th June 2005, it has proffered the following grounds *inter-alia*;

“3. The learned Judge erred in law and fact in failing to find that Motor-Vehicle registration number KVE 001 legally belonged to the Appellant by virtue of the entry in the original logbook that was presented to the Honourable Court on its request.

4. The Learned Judge erred in law and in fact in failing to appreciate and that the decree subject to execution was neither against the Appellant, Mohamed Fazal or Shabbir Brothers and as

such motor vehicle registration number KVE 001 was wrongly attached.

5. The learned Judge erred in law and fact if failing to differentiate the separate legal personalities between the Appellant and George Gikubu Mbutia who was in the judgment debtor in the main suit and a director and shareholder of the Appellant.

6. The learned judge erred in law and fact in completely ignoring the fact that on the 22nd December 2004 when the Motor-Vehicle registration Number KVE 001 was attached, the warrants of attachment issued by the High Court had expired and the said attachment was illegal.

7. The learned Judge misdirected herself in finding that the subject motor vehicle registration number KVE 001 had been proclaimed on 23rd November while it had not.

8. The learned Judge misdirected herself in finding that the Appellant needed to prove how it purchased the subject motor-vehicle and whether there was the Appellant's resolution to purchase the said Motor-Vehicle.

9. The learned Judge misdirected herself in finding that in Objector proceedings a party need not seek the Court's leave to join a party who was involved in the attachment, which brought about the proceedings.

10. The learned Judge erred in law and fact in dismissing the Appellant's application dated 21st January, 2005.”

When the Appeal came before us for hearing on 27th April 2015, Mr. Gikubu appearing in person on behalf of the appellant requested for the consolidation of this appeal with Civil Appeal No. 72 of 2014 which was not before the Court and which had no hearing date, in effect seeking an adjournment.

Mr. Mugambi, learned counsel for the respondents opposed the application for adjournment and urged that Civil Appeal 72 of 2014 was strange to him and his clients, and was not relevant at all to this appeal. The application for adjournment was declined, and the appeal therefore proceeded as scheduled.

Mr Gikubu did not make any oral submissions and so the appeal proceeded on the basis of the record of appeal as filed.

Urging us to dismiss the appeal, learned counsel for the respondent submitted that the proclamation was done on 23rd November 2004 and by then the motor-vehicle was registered in the name of **Shabbir Brothers** and **NIC**. He submitted that the proclamation was not against the appellant who had filed objection proceedings. He submitted that the respondent brought a copy of the logbook to Court to show that the motor-vehicle had been transferred to the other owners a day after the proclamation. He contended that at the time of the proclamation the appellant did not have a legal or equitable right over the motor-vehicle.

Therefore, there was no basis on which the appellant could claim ownership. There was also no evidence of purchase of the said motor vehicle from its previous owners.

He distinguished this appeal from the case of **Ernest Orwa Mwayi v. Victoria Enterprises Ltd** , **Civil Appeal No.14 of 1991 (Unreported)** and the Traffic Act, in that, in this case there was such evidence of purchase or ownership by the appellant at the time of proclamation. Furthermore, there was no objection by the registered owner when the motor vehicle was proclaimed, and the application was for dismissal.

This being a first appeal, it behoves us to re-evaluate, re-assess and analyze in a fresh and exhaustive manner, all the evidence on record before making our own inferences of fact and arriving at our own independent conclusions. See **SELLE & ANOR Vs. ASSOCIATED MOTOR BOAT CO. LTD &**

OTHERS [1968] EA 123; PETERS Vs. SUNDAY POST LTD [1958] EA 424. The test in deciding whether to uphold the trial court's conclusions on fact is set out in the quotation from Lord Simon's speech in **Watt v. Thomas [1947] AC, 484** at p. 485 as follows:-

"...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

Having considered the submissions of counsel, the evidence on record and the legal authorities cited, we find that this appeal revolves solely on the issue of the ownership of the motor vehicle in question as at the time it was proclaimed. Did the appellant prove ownership? If the answer to this question is in the affirmative, then clearly the motor vehicle was wrongly attached. This would be so because as rightly submitted by the appellant before the trial court and in the memorandum of appeal, a company is a separate legal entity from its directors and a vehicle belonging to the appellant could not therefore have been attached to settle Mr Gikubu's debt.

In making such a determination we need to examine whether the appellant discharged its burden of proof on a balance of probability to prove ownership of the motor-vehicle. The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in **Miller -vs- Minister of Pensions [1947] 2 ALL ER 372** discussing the burden of proof had this to say:-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

Section 107 and 108 of Evidence Act Cap 80 provides who bears the burden of proof in a case. Those two sections provide-

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise.

Section 8 of the Traffic Offences Act provides that

"The person in whose name a vehicle is registered shall, unless the contrary is proved,

be deemed to be the owner of the vehicle.”

This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of **Osapil v. Kaddy [2000] 1 EALA 187** the Court of Appeal of Uganda held that a registration card or logbook was only *prima-facie* evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

This Court adopted the interpretation above in the case of **Securicor Kenya Ltd v. Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O’Kubasu’ Deverell JJA)** and held that;

“Our holding finds support in the decision in OSAPIL VS.

KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

Also recently, this Court in the case of **Joel Muga Opinja v. East Africa Sea Food Ltd [2013] eKLR** restated this position as follows:

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied”

Turning to the evidence that was brought before the trial Court, it is evident that the motor-vehicle was attached on the 23rd November, 2004. The learned Judge correctly found that attachment is complete on proclamation. Following the search results obtained from a search of the motor-vehicle at the Registrar of motor vehicles done by the 1st respondent, the particulars of ownership indicated that as at 23rd November 2004, the motor vehicle was registered in the name of **Shabbir Brothers**. We have also perused the logbook and found that ownership of the motor-vehicle changed after attachment on 24th November, 2004. The motor vehicle was transferred to **Mohamed Afzal** and thereafter to the appellant, Palace Investments Limited.

This would mean that at the time of proclamation and attachment, on 23rd November, 2004, the appellant did not have any legal or equitable interest in the said motor-vehicle. We also agree with the learned Judge that the appellant failed to demonstrate or prove otherwise with regard to ownership of the motor-vehicle. The appellant only relied on the logbook and did not prove any other basis of legal interest in the motor-vehicle on the date of attachment. The appellant was under an obligation to prove that it had legal or equitable interest in the motor-vehicle as at the date of the attachment. It is an obligation that it has failed to discharge.

Our finding therefore is that the learned Judge was right in finding that the appellant had failed to prove ownership of the said motor-vehicle and further that the person registered as the owner as at the time of the proclamation was not a party to the objection proceedings, and no orders therefore could have been made in his favour. The other issues raised in this appeal were peripheral and would not have affected the outcome of this appeal. We see no need to make any findings on them.

In view of the foregoing, we find this appeal devoid of merit and dismiss the same with costs to the respondents.

Dated and delivered at Nairobi this 19th day of June, 2015.

W. KARANJA

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

G. B. M KARIUKI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR