



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 40 OF 2009

ELDORET STEEL MILLS.....APPELLANT

VERSUS

ERNEST NJEKA OMBANGO.....RESPONDENT

RULING:

The application is brought under Order 22 Rules 86 (11) and 87 of the Civil Procedure Rules and Sections 3A and 51 of the Civil Procedure Act. The application is supported by the affidavit of **Navider Sirgh Lochab** made on the 18th March, 2011.

The application arises from the Ruling delivered on the 30th December, 2010 which declared the execution process in CMCC 1100/99 a nullity. The decree that was being executed was over one year old and the execution process was declared a nullity ab-initio and the public auction and sale carried out on the 14th December 2010 was also declared a nullity and the same was set aside. The attached motor vehicle registration number KAS 009Q it was ordered be released and returned to the Applicant, herein.

The Applicant avers that when the Ruling was read in open court the auctioneer was present in court and was therefore aware of the order.

The Applicant further averred that the auctioneer in complete disobedience of the court order has failed to return the vehicle.

The Applicant's prayers are that a Notice to Show Cause should issue against the Respondent and auctioneer to show cause why they should not be committed to civil jail for having not complied with the order.

The Appellant further prays for the production and release of the vehicle KAS 009Q.

The Applicant also prayed for the auctioneer to bear the costs of the application.

The application as opposed by Learned Counsel Mr. Miyienda for the Respondent. The Respondent deponed that the sale took place on the 14th December, 2010 long before the delivery of the ruling and that the purchaser was a bona fide purchaser for value.

The Applicant, the party that was aggrieved had a remedy in filing suit and to claim for damages. Counsel urged the court to disallow the application as it was not merited under Order 22 Rules 64 and 65. The Respondent prayed for costs.

The application was also opposed by Mr. Momanyi, Counsel representing the auctioneer. Counsel submitted that the Applicant had not brought a proper application before court. That the Applicant should have proceeded under the Judicature Act to proceed on an application for contempt of court.

Counsel argued that the auctioneer was not in court on the date the ruling was delivered and only became aware of the order when the application was served upon him.

The auctioneer averred that the vehicle was no longer in his custody as the same had been sold.

His prayer was that the application was incompetent in its current form and was not meritorious and should be dismissed with costs.

After hearing the arguments of Counsel for the Applicant and both Counsel for the Respondent and the auctioneer the court finds that the only issue for determination is the Order of 30th December 2010.

The court found that the decree that was executed was over one (1) year and the court correctly found that after one year a Notice to Show Cause must issue and that no such notice was issued to the Applicant before the date of the execution and sale. The sale was also a nullity as the person who conducted the public auction was not a licenced auctioneer. The court then set aside the sale of 14th December 2011 and ordered the release of the motor vehicle forthwith.

To date the Respondent nor the auctioneer have not returned or released the said vehicle.

That is why the Applicant is now before this court with the current application.

The Applicant is seeking the courts assistance in enforcing the order of 30th December 2010 for the return of the vehicle which the auctioneer has failed to comply with.

For orders for contempt and committal there is a proper methodology that must be followed, which I am sure Learned Counsel for the Applicant is fully acquainted with. This court finds that the Applicant is trying to circumvent the said procedure and process.

The Applicant also has other remedies at hand which are to retake the motor vehicle without action or institute legal proceedings for the production, return and delivery of the said motor vehicle.

The Applicant can also sue for wrongful interference and seek special damages, general damages, punitive damages and exemplary damages. Refer to the cases of:

- (1) **LEAH GACHER –VS- BBK e KLR (2005)**
- (2) **SATWANT SINGH DHANJAL & 2 OTHERS –VS- KRA HCC NO. 1610 OF 2001** Emukule J.

These cases outline all the remedies available to the aggrieved party whose property has been wrongfully seized and sold by public auction.

For the reasons stated above the court finds that the Applicant does not merit the prayers sought as there is a proper procedure that needs to be followed. The application is disallowed. Each party to bear their own respective costs.

Dated and delivered at Eldoret this 25th day of April 2012.

MSHILA

JUDGE

Coram: Before Hon. Mshila J

CC: Sophie

Namiti – for Applicant

Miyienda – for 1st Respondent.

No appearance for the Auctioneer.

MSHILA

JUDGE



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