

ERNEST MAJAJI
versus
MICHAEL MADONDO
and
JAMES DOUZA
and
THE MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA & MWAYERA JJ
HARARE, 24 November 2016 and 17 May 2017

Civil appeal

P. Nyeperai, for the appellant
Respondents in person

MUNANGATI-MANONGWA J: The appellant in this matter, a claimant in the court *a quo* had claimed ownership of a Ford Transit motor vehicle registration No ACU 3159 through interpleader proceedings. The *court a quo* dismissed his claim and aggrieved by such a decision he appealed to this court.

The brief facts of the matter are as follows. The first respondent successfully sued the second respondent for arrear rentals and other relief in the sum of \$1 248.00. A writ was duly issued and the aforesaid motor vehicle a Ford Transit was attached in execution to satisfy the debt.

The appellant filed an affidavit claiming ownership on the basis that he is the owner of the property which was attached and by the Messenger of Court and referred the court to an attached registration book and agreement of sale. The claim was opposed by the judgment creditor who challenged the authenticity of the documents produced as fake and pointed to alteration of dates on the agreement of sale. These anomalies are noted after reaching the claimant's interpleader affidavit.

After hearing arguments the court *a quo* dismissed the claim with costs. The appellant has appealed raising the following grounds:

1. The learned Magistrate erred and misdirected himself in dismissing the applicant's application of Interpleader Summons for appellant's motor vehicle a Ford Transit registration number ACU 3159.
2. The learned magistrate also erred and seriously misdirected himself in dismissing the appellant's claim when there is overwhelming evidence confirming the appellant as the owner of the motor vehicle in question attached by the Messenger of Court over a matter for which the appellant cited as a party to the said proceedings.
3. The learned magistrate also erred and seriously directed himself in failing to appreciate the fact that the appellant was not a party to the proceedings which gave rise to the attachment of his motor vehicle hence the appellant's motor vehicle could not be attached and sold over a debt which appellant never incurred.
4. The learned magistrate also erred in seriously misdirecting himself in failing to accept the agreement of sale and vehicle registration book confirming the appellant as the sole owner of the motor vehicle in question.

Wherefore, the appellant prays for an order setting aside the whole judgment by the magistrate and order the following:

- a) That the judgment of the court *quo* be and is hereby set aside.
- b) That the appellant's interpleader summons be and is hereby granted.
- c) That the defendant pays costs of suit.

From the onset this court notes that ground 1 is not a proper ground for want of stating the basis for the misdirection. As for ground 3, nowhere in the record does it show that the magistrate ever assumed that the appellant was party to the proceedings which gave rise to the attachment. The appellant was treated as a claimant and the court assessed the evidence provided by him in that capacity, that of a third party claiming a right to purportedly wrongly attached property.

Grounds 2 and 4 are essentially one ground where the appellant claims that the evidence placed before the court being the agreement of sale and the vehicle registration book consisted of overwhelming evidence proving ownership which the court failed to consider when it dismissed his claim.

The first respondent a self-actor raised an issue that the record had been tempered with as he believed that certain information was missing. This was disputed by the

appellant's representative arguing that if that had been so, it should have been raised with the Clerk of Court. A perusal of the record of proceedings however, reveals that the record was intact with original exhibits annexed thereto for our consideration and assessment.

In support of the only ground of appeal that we recognised, the appellant insisted that the evidence of the sale agreement and the registration book was *prima facie* evidence that the motor vehicle was appellants'.

It is clear from the record that the court *a quo* was very alive to the requirements to be met by a claimant if he were to be successful. Reference was made to *Phillips NO v National Foods Ltd & Another* where CHATIKOBO J in referring to the case 1996 (2) ZLR 532 (HC) of *Bruce NO v Josiah Parkes & Sons Ltd & Anor* where it was held that:

“In interpleader proceedings the claimant must set out such facts and allegations which constitute proof of ownership so that the question whether or not to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without hearing oral evidence.”

Suffice to state that the requisite proof by the claimant is on a balance of probabilities.

Of note, the copy of the registration book is not itself in the name of the appellant. The appellant does not state that he had hired out his motor vehicle to the judgment debtor. The agreement of sale itself as noted by the court *a quo* had been tempered with. The court was clear that the agreement which was said to have been concluded on 10 August 2015, had alteration on the Commissioner of Oaths' stamp with the date written “22-01” which portion was then scribbled over so that the date “10-08-2015” appears.

The court *a quo* which had privilege to read original documents could not have fabricated this evidence moreso when the first respondent had himself raised the same issue when he opposed the claimant's claim in his affidavit of 23rd February 2016. A close look of the original record, revealed claimant's affidavit which clearly shows the alleged alterations.

Further, the claimant's supporting affidavit does not state why the motor vehicle was found in the possession of the judgment debtor. The relevant paragraph which sets out the basis for the claim is para 4.1 which read as follows:

“The claimant is the owner of the property which was attached by the Messenger of court in execution of a court order obtained against judgment debtor on 15 January 2016, see attached registration book and agreement of sale entered between claimant and Milton Mukondwa (seller).”

It is the judgment debtor in his application for rescission of judgment (which was dismissed after dismissal of his application for stay of execution) who brought up the aspect of the motor vehicle being on hire and bringing about the alleged hire document. If indeed there was such an arrangement this should have been brought up by the claimant from the onset. Given the foregoing, the court *a quo* did not err in making a finding that there seemed to be collusion between the judgment debtor and claimant.

The court *a quo* meticulously considered the documents before it and was satisfied that the claimant had not proved ownership on a balance of probabilities. Thus, contrary to appellant's averment that there was overwhelming evidence to prove ownership, the appellant turned out not to be a straight claimant who genuinely owned the attached item but one trying to aid a judgment debtor reluctant to meet his obligations.

This court therefore finds no misdirection on the part of the court *a quo*. The appeal has no merit and is accordingly dismissed with costs.

MWAYERA J agrees

Costa & Madzinga, appellant's legal practitioner