

KEARNEY AND COMPANY LIMITED v AGIP (Z) LIMITED AND ASHALT
AND TARMAC (1985) Z.R. 7 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S.
31ST JANUARY, 1985
(S.C.Z. JUDGMENT NO 6 OF 1985)

Flynote

Civil procedure - Appeal to Judge in chambers - Further affidavits - Admissibility of.
Evidence - Motor vehicle - Blue Book - Whether document of title.

Headnote

The first respondent obtained judgment in default of appearance against the second respondent. The first respondent issued a writ of fi.fa under which the sheriff seized a number of vehicles in the possession of the second respondent. The appellant claimed ownership of the vehicles and issued an interpleader summons. The appellant filed an affidavit to the effect that the second respondent had sold the vehicles to the appellant, and that due to an oversight the change of ownership was not registered on the registration books relating to the vehicles. The Deputy Registrar in his ruling against the appellant said that he was not impressed by the reason given for the failure to effect change of ownership and was not satisfied with the affidavit that was filed by the appellant to prove that the vehicles were sold to the appellant. He said something more like the mode of payment should have been shown to the court. On appeal to the judge in chambers a further affidavit was filed exhibiting a copy of an assignment between the second respondent and the deponent which indicated that the vehicles in question had been assigned to the deponent. In his judgment the judge noted that titles of vehicles are proved by registration books, commonly known as blue books. The appellant appealed.

Held:

- (i) A blue book is not a document of title; at most it is some evidence to be taken into account when investigating the question of ownership;
- (ii) An appeal from deputy registrar to a judge in chambers is an entirely fresh application and it is not improper to lodge further affidavits which should be taken note of by the appellate judge.

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For the appellant: S.S. Sikota of Solly Patel, Hamir and Lawrence.
For the respondent: H.H. Ndblovu, of Jaques and Partner.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal against the judgment of a judge of the High Court sitting in chambers in his appellate capacity upholding a decision by the Deputy Registrar of the High Court on an interpleader summons holding that vehicles seized by the Sheriff in execution of a Writ of Fieri Facias, did not belong to the claimant, who is the appellant in this appeal, but instead belonged to the judgment debtor, who is the second respondent in this appeal.

The facts of this case were that the first respondent obtained a judgment in default of appearance against the second respondent for the sum of K60,340.50n and costs. The first respondent issued a Writ of Fieri Facias in response to which the Sheriff seized a number of vehicles from the second respondent. The appellant claimed ownership of the vehicles and, as a result, an interpleader summons was issued. At the hearing of that summons before the Deputy Registrar the appellant filed an affidavit by one Mistry who deposed that on the 4th of June, 1979, the second respondent sold to the appellant a number of assets including several vehicles referred to in a letter written by the Managing Director of the second respondent company addressed "To Whom It May Concern" certifying that his company had sold vehicles and machinery to the appellant and requesting that the necessary change of ownership in the Road Traffic Commissioner's records and in the blue book should be effected. In his affidavit Mistry deposed that due to an administrative oversight on the part of the appellant company the registration books of the vehicles were never submitted to the Road Traffic Commissioner to effect the registration of change of ownership although the second respondent's livery was painted off the vehicles .

The Deputy Registrar in his ruling said:

"I am not impressed by the reason given by the plaintiff for the failure to effect change of ownership of the vehicles in question . . . and I am equally not satisfied beyond reasonable doubt that the letter exhibited "NKM" alone proves what it is talking about, namely, that the vehicles in question were duly, sold to Messrs Kearney and Co. Ltd. Something more like the mode of payment should have been shown to Court . . . "

When the matter came before the Learned appellate judge a further affidavit was filed on behalf of the appellant, this was an affidavit by one Charles Kearney producing a copy of an assignment dated the 4th of June, 1979, made between the second respondent and the deponent. This assignment indicated that the second respondent assigned a number of vehicles and machinery (including the vehicles seized by the Sheriff) to the deponent in consideration of an agreement by the deponent to liquidate the liabilities of the second respondent as shown in schedule

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to the agreement. It was provided by Clause 4 of the agreement that title to the plant, machinery and other assets should pass on the signing of the agreement.

Mr Sikota, on behalf of the appellant has argued that, the Deputy Registrar, should have taken no notice of any delay in registering the change of ownership of the vehicles because he stated, the actual ownership of the vehicles was not affected by the particulars entered either in the Register or the registration book, which is commonly known as the blue book. With regard to the learned

appellate judge's comments that titles of vehicles are proved by blue books, Mr Sikota argued that this was not in accordance with the law as to the change of ownership of moveable property.

Mr Ndhlovu on behalf of the first respondent agreed that delay in registering change of ownership did not in fact affect the ownership of the vehicles and that the blue book was not a document of title but he said that the delay should have raised a doubt in the mind of both Courts below and they were entitled to say that they were suspicious of the circumstances of the transfer of ownership.

We are quite satisfied that both the Deputy Registrar and the learned trial judge misdirected themselves when finding that the delay in affecting registration of the change of ownership was in this case relevant to the issue as to whether or not there had been a change of ownership. We also agree with Mr Sikota that a blue book is not document of title; at most it is some evidence to be taken into account when investigating the question as to ownership. We would also comment that we agree with Mr Sikota's argument that on an appeal to a judge in Chambers the application is an entirely fresh application and it was not improper to lodge a further affidavit which should in fact have been taken note of by the appellate judge.

On its own motion this Court has raised the point that the appellant is a limited company known as Kearney and Company Limited and the letter referred to in Mistry's affidavit confirms a change of ownership to the appellant company, whereas the document produced as an exhibit to the affidavit of Charles Kearney in the Court below indicates that the agreement for the sale of the second respondent's assets and vehicles was made between the second respondent and Charles Kearney in his personal capacity. It would appear therefore at first sight that the affidavit of Charles Kearney and the agreement exhibited thereto are not relevant to this appeal. However, we do take note of the fact that Charles Kearney bears the same name as the appellant company and there may be an explanation as to the transaction which occurred between these parties. For this reason, we consider that this is an appropriate case to be sent back to the Deputy Registrar for a rehearing on the facts as they appear to us and on such other facts as may be produced before him either on affidavit or orally as he may direct. For this reason we allow the appeal and order that this case be sent back to the Deputy Registrar for complete re-hearing.

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In view of the fact that appeal was allowed on an entirely new point raised for the first time by this Court, there will be no order as to costs.

Appeal allowed
