



Benard Onkoba t/a Betico Auctioneers & another v Oteke & 2 others (Civil Appeal E116 of 2023) [2024] KEHC 8276 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E116 OF 2023
TA ODERA, J
JUNE 26, 2024**

BETWEEN

BENARD ONKOBA T/A BETICO AUCTIONEERS 1ST APPELLANT

KENNEDY MOKUA T/A MOCO AUCTIONEERS 2ND APPELLANT

AND

DAVID ODHIAMBO OTEKE 1ST RESPONDENT

MERCYLINE MORANGA MACHWARA 2ND RESPONDENT

WILFRED NYANGWONO OSORO 3RD RESPONDENT

(Being an appeal from the Ruling of Hon. P.K. Mutai –Principal Magistrate, dated 6th September, 2023 and delivered on 6th September, 2023 at the Lower Court at Kisii in Kisii CMCC NO. E427 OF 2023)

JUDGMENT

1. The Appellants Benard Onkoba T/a Betico Auctioneers And Kennedy Mokua T/a Moco Auctioneers were aggrieved with the Ruling of Hon. P.K. Mutai –Principal Magistrate, delivered on 6th September, 2023 in Kisii CMCC No. E427 of 2023 and filed the following grounds of appeal:
2. The learned Magistrate erred in law and fact when he failed to find that the appellant proceeded on the basis of the creditors (1st letter of instructions issued under Rule 5 of the Auctioneers Rules and not the court for police assistance made under Rule 9 of the Auctioneers Rules Act).
3. The Learned Magistrate misguided himself in law and fact when he failed to find that as the High Court in Kisii High Court Misc. Civil Application No.2 of 2022 JR. did not order release of subject motor vehicle, same stood deemed, declined by a correct reading of section 7 explaining 5) of the Civil Procedure Rules.



4. The learned magistrate order for release of subject motor vehicle was an error in law and fact as no mandatory injunction could issue is against appellant in the circumstances.

The appellant sought for orders: -

1. Call for the original record of the court below
2. Set aside the Ruling and substitute it with, and/or re-instance the finding of the ruling of the trial court.
3. Award costs of this appeal to the appellants .

Facts

David Odhiambo Oteke the 1st respondent bought motor vehicle registration no. KBX 698 Z Ashock Leyland from Wilfred Nyangwono Osoro at Kshs. 3,500,000/= on 15.1.2016 through his first wife one Mourine Atieno Omolo, he paid the said Osoro Kshs. 1,000,000/= and the same was duly receipted and acknowledged by him. There remained a balance of Kshs. 2,500,000/= which was to be paid by NIC Bank. They cleared the balance with the bank and the vehicle was duly transferred to him. The seller thereafter proceeded to engage the 1st appellant to recover the said vehicle. The 1st appellant recovered the vehicle and kept it in the yard of the 2nd appellant to. The 1st appellant then moved the lower court for orders that police to provide them with security during the said recovery of the said vehicle. The said orders were granted and the 1st respondent moved the High court seeking judicial review orders to quash the said orders granted by the lower court granting Orders to the OCS Kisii central police station to provide the 1st appellant with security during repossession of the said vehicle. The trial court then lifted the said orders and hence this appeal.

5. This is an appellate court whose duty is to re-evaluate the entire evidence on record and arrive at its own conclusion.
6. The appellant submitted that in repossessing the vehicle, he acted under letters of instruction issued pursuant to Rule 5 of the auctioneers rules and not Rule 9 and that he sought security out of abundance of caution. Also that the decision by Justice Gichohi in Judicial review case no. 2 of 2022 was silent on the release of the motor vehicle and thus it is considered to have been denied under Section 7, explanation 5 of *Civil Procedure Rules*.
7. This is an appellate court and the duty of this court is to re-evaluate, re-assess and re-analyze the record and make a determination on whether the trial court erred or not as was held in the cited cases of *Abok James t/a AJ Odera v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR and *Peters v Sunday Post ltd* [1958] EA 424.
8. I have considered the appeal and the submissions by the appellant, the appellant seeks that this court nullifies the decision of the Trial decision to grant orders to the effect that the police escort the respondent to repossess the vehicle. It is thus clear that the issue of release of the vehicle was determined in the ruling. Magistrate in ordering release of motor vehicle registration number KBX XXXX. Hon. Gichohi in judicial review no. 2 of 2022 quashed the decision of the trial magistrate who ordered that the police escort the appellant to repossess motor vehicle registration no. KBX XXXX. The learned Judge held that the exparte applicant who is the respondent herein was not given the Right to be heard.
9. The issues arising for determination are:



- a. Whether the Hon. Justice Gichohi omitted to make a determination on the release of the motor vehicle.
 - b. Whether the learned trial magistrate erred in failing to hold that the appellant repossessed the motor vehicle under Rule 5 of the Auctioneers rules.
10. On whether the Hon. Judge did not make a determination on the release of the vehicle, the appellant argued that the Judicial review judgment did not make a provision for release of the said vehicle and thus the provisions of Section 7 explanation (5) of the *Civil Procedure Rules* apply.
- Explanation. — (5)” Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused”. The orders issued by the Hon Judge are in a clear and plain language that she quashed the orders of the trial magistrate allowing the use of police to aid in the repossession of the said vehicle.
11. On whether the trial magistrate erred in failing to find that the appellant repossessed the vehicle based on Rule 5 of the Auctioneers rules, the vehicle was repossessed with the assistance of the police upon issuance of a court order for repossession. It is this process of obtaining the court order and subsequent repossession which were challenged. It is this not true as alleged by the appellant that he proceeded to repossess not based on the court orders but under rule 5 of the *Auctioneers Act* as alleged. If this was true, then the auctioneer would not have moved the court for the escort orders.
12. It was submitted that the Hon. Judge erred in the said Judicial review decision but this is not an appeal against the Judge’s decision in the Judicial review case but the ruling of the Trial Magistrate. The learned Magistrate was bound by the decision of the Hon Judge and could not depart from it. In any event this court lacks jurisdiction to deal with an appeal from a decision of a court of concurrent jurisdiction. The appellant ought to have moved the court of appeal if he was dissatisfied with the decision of the Judge.
13. I find no reason to interfere with the decision of the learned trial magistrate herein. The appeal is devoid of merit and I proceed to dismiss it with costs to the 1st and 2nd respondent only as the 3rd respondent did not participate in this appeal.

T.A ODERA

JUDGE

26.6.24

Delivered Virtually Via Teams platform in the presence of:

Miss Bosire for appellant

N/A for respondent

Court Assistant: Oigo

