IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 208 OF 2010

BETWEEN

PETER OBARA ONDARI …..... APPELLANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (M. A. Makhandia, J) dated 31st May 2010

in

KISII HCCA No. 193 OF 2008

****

JUDGEMENT OF THE COURT

This is a second appeal. The appellant Peter Obara Ondari was the respondent in the first appellate court – High Court of Kenya at Kisii Civil Appeal No. 193 of 2008 and was the Plaintiff in the Resident Magistrate Court at Rongo in Civil suit No. 101 of 2007. He sued the respondent Kenya Revenue Authority by a plaint dated 25th July, 2007 and filed in court the same day claiming release of a motor vehicle registration make KAG 620 Y; a permanent injunction to restrain the defendant, its employees, servants and agents from disposing of the said motor vehicle; a declaration that the seizure of the motor vehicle was "illegal, wrongful, unlawful and void ab initio," general damages, costs of the suit and interest. The suit was heard by the learned Senior Resident Magistrate (D. KEMEI) who in a judgement delivered on 9th October, 2008 found for the plaintiff.

The defendant was dissatisfied with the magistrate's findings and filed the appeal already referred to. The appeal was heard by Asike-Makhanda, J (as he then was) who found favour in the appeal finding for the defendant in a judgement delivered on 31st May, 2010 in effect reversing the trial court.

The original plaintiff filed this appeal against the said findings of the first appellate court. Being a second appeal our duty is to consider only issues of law but not matters of fact which have been considered by the two courts below and on which factual findings were made. Indeed the enabling provision in Section 72 of the Civil Procedure Act Chapter 21 Laws of Kenya – provides that:-

"(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed exparte."

This court differently constituted in the case of **Maina v Mugiria [1983] KLR 79** considering that issue of jurisdiction held that on a second appeal only matters of law may be taken. Across over the national boundaries the Court of Appeal of Uganda in **Mutazindwa v Agaba & Others [2008] 2 EA 265** was of similar view when it held that the duty of the second appellate court is not to re-evaluate the evidence but to consider whether the first appellate court properly carried out the functions of reappraisal of the evidence.

Chesoni, Acting JA (as he then was) in **Stephen Muriungi & Anor v Republic (1982 -88) 1 KAR 360 said at page 360:**

"Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

What are the matters of law in this appeal calling for our consideration?

There are ten grounds of appeal in the Memorandum of Appeal drawn by the appellants counsel M/s Omwenga & Co Advocates. They are:

"1. That the learned Judge erred in law and fact in setting aside the judgement of the learned trial magistrate and substituting it with an order dismissing the suit with costs.

2. That the learned Judge erred in law and fact by failing to hold that the Appellant was the registered, legal and / or beneficial owner of the suit motor vehicle.

3. That the learned Judge erred in law and fact in making a finding that "the appellant was not legally and in law the Registered owner and entitled to the possession of the motor vehicle" when there was no evidence on record to support that finding.

4. That the learned Judge erred in law and fact by holding that the Respondent had legally and lawfully seized and detained the suit motor vehicle without any evidence on record to support that finding.

5. That the learned Judge erred in law by holding that the Respondent had proved fraud on the part of the Appellant when there was no evidence on record to support that finding.

6. That the learned Judge erred in law by failing to consider the submissions on the part of the Appellant.

7. That the learned Judge erred in law and fact by holding that the Respondent was not required to file any counter-claim.

8. That the learned Judge erred in law and in fact in applying wrong principles to arrive at his decision.

9. That the learned Judge erred in law and in fact in relying on documents which the respondent marked but failed to produce to arrive at his decision, contrary to the provisions of the law.

10. That the learned trial judge's decision albeit, a discretionary one was plainly wrong."

It is therefore proposed by the appellant that the appeal be allowed; that the judgement of the High Court be set aside and the trial courts' judgement be restored and it is also prayed that we award costs.

Various averments were made in the plaint but those material for determination were that on 26th September, 2006 the respondents agents impounded the appellants motor vehicle KAG 620 Y with its documents and detained the motor vehicle at Awendo Police Station from where the motor vehicle was later released to the appellant; that on 2nd May, 2007 the respondent again impounded the same motor vehicle; that the said act by the respondent had damaged the appellants reputation by portraying him as a person who did not pay taxes; that the appellant had in the event suffered loss and damage and was entitled to the prayers which we have already set out.

The respondent filed a statement of defence essentially denying all the appellants' claims but alleging that the appellant had caused himself to be registered as owner of the said motor vehicle through fraud. Particulars of fraud were duly set out. The respondent also claimed immunity citing provisions of the Government Proceedings Act Chapter 40 Laws of Kenya and the Kenya Revenue Authority Act Chapter 469 of the Laws of Kenya. Together with the said defence the respondent filed a "**Notice of Preliminary Objection on Points of Law**" citing the said immunities.

The record does not contain proceedings where the respondent raised those objections on points of law which would ordinarily be raised as preliminary issues. That issue is not before us and we shall not make any further comment on the same.

After dealing with some interlocutory applications for injunction the matter was then heard by the said learned magistrate.

The appellant testified that he was the registered owner of the said motor vehicle KAG 620 Y. He had initially agreed to purchase from a third party another motor vehicle and duly paid the agreed purchase price but that sale fell through because of some differences in the third partys' home from where that vehicle could not be released. So the suit motor vehicle was given to the appellant as replacement and it was agreed that the motor vehicle be kept at a police station pending resolution of the said exchange of motor vehicles and reimbursement of a difference in purchase price paid. The motor vehicle remained at the police station for six months forcing the appellant to file proceedings in another matter for release of the motor vehicle to him. This led to orders for the motor vehicle to be released to the appellant. He kept the motor vehicle for about three months when the events the subject of the proceedings in the subordinate court took place – the motor vehicle was seized by the respondent.

The appellant produced in evidence a log book for the said motor vehicle issued to him by the respondent and also produced a "Seizure Notice" served on him by the respondent on the strength of which the motor vehicle was seized by the respondent. The respondent called a total of seven witnesses.

John Owiti Odiah (DW1) testified that in September, 2006 one Benson Mogeni presented to him a log book in respect of a motor vehicle KAG 620 Y for purposes of obtaining Transport Licensing Board license. He found the log book suspicious. He passed over the matter to be investigated. Again in April 2007 yet another person presented documents for yet another motor vehicle with similar registration particulars. Investigations were carried out on how three motor vehicles could bear similar registration

numbers when, according to the witness, the system established by the respondent did not allow two motor vehicles to have the same registration number. The witness confirmed that a search certificate produced as evidence showed the appellant as registered as the owner of the motor vehicle KAG 620 Y.

Francis Kamau (DW2), a Chief Inspector of Police attached to the respondents' Kisumu office investigated the matter and confirmed that the duplicate log book produced to him by the appellant was genuine as was issued to him by the respondent.

Kenneth Nyamichaba Moenga (DW3), who kept records of motor vehicles for the respondent, confirmed that the appellant was the registered owner of the motor vehicle according to official records maintained by this witness. There was however a caveat placed in the records to prevent dealings with the motor vehicle pending finalization of investigations.

Rameshchandra Meghji (DW4), a partner at a firm called Fabritex was the second owner of the subject motor vehicle which he traded in for another.

Ishmael Mohammed Farah (DW5) dealt with approvals and verification of documents for the respondent. Upon receiving documents in respect of the subject motor vehicle he sent them for investigations.

Daniel Ngugi Mwenje (DW6) testified that he owned a motor vehicle KAG 620 Y which he had purchased through his brother in Mtwapa in March, 2005.

Stephen Asena Asiachi (DW7) an Assistant Commissioner of the respondent in charge of records of road transport testified inter alia that official records showed the appellant as the registered owner of the subject motor vehicle.

The learned trial magistrate analysed that evidence and all the material placed before him by the appellant and the respondent and found for the appellant. The learned magistrate found as fact that of the three motor vehicles subject of the respondents investigations only the appellant had a log book for his motor vehicle. Let us hear the magistrate:-

“I have considered the evidence of the plaintiff and defendant as well as the submissions by their respective learned counsels. I have also considered the pleadings filed herein it is not in dispute that the defendant seized the plaintiff's motor vehicle reg.KAG 620Y and it is in its possession to date. It is also not in dispute that a similar vehicle was later seized and is with the defendant. It is also not in dispute that a third vehicle of similar make is in possession of one Daniel Ngugi Mwenje based in Timau areas of Nanyuki but which was not seized by the defendant and include it with the two already in its possession. It is also not in dispute that of the three owners, it is only the plaintiff who has been issued with a current duplicate log book as the others have not been registered as owners and issued with log books. The defendants witnesses initially stated that Stephen Chiluka Ambulwa's vehicle was the genuine one but the said Stephen Chiluka was not called as a witness. Again the defence witness Ramesh Chandra Maghji (DW4) visited Kisumu and viewed the two vehicles but none of them seemed to have been owned by him before he sold it. The evidence of Daniel Ngugi Mwenje (DW6) claimed to have bought his vehicle through his brother Andrew Kenda Mwenje from Murira Mwafungo Murira but the documents of ownership were not produced as exhibit and further his brother who participated in the transaction was not called and again the vehicle was not taken over by the complainant. It is curious why the defendant failed to seize the said vehicle and join it with the other two already in its yard in Kisumu. The defendant did not even dispatch its security officer to check the engine and chassis numbers of this third vehicle traced at Timau and compare them with the other vehicles. The defendant has only paraded the vehicles but has failed to establish before the court which of the three is the genuine one. Already the defendant has issued a logbook to the plaintiff and the current status of ownership as exhibited by the search of motor vehicle certificate confirms beyond any doubts that it is the plaintiff herein who is the registered owner of m/v reg. KAG 620Y. The defendant has sought to portray the plaintiff as a fraudster and accused him of obtaining the log book

unprocedurally. I find the defendant's assertion rather unbelievable because it is its officer who processed the plaintiff's application and issued him with the logbook and who later authorised the OCS Awendo police station to release the vehicle to the plaintiff. The vehicle was only seized afterwards, after another person presented documents in respect of the two vehicles were taken to the defendant customs yard in Kisumu. It was now the duty of the defendant to establish the which of the vehicles is genuine. All the defendant has done is to go out and search for similar vehicles and has managed to get of (sic) them but left out the crucial exercise of stating to the court which of the three is the genuine one. The defendant only produced documents in respect of Stephen Chiluka Ambulewa vehicle but did not produce those of Daniel Ngugiu Mwenja whose vehicle was not even towed to join the rest at the customs yard in Kisumu. The defendant further rejected documents from Stephen Chiluka Ambulwa as not genuine. Hence it leaves the plaintiff's documents to be considered. The defendant despite challenging the documents forwarded by the plaintiff, it did proceed to issue him with a logbook and the current status as regards ownership of m/v KAG 620Y indicates the plaintiff as the registered owner. The search certificate of motor vehicle produced confirmed the same."

The trial magistrate also found and held that the respondent had not filed a counterclaim and in the event the appellant was entitled to the orders in respect of the motor vehicle.

Those findings were the subject of the first appeal. Twenty grounds were taken in the Memorandum of Appeal filed in court on 7th November, 2008. These grounds related to a complaint that the trial magistrate erred in holding against the respondent when a mandatory Notice of intention to sue had not been served on the Attorney General; that it was wrong to award damages which were not proved; that the magistrate was wrong in holding that the respondent had not produced ownership documents of the subject motor vehicle; that the magistrate erred in holding that the subject motor vehicle was not properly seized by the respondent; that the magistrate erred in holding that engine and chassis numbers had not been established and further erred in holding that the respondents' officers had not established which of the three motor vehicles was the genuine one; that it was wrong to hold that the certificate of search produced was confirmation of ownership; that the magistrate erred in holding that the respondent should have filed a counterclaim; that the magistrate ignored the respondents evidence; that the trial magistrate was wrong in holding that the appellant was rightfully entitled to the motor vehicle and that the trial magistrate erred in relying on submissions of the appellant and ignored those of the respondent.

The first appeal was heard through written submissions as agreed by the parties. The learned judge then framed in the judgement the issues calling for his determination as follows;-

" - Whether in law the respondent was the registered owner and entitled to the possession of the motor vehicle.

- **Whether appellant illegally and unlawfully seized and detained the vehicle.**
- **Whether the respondent was entitled to damages if at all**
- **Quantum**
- **Costs."**

The learned judge dealt first with the complaint that the trial magistrate had ignored the legal issue that a statutory notice should have been served. The judge found, correctly, we think, that such a notice had indeed been served. The learned judge also found that such an issue could in any event not be raised on appeal when it had not been an issue in the court below.

We shall address the other holdings of the learned judge as we consider the grounds of appeal taken before us.

This appeal came up for hearing before us on 17th October, 2013 when it was urged by learned counsel for the appellant Mr. V. N. Oribo. Learned counsel for the respondent Mr. Twahir A. Mohamed appeared for the respondent.

Learned counsel for the appellant submitted before us that the learned judge had overstepped his power in re-evaluating the evidence and thus came to a wrong conclusion. Counsel submitted that it was wrong for the learned judge to allow the respondent to rely on a document which had not been produced as part of the evidence. Counsel also faulted the learned judge for overturning the magistrates findings on the evidence that the appellant was entitled to be registered owner of the motor vehicle.

Learned counsel also faulted the learned judge for finding that the appellant had engaged in fraud in having himself registered as owner of the motor vehicle when fraud was not proved. Counsel lastly found fault with the learned judge for finding in favour of a party who had not filed a counterclaim.

As expected learned counsel for the respondent opposed the appeal and submitted that the learned judge was right when he set aside the decision of the trial magistrate. Counsel submitted that the appellant had fraudulently had himself registered as owner of the motor vehicle and the respondent was in the premises entitled to seize the motor vehicle. On the submission that the respondent had not filed a counter-claim, counsel submitted that there was no need for one because all the respondent wanted to do was to establish ownership of the motor vehicle.

The gravamen of the appeal would appear to be the place of fraud which was averred in the statement of defence and was the main stay of the submissions made before the lower courts and before us at the hearing of the appeal.

It was held by this court differently constituted in the case of **Gudka v Dodhia [1982] e KLR 1** that allegations of fraud must be strictly proved, more than on a mere balance of probabilities.

In **Elizabeth Kamene Ndolo v George Matata Ndolo Civil Appeal No. 128 of 1995 (ur)** the court observed in relation to an allegation that the contested will was a forgery:

"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obliviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

The same issue on allegations of fraud was considered by this court differently constituted in **Virani t/a Kisumu Beach Resort v Phoenix East Africa Assurance Company Limited [2004] 2KLR 269** where it was held that fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. It was further held that sufficient notice and particulars must be supplied to the party charged for rebuttal of such allegations.

The case for the appellant before the trial magistrate was that he purchased the subject motor vehicle from a named party and was thereafter duly registered as the owner of the same by the respondent. It was alleged by the respondent that there were two other motor vehicles with similar registration numbers as the motor vehicle claimed by the appellant. The learned trial magistrate found as a fact that of the three motor vehicles only the appellant had genuine ownership documents for the motor vehicle held by him.

The respondent alleged in the statement of defence, and this remained its position at the trial, before the first appellate court and before us that the appellant had fraudulently caused himself to be registered as the owner of the motor vehicle. No material was placed before the trial court to show or prove in any way at all or to the required standard that the appellant had engaged in any fraudulent activities. Instead the various witnesses called in support of the respondents case confirmed that the registration documents for the subject motor vehicle held by the appellant were genuine and were issued to him by the respondent. The learned magistrate was entitled to find for the appellant.

We have carefully considered the whole matter, the submissions made and the law. We cannot,

with respect, see the material that was before the learned judge which persuaded him to set aside the findings of the trial magistrate.

There is a small issue that relates to the final orders made by the magistrate when he ordered:

"Consequently, I grant the prayers sought in the Plaint dated 25.7.07"

Those prayers, which we have set out in this judgement included inter alia prayers for general damages and a declaration. It will be seen that no evidence was led to establish the claim for general damages and judgement could not be entered the way the magistrate did. The way the orders were granted led to a situation where the decree emanating from them could not be properly drawn.

The learned judge was alive to the difficulties posed by that part of the learned magistrates judgement because he asked:

"... Now if learned trial magistrate issues a blanket order that he had granted the prayers as sought in the plaint, how is the respondent to know what damages were awarded to him. The respondent thus has a decree that awarded him damages, which damages were never assessed. How then is he expected to execute such a decree ….. I am not surprised that the court resorted to an ambiguous order aforesaid on this aspect of the matter...."

The trial magistrate had no material on which to assess damages; he did not assess damages but he delivered a judgement granting all prayers in the plaint. This was, with respect, in error. We are entitled, and we hereby do, correct the error by entering judgement for the appellant to the extent that he is entitled to the possession and ownership of the motor vehicle KAG 620Y and the respondent has no authority to interfere with the appellants rights of ownership thereof.

The upshot of our findings is that the appeal succeeds to the extent hereinabove and is hereby allowed. Judgement of the first appellate court is hereby set aside. We award costs of the appeal and of the courts below to the appellant.

Dated and Delivered at Kisumu this 20th day of December, 2013

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR