

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

HIGH COURT CIVIL SUIT NO. 167 of 2016

- 1. BUKONKO TRADERS & TRANSPORT BUS COMPANY**
- 2. SPEAR MOTORS LIMITED ::::::::::::::::::::::::::::::: PLAINTIFFS**

VERSUS

- 1. SEMPALA RONALD**
- 2. NYABUHARA JULIAN**
- 3. WALUSIMBI SAMUEL ::::::::::::::::::::::::::::::: DEFENDANTS**
T/A KAWALA PARKING YARD

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff brought this suit against the defendants claiming inter alia orders for payment of the sum of UGX. 165,000,000/= being the purchase price of Model 2006 Mercedes Benz Atego Bus Reg. No. UAF 132Y to be split between the plaintiffs in their respective interests in the bus, an order for compensation to the 1st plaintiff for lost income resulting from the sale of the bus, general damages, interest and costs of the suit.

The 1st plaintiff was in the process of acquiring a Mercedes Benz bus from the 2nd plaintiff company and by the defendants. the said bus was registered in the names of the 2nd plaintiff and was in the process of being purchased by the 1st plaintiff with part of the purchase paid thus giving the 1st plaintiff possession and equitable interest in the bus. The overall cost price of the bus was UGX.

165,000,000/= and at the time of facts leading to these proceedings, the 1st plaintiff had a balance of UGX. 60,000,000/= outstanding.

The bus developed a fault with the gear box and was parked at Kawaala parking yard owned by the defendants for an agreed parking fee of UGX.3000 per day. The 1st plaintiff made various payments to the 1st defendant and to his son Nicholas Kigozi through mobile money transfer. the defendants filed a suit Mengo Chief Magistrate Court vide Civil Suit 288 of 2012 against Wilberforce Bukonko, a director and Julius Caesar an employee of the 1st plaintiff claiming that they had not received any payments for the parking fees and a default judgement was entered against the plaintiffs for apparent failure to file a defense.

The said defendants purported to sell the bus owned by the plaintiffs under a review decision pending determination before the High court. In trying to enforce the ex parte judgement in the Mengo case, the defendants attached and sold the bus describing it as scrap without taking the basic effort and proper care to establish the ownership of the bus and whether it was subject to attachment. After attachment, the bus was destroyed as scrap and chopped to pieces such that it was not even available for viewing or any other examinations and not even the seats or fittings could be recovered or viewed.

The defendants filed a written statement of defense wherein they denied liability on all the allegations and stated that the plaintiffs were not entitled to any of the reliefs sought.

The 2nd defendant stating in her defense that she was a licensed court bailiff at the time executed a valid court warrant which was authorizing her to attach and

sale Mercedes Benz Reg No, UAF 132Y and that she performed all her lawful duties as required of her as a court officer and as such, no worries can be imputed on her to warrant the court to grant the remedies sought by the plaintiffs against her.

The 1st plaintiff was represented by Titus Bitebekezi (TFB Advocates) & Isoota Suleiman (Katuntu & Co Advocates and the 2nd plaintiff was represented by its Legal department-Joseph Magala whereas the 2nd defendant was represented by Silicon Advocates and 3rd defendant was represented by Ssajabi Richard and the other defendant represented himself

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

- 1. Whether the sale of the suit vehicle Mercedes Bens Atego Bus 1824, Reg No. UAF 132Y was a lawful sale.*
- 2. Whether the defendants owed the plaintiffs a duty to establish the ownership of the bus before disposing it.*
- 3. What remedies are available to the parties?*

The parties were ordered to file written submissions and accordingly filed the same. The parties' submissions were considered by this court in determination of this suit.

DETERMINATION OF ISSUES

Issue 1

Whether the sale of the suit vehicle Mercedes Benz Atego Bus 1824, 64 seater Reg. No. UAF 132Y was a lawful sale.

Submissions

Counsel for the plaintiffs submitted that the sale of the bus was unlawful. He stated that the only property that is subject to attachment to settle a decree of court is the property of the judgement debtor. The plaintiffs are the legal and beneficial owners of the bus would of necessity have had to be party to the proceedings in which orders were made for attachment of their property and that alone makes the sale unlawful. It was stated that the defendants could have searched the vehicle registry and verified the ownership of the bus they sought to attach and sale. In neglecting to carry out such a basic check before appropriation, the defendants' actions border on fraudulent and criminal.

It was submitted for the 1st defendant that the sale of the bus lacked or failed to fulfill the required procedures in attaching movable properties since it was sold at a relative of a party in the suit.

The 2nd defendant submitted that the sale was duly executed as she was handed a warrant of attachment and sale of the motor vehicle which warrant unequivocally provided the mode of execution of the same. That was required by the 2nd defendant to value the suit motor vehicle, advertise the same prior to selling and ensure that the sale was properly done which was all done. The 2nd defendant contends that she sold the vehicle at even a higher value than what the valuer had indicated and cannot therefore be faulted for she followed all the legal steps prior to executing the sale at the she received the warrant of attachment and sale from the court.

Counsel for the 3rd defendant submitted that the plaintiffs' allegation that the vehicle was sold to a relative thus tainted with fraud is merely conclusion from information given by the 1st defendant. Counsel relied on Hima Cement Ltd v Rukia Isanga HCCS No. 103 of 2009 where court noted that in civil proceedings, a person who alleges fraud must specifically plead and strictly prove it. He further stated that the matter proceeded under Order 17, Rule 4 of the Civil Procedure Rules S.I 71-1 to determine the case without the 1st and 3rd defendants' evidence on record.

Determination

The Civil procedure Rules under O. 22, R. 27 provides that a decree for payment of money may be executed by the attachment and sale of a judgement debtor's property.

The power of sale after execution under the law is highly regulated at every stage of the sale process in order to ensure that the judgement debtor and those claiming under him or her are not prejudiced. **Section 44(1) of the Civil Procedure Act, Cap. 71** provides:

“the following property is liable to attachment and sale in execution of a decree, namely; lands, houses, or other buildings, goods, money, bank notes, cheques, bill of exchange, promissory notes, government securities, bonds or other securities for money, debts, shares in a corporation and, except as hereafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power which he or she may exercise for his or her benefit,

whether the property be held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf: ..."

It is clear from the above section that the property to be attached in execution of a court decree must be those saleable property which belong to the judgment debtor or over which he or she has a disposing power for his or her benefit whether the property is held in his or her name or in the name of other person in trust for him or her or on his or her behalf. This court observes that it would be a bad state of the law to allow a judgment debtor to offer for attachment or a decree holder to deliberately attach and sell property which does not belong to the judgment debtor (*see; Imelda Nassanga v Stanbic Bank & Anor Civil Appeal No.10 of 2005, Labanito Okwajja v. Giripasio Okello (1985) H.C.B 85*)

The plaintiffs claimed ownership of the attached property Model 2006 Mercedes Benz Atego Bus Reg. No. UAF 132Y; which was registered in the 2nd plaintiff's names and was to be purchased by the 1st plaintiff. The plaintiffs were never subject to the proceedings in the Mengo case for which the defendants sought to execute. In the circumstances, the property so attached and sold was property of the plaintiffs who were not judgement debtors for which the defendants could claim from.

The only property liable for attachment is all saleable property (movable or immovable) belonging to the judgment-debtor or over which or portion of which he has a disposing power which he may exercise from his own benefit may be attached and sold in execution of a decree against him

The said property was therefore wrongly attached and it was contrary to section 44 of the Civil Procedure Act since it never belonged to Bukonko Wilberforce.

Issue 1 is resolved in the affirmative.

Issue 2

Whether the Defendants owed the plaintiffs a duty to establish the ownership of the bus before disposing it off.

Counsel for the plaintiffs submitted that the 2nd defendant admitted under cross examination that she did not do due diligence to ascertain ownership of the suit but with motor vehicle registry before she sold it off. She stated that she thought the 1st and 3rd defendants had done the due diligence and found out who owned the bus they sought to sale. Not even the person who bought the bus appears to have checked with the motor vehicle registry or inquired to establish the ownership of the bus before it was bought. Counsel further submitted that the duty to establish the ownership of the bus arises from the general right to sanctity of private property established under Article 26 of the Constitution.

The 1st defendant submitted that it is not contested that the directors sent to the 3rd defendant mobile money for parking space as agreed. He stated that the last portion of the money was paid to the bailiff who acknowledged receipt. This alone puts the whole process a fraudulent transaction. He defined fraud according to *Kampala Bottlers Ltd v Damanico (U) Ltd S.C.CA No.22 of 1992*. He therefore submitted that it was fraudulent transaction for which the 3rd defendant handled and is answerable for and prayed that court finds so.

The 2nd defendant submitted that she did not owe the plaintiffs any duty to establish the ownership of the bus as she was executing a writ endorsed by court that had been directed to her to recover sums of judgement creditors. She further stated that the decision of Zaabwe (*supra*) is irrelevant as the plaintiffs did not plead fraud.

Determination

As already stated above that the property to be attached in execution of a court decree must be those saleable property which belong to the judgment debtor or over which he or she has a disposing power for his or her benefit whether the property is held in his or her name or in the name of other person in trust for him or her or on his or her behalf. The defendants had a duty to establish whether the property attached belonged to the judgement debtor before sale of the same.

In respect of the 2nd defendant, a court bailiff is an officer of court. section 46 (2) of the Judicature Act, Cap 13 provides that any officer of court or other person bonded to execute any order or warrant of any judge shall not be liable to be sued in any civil court in respect of any lawful or authorized act done in the execution of such order. Court bailiff loses immunity only if he /she acts unlawfully. In the circumstances, the court bailiff cannot be said to have acted unlawfully in the circumstances as she was executing an order of court. See *Aroni & Others v Gesare Nyamaiko* [1988]KLR 574 [1986-1989] EA 567

It is also a duty of the court executing the order to be satisfied that the property under attachment belongs to the judgment debtor in order to avoid wrongful attachment of property. The court relied on the information availed by the 3rd

defendant as the plaintiff in that matter as the decree-holder. See *Famous Cycle Agency & Others v Mansukhulala Rarji Karia & another* [1994] 1 KALR 20

According to the facts of the case, the 3rd defendant extracted the orders of court and made an application for execution and therein indicated that the said motor vehicle belonged to the defendant in that matter. The 3rd defendant was wholly responsible for the identification of the property to be attached and therefore the wrongful attachment of Motor vehicle Mercedes Benz Atego Bus 1824, 64 seater Reg. No. UAF 132Y. Even if there was any wrongdoing committed by the court and court bailiff, it was under the wrong information given in the application for execution by the 3rd defendant. See *Hannington Wasswa & another v Maria Onyango Ochola SCCA No. 22 of 1993* [1994] IV KALR 98

This issue is therefore answered in the affirmative.

Issue 3

What remedies are available to the parties?

The plaintiffs in their pleadings prayed for; order payment of UGX.165,000,000/= being the purchase price of the bus, an order for compensation to the 1st plaintiff for lost income resulting from the sale, general damages, interest at commercial rate and costs of the suit.

This court orders that the 1st and 3rd defendants make payment of UGX 165,000,000/= to the plaintiffs respectively.

General damages

It is trite that compensation for future expenses falls under General Damages and court ought to make consideration of the same in assessing general damages due to an injured party.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

I find that the 1st plaintiff has discharged her duty to prove damages and injuries as a result of the 3rd defendant's actions.

The 1st plaintiff is awarded **UGX 30,000,000** as general damages and lost income.

The plaintiff is awarded interest at a rate of 10% on the value of the motor vehicle from the date of filing the suit until payment in full.

The plaintiffs are awarded costs of the suit against the 1st & 3rd defendants only.

I so order.

Dated, signed and delivered by email at Kampala this 23rd day of April 2020

SSEKAANA MUSA
JUDGE