



Kiarie v Faith Wanjugu t/a Compliance Auctioneers & 2 others (Civil Appeal E927 of 2022) [2024] KEHC 7695 (KLR) (Civ) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E927 OF 2022**

WM MUSYOKA, J

JUNE 24, 2024

BETWEEN

NANCY NYAMBURA KIARIE APPELLANT

AND

FAITH WANJUGU T/A COMPLIANCE AUCTIONEERS 1ST RESPONDENT

LEMMY REGAU T/A LEMMY REGAU & CO. ADVOCATES 2ND RESPONDENT

MUTINDA MUSYOKA 3RD RESPONDENT

(An appeal arising from orders made in a ruling by Hon. JW Munene, Resident Magistrate, PM, delivered on 13th October 2022, in Milimani SCCC No. E2113 of 2022)

JUDGMENT

1. The suit at the primary court was initiated by the appellant, against the respondents, for a sum of Kshs. 577,774.00, together with interests and costs. The appellant had alleged that she had bought a motor vehicle, initially belonging to the 3rd respondent, at a public auction, conducted by the 1st respondent, in execution of a decree in a judgment passed in Mavoko CMC ELRC No. 9 of 2018, and the vehicle was subsequently repossessed by an entity, Spread Capital Limited, that co-owned the motor vehicle with the 3rd respondent. The appellant asserted that the respondents ought to have done due diligence before selling a motor vehicle that was co-owned by the 3rd respondent and another. Only the 1st respondent filed a defence, in which she asserted that she acted within the law, and that the public auction was conducted with notice to the co-owner, who did not raise any objection.
2. The response by the 1st respondent incorporated a preliminary objection on a point of law, to the effect that the suit in Milimani SCCC No. E2113 of 2022 related to execution proceedings in Mavoko CMC



- ELRC No. 9 of 2018, and the appellant ought to have raised her issues in Mavoko CMC ELRC No. 9 of 2018, instead of initiating a separate suit in Milimani SCCC No. E2113 of 2022.
3. The preliminary objection was canvassed by way of written submissions. A ruling was delivered thereon, on 13th October 2022. The finding and holding of the court were that, to the extent that the appellant bought the motor vehicle at an auction, being conducted in execution of a decree passed in Mavoko CMC ELRC No. 9 of 2018, she could only raise her claim in that cause, for the court seized of that matter to determine the propriety of the execution proceedings, leading up to the sale of the property to her, and the repossession by the co-owner. The court held that it had no jurisdiction, in view of that.
 4. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 11th November 2022, revolve around the trial court treating the pleadings and submissions by the appellant superficially; for holding that the suit contravened section 34 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya; and by misapprehending the provisions of section 34 of the [Civil Procedure Act](#).
 5. Directions were given on 20th December 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions.
 6. The appellant has collapsed her 3 grounds of appeal into 1, whether her suit in Milimani SCCC No. E2113 of 2022 contravened section 34 of the [Civil Procedure Act](#). She submits that section 34 of the [Civil Procedure Act](#) only applied to the parties in the suit, the subject of the execution proceedings. She asserts that she was not a party in Mavoko CMC ELRC No. 9 of 2018, and, therefore, for that reason, she could not ventilate her issues in that suit, and had to commence a separate suit. She cites [Kuronya Auctioneers v. Maurice O. Odoch & another](#) [2003] eKLR (Omolo, Shah & Owuor, JJA), [Josephat Lishenga v. Muganda Wasilwa t/a Keysian Auctioneers](#) [2018] eKLR (Jaden, J) and [Kenya Tea Development Agency Holdings Limited v. Leo Kimathi & 2 others](#) [2011] eKLR (M. Onyango, J), to argue that she was not party to Mavoko CMC ELRC No. 9 of 2018, the issues in that suit and her suit were different, the parties in the 2 suits were also different, and so were the prayers. She also cites Order 22 Rule 41 of the [Civil Procedure Rules](#), on how execution on co-owned movable property should be levied, and [Rot Mel Limited v. Interstate Limited & another](#) [2009] eKLR (Kimaru, J), which interpreted it, to mean that such property cannot be attached in execution of a decree of the court. She submits that the 1st and 2nd respondents, therefore, acted unlawfully when they attached the subject motor vehicle, and sold it to her. She cites section 26 of the [Auctioneers Act](#), Cap 526, Laws of Kenya, on the remedy available to a person aggrieved by the actions of an auctioneer, that of damages for the loss suffered, which was interpreted in [Kenya Tea Development Agency Holdings Limited v. Leo Kimathi & 2 others](#) [2011] eKLR (M. Onyango, J), to mean that a separate suit could be filed for that purpose. She asserts that she was within her rights when she filed the Milimani SCCC No. E2113 of 2022. She cites section 27 of the [Civil Procedure Act](#), [Hellen Wandiga Ngeru v. National Land Commission](#) [2020] eKLR (Oundo, J), and [Republic v. Rosemary Wairimu Munene, Exparte Applicant v Ibururu Dairy Farmers Cooperative Society Ltd Nyeri HCJR No. 6 of 2004](#) (Mativo, J) (unreported), to assert that she was entitled to costs of the appeal.
 7. The 1st respondent, on her part, identified 2 issues for determination: whether the suit in Milimani SCCC No. E2113 of 2022 was competent, and whether the 1st respondent passed good title, in the motor vehicle, to the appellant. On the first issue, she cites section 13(2) of the [Small Claims Court Act](#), Cap 10A, Laws of Kenya, to submit that there would be no jurisdiction for the Small Claims Court, over a matter if proceedings relating to that claim are pending in or have been heard and determined by any other court; and section 34 of the [Civil Procedure Act](#), to submit that all questions arising between parties in the suit in which the decree is passed, or their representatives, and relating to execution,



discharge or satisfaction of the decree, should be determined by the court executing the decree, and not by a separate suit. On the second issue, he cites *South Nyanza Sugar Company Limited v. Alfred Sagwa Mdeizi t/s Pave Auctioneers* [2010] eKLR (Makhandia, J) and *Kennedy Ooko Jacob t/a Ssebo Intel Co. Auctioneer v. John Abich Ochanda* [2021] eKLR (Wendoh, J), to submit that section 34 of the *Civil Procedure Act* does not allow the filing of a separate suit, to determine issues that emanate from execution of a decree in a suit. She submits that, in view of section 34 of the *Civil Procedure Act* and section 13 of the *Small Claims Act*, the dispute in Milimani SCCC No. E2113 of 2022 related to execution proceedings, arising from the decree in Mavoko CMC ELRC No. 9 of 2018, and should have been ventilated in that suit, and not in Milimani SCCC No. E2113 of 2022, and that the consequence of which was that the Small Claims Court lacked jurisdiction to entertain the matter in Milimani SCCC No. E2113 of 2022. On the second issue, it is submitted that to the extent that no objection proceedings were brought under Order 22 rule 51 of the *Civil Procedure Rules*, nor under section 34 of the *Civil Procedure Act*, the sale by auction was not rendered illegal, and, therefore, the 1st respondent had passed a good title to the appellant. She avers that there was no determination that the motor vehicle had been wrongly sold, to warrant invocation of section 26 of the *Auctioneers Act*, for damages in compensation. She asserts that damages could only be sought upon a determination that the auctioneer had adopted the wrong procedure in disposing the motor vehicle to the appellant. It is asserted that the 1st respondent had taken all the requisite steps in the disposal of the motor vehicle, as all the processes envisaged in rule 15 of the *Auctioneers Rules*, 1997, were followed.

8. I would agree with the appellant, that there is only 1 issue for determination, whether Milimani SCCC No. E2113 of 2022 contravened section 34 of the *Civil Procedure Act*.

9. The starting point should be with what section 34 of the *Civil Procedure Act* provides. The relevant part of it, section 34(1), states as follows:

“ All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

10. Section 34 is about parties in a suit, where the decree was passed. Section 34 is in the *Civil Procedure Act*. The principal parties in proceedings commenced under the *Civil Procedure Act*, which take the form of complaints and originating motions, are plaintiffs and defendants. Section 34, therefore, envisages plaintiffs and defendants raising issues relating to execution of a decree, for they would be the parties to the suit. Section 34 should be read together with Order 22 of the *Civil Procedure Rules*, which provides for execution of decrees and orders. Order 22 allows persons, who are not parties to a suit, to intervene in execution proceedings, where their interests are affected or are at stake. Order 22 rule 51 allows objectors, to execution proceedings, to do just that, where they claim that the property, targeted for execution, was actually theirs, and not the judgment-debtor's. That process would then make such an intervener a party to the suit, but limited to the execution proceedings.

11. The question that should follow then is whether the appellant was a party in Mavoko CMC ELRC No. 9 of 2018, where that execution happened. She definitely was not a principal party to that suit, given that she was neither the plaintiff nor the defendant in it. Was she a secondary party? Was she an intervener in it? She did not file the objection envisaged under Order 22 rule 51 of the *Civil Procedure Rules*, and, therefore, she was not an intervener, by way of objection, under that provision. She was not a party to those proceedings. She merely bought an asset sold at an auction carried out in execution of a decree in that cause. That did not make her a party to that matter. She was not the sort of party envisaged by section 34 of the *Civil Procedure Act*. The decisions, that the 1st respondent relies upon, which turn on section 34 of the *Civil Procedure Act*, such as South *Nyanza Sugar Company Limited*



v. Alfred Sagwa Mdeizi t/s Pave Auctioneers [2010] eKLR (Makhandia, J) and Kennedy Ooko Jacob t/a Ssebo Intel Co. Auctioneer v. John Abich Ochanda [2021] eKLR (Wendoh, J), would not apply to her.

12. The appellant had bought an asset that was subsequently taken away from her, by another person, who claimed to be a co-owner of the property. It does not appear contested that indeed that that other person was a co-owner of the property. Going by Rot Mel Limited v. Interstate Limited & another [2009] eKLR (Kimaru, J), a co-owned property should not be disposed of in execution of a court decree, obtained against one of the co-owners, without reference to the other. Indeed, according to the court, in that matter, such a property should not be attached in execution of a court decree. The 1st respondent appears to make light of the interest of the co-owner, when she says that she sent out a notice to that co-owner, before she sold the property, but the co-owner did not respond, nor file an objection under Order 22 rule 51 of the Civil Procedure Rules. I am unaware of a law or rule of law, which states that the legal rights and interests of a co-owner of property, would be extinguished by the mere fact of that co-owner failing to respond to a notice by the auctioneer, or by failing to file an objection under Order 22 rule 51. To the extent that a property is co-owned, it would not be available for attachment and sale in execution of a court decree. The decree-holder ought to find other assets, singly owned by the judgement, or adopt the other modes of execution of a decree. One thing is for sure, the sale of the subject motor vehicle by the 1st respondent did not pass a good title to the appellant, for no valid sale could happen, if its effect was to extinguish the ownership rights or interests of the other owner. The appellant did not need to get a court order for a declaration in that respect. She appeared to pretty understand and appreciate that, hence she did not resist the repossession, by filing suit against that other owner.
13. What were her options? The repossession of the motor vehicle by the other owner was not done within the context of Mavoko CMC ELRC No. 9 of 2018, and, therefore, she could not move the court in that suit under Order 22 rule 51 of the Civil Procedure Rules, by way of objection proceedings. There is no provision in Order 22 of the Civil Procedure Rules, under which she could challenge that repossession within Mavoko CMC ELRC No. 9 of 2018. Neither could she move in that suit, against the auctioneer, the 1st respondent in this case, given that she was not a principal party in that suit, and section 34 of the Civil Procedure Act could not come to her aid. By dint of Kuronya Auctioneers v. Maurice O. Odoch & another [2003] eKLR (Omolo, Shah & Owuor, JJA), Josephat Lishenga v. Muganda Wasilwa t/a Keysian Auctioneers [2018] eKLR (Jaden, J) and Kenya Tea Development Agency Holdings Limited v. Leo Kimathi & 2 others [2011] eKLR (M. Onyango, J), she could not pursue damages against the 1st respondent, within that suit, as she was not a party to it, and there were no legal provisions that would have aided her to intervene in any way in that suit.
14. The notion that the appellant could pursue compensation for the wrong committed against her, and the loss and damage that she suffered as a result, in the same suit, the execution of whose decree exposed her to the damage, is conceptually flawed. The court, in Mavoko CMC ELRC No. 9 of 2018, became functus officio, once it pronounced the judgment, whose decree was being executed through the flawed sale, the subject of these proceedings. It had handled a cause of action between the 3rd respondent and another party, a Mr. Paul Muiruri, to exhaustion, vide the decree that was executed through the 1st respondent. It could not be, that the said cause, Mavoko CMC ELRC No. 9 of 2018, having become spent, and the court having become functus officio, the same court would again handle another cause of action between 2 other parties, different from the original parties, that is to say the appellant herein and the 1st respondent, or between the appellant and Spread Capital Limited. That would be a conceptual impossibility, where 2 separate causes of action, involving different parties, could be handled by the same court, in the same cause or suit, with one cause of action being handled after the court had become functus officio. The court handles only one cause of action at a time, and after it pronounces itself, its



work would be completely done, so far as that cause is concerned, and the suit would have terminated. It only handles a bundle of several causes of action, simultaneously, where they are based on the same facts, and where the parties are common. The court, in Mavoko CMC ELRC No. 9 of 2018, having assessed damages, and passed a decree, in favour of Mr. Muiruri, and against the 3rd respondent, which was thereafter executed, could not, conceptually, embark on a second round of assessing damages and passing another decree, in the same suit, in favour of the appellant, and against the 1st respondent, or Spread Capital Limited, who were not even parties in that cause.

15. The fact that the 1st respondent was the auctioneer or court broker, through whom the decree in Mavoko CMC ELRC No. 9 of 2018 was executed, did not make her a party in that suit, neither did the appellant become a party in that suit by merely having participated in the auction exercise through which that decree was executed. Auctioneers, court bailiffs and court brokers are not parties to the suits in which they play some role or other. They act as court agents, executing roles within the civil process, on behalf of the court. That does not make them parties in the suit. Persons who participate in auctions, conducted by such court agents, in execution of court decrees, and who purchase items on offer in such sales, do not become parties to the suit, on that account. Where something goes wrong, with the exercise being carried out by such court agents, and persons who are not party to that suit, and who suffer loss or damage, through the fault of the court agents, such as where an eviction or demolition order is executed against persons who are not parties in the suit, the recourse that such persons would have, would not be within the suit, but elsewhere, outside the suit, in separate proceedings.
16. The appellant herein was not left without a remedy. Her remedy was in the *Auctioneers Act*, for the transaction, that placed the motor vehicle, in question, in her hands, had been carried out under the provisions of the *Auctioneers Act* and the Rules made under that Act, and not the *Civil Procedure Act* and the *Civil Procedure Rules*. The *Civil Procedure Act* and the *Civil Procedure Rules* only provide for execution of decrees by way of sale, they do not carry provisions on how those sales are to be carried out. Such details are in the statutes that regulate such sales, and one of those statutes is the *Auctioneers Act*. The remedy is in section 26 of the said *Act*, which provides that:
 - “26. Right to recover damages from auctioneer
Subject to the provisions of any other written law, a person who suffers any special or general damage by the improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action ...”
17. The appellant was a person who suffered special damage by, according to her, an improper exercise of power by a licensed auctioneer. That alleged improper exercise of power was the sale to her of property that was co-owned, without notice to one of the co-owners, with the result that the asset was repossessed by the other co-owner, and the appellant was left without her money and the motor vehicle she had allegedly bought at the auction. She could not pursue the co-owner who had repossessed the vehicle, for the repossession was in exercise of ownership rights. Neither could she pursue the other co-owner, for he had not sold it to her in the first place. Her loss or damage could only be made good by the person who sold the vehicle to her, and who had exercised her power, according to her, improperly, the 1st respondent herein. Section 26 of the *Auctioneers Act* allowed the appellant to go after the 1st respondent, by action or suit, and that was what she exactly did, in Milimani SCCC No. E2113 of 2022. Filing the suit in Milimani SCCC No. E2113 of 2022 was the only option left to her. She was within her rights, and the suit was properly filed.
18. The 1st respondent has argued that the Small Claims Court had no jurisdiction over the dispute, framed in Milimani SCCC No. E2113 of 2022, based on both section 34 of the *Civil Procedure Act* and section



13(2) of the *Small Claims Court Act*. I have addressed section 34 of the *Civil Procedure Act* exhaustively hereabove, and I shall not advert to it. Section 13(2) is about claims that are pending in or have been heard and determined by any other court not being entertained by the Small Claims Court. Section 13(2) would be of no application to the circumstances of the appellant, as she was not party to the other suit, Mavoko CMC ELRC No. 9 of 2018, and the issues she raised before the Small Claims Court, in Milimani SCCC No. E2113 of 2022, were different from those that were being handled in Mavoko CMC ELRC No. 9 of 2018, and her claims were not against the parties in that cause, but different individuals. Of course, I do note that the 3rd respondent was a party in both causes, but his joinder, in Milimani SCCC No. E2113 of 2022, made him a nominal party, for the appellant never dealt with him, and he never purported to sell the suit motor vehicle to her, and no orders could be made against him, and if any were made, they would not be executable against him, in view of the decree made and executed against him in Mavoko CMC ELRC No. 9 of 2018.

19. For avoidance of doubt, section 13(2) of the *Small Claims Court Act* states:

“A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.”

20. I trust I have said enough to demonstrate that Milimani SCCC No. E2113 of 2022 was properly filed before the Small Claims Court, it was a competent suit, and the trial court was in error in striking it out. Consequently, I find and hold that the appeal herein has merit. I hereby allow it, with the consequence that the order made on 13th October 2022, in Milimani SCCC No. E2113 of 2022, is hereby quashed, and substituted with an order dismissing the preliminary objection, in the response dated 22nd August 2022, and direct that the suit in Milimani SCCC No. E2113 of 2022 be heard on its merits. The appellant shall have the costs of this appeal. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 24TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates:-

Ms. Kamau, instructed by COOTOW & Associates, Advocates for the appellant.

Mr. Makumi, instructed by J. Makumi & Company, Advocates for the 1st respondent.

