



**Board of Governors Matili Technical Training Institute v Eshikoni Auctioneers & another
(Civil Appeal 1 of 2023) [2024] KEHC 16867 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 1 OF 2023
DK KEMEL, J
NOVEMBER 29, 2024**

BETWEEN

**THE BOARD OF GOVERNORS MATILI TECHNICAL TRAINING
INSTITUTE APPLICANT**

AND

**ESHIKONI AUCTIONEERS 1ST RESPONDENT
RAMAGON CONSTRUCTION COMPANY LIMITED 2ND RESPONDENT**

RULING

1. This ruling is in respect of the Applicant’s applications dated 14th May 2024 and 7th June 2024 filed under certificate of urgency via the Attorney General’s State Office pursuant to Articles 159 and 162 (2) of *the Constitution* of Kenya 2010, Sections 43, 53, 86, 87 and 88 of the *Basic Education Act*, Section 1A, 1B and 63 (e) of the *Civil Procedure Act*, Order 51 Rule 1 and Rule 15, Order 22 Rule 2 & Rule 22 and Order 29 of the *Civil procedure Rules*, 2010 and Section 21(1) (2) (3) (4) of the *Government Proceedings Act* and all other enabling provisions of law, seeking the following orders;
 - a. That this application be certified urgent and service be dispensed with in the first instance.
 - b. That the Respondent be compelled to release the Applicant’s motor vehicle registration number KDA 556 B illegally impounded on 4th June 2024.
 - c. That the Respondent be compelled to abide by a Court order issued on 5th June for a stay of execution pending the determination of the application dated 14th March 2024.
 - d. That the court be pleased to set aside the notice of attachment dated 8/5/2024 and subsequent proclamation by Eshikoni Auctioneers attaching property belonging to the Applicant.



- e. That the execution proceedings to enforce judgement and decree be declared a nullity and that the court do cancel and set aside by lifting the warrants of attachment and sale as the same is irregular.
 - f. That the Respondent be ordered to abide by the orders made on 5/6/2024 for stay of execution pending determination of the Applicant's application dated 14/3/2024.
 - g. That the Respondent to pay the costs of the applications.
2. The application are supported by the grounds on the face of the application and the affidavit sworn on 6th June 2024 by Thomas Abuga, the deputy principal of Matili Technical Training Institute, the Applicant herein and based on the following grounds: -
- a. That the 2nd Respondent herein obtained a judgement against the Applicant for a sum of Kshs. 16,438,442/= on 15th January 2024.
 - b. That on 8th May 2024, the 2nd Respondent vide the 1st Respondent proclaimed the Applicant's properties in an attempt to execute the decree and judgment of the Court as delivered on 15th January 2024.
 - c. That the impounded motor vehicle registration number KDA 556 B was not part of the 2nd Respondent's schedule of proclaimed goods.
 - d. That the Applicant obtained stay of execution orders thus it will not be in the interest of justice if the Respondent continues the unlawful detention of the said motor vehicle registration number KDA 556 B. Also, that the said motor vehicle is serving over 200 students and that the action of the Respondent is prejudicial to the Applicant.
 - e. That the Applicant has already deposited a sum of Kshs. 500,000/= to the account of the decree holder towards the settlement of the decree.
 - f. That the Applicant's properties are not subject to attachment or auction for the purpose of executing a decree or judgement thus the impoundment of the said motor vehicle is illegal.
 - g. That the Applicant is apprehensive that unless the said prayers as sought herein are granted, the Applicant will suffer irreparable loss.
 - h. That the Application was made without delay.
3. In opposing the application, the 2nd Respondent filed grounds of opposition dated 12th June 2024 as follows;
- a. That the application is bad in law, non-starter, misconceived and unsustainable as execution was duly carried out on the moveable property belonging to the Applicant.
 - b. That the application does not disclose any reasonable grounds upon which it can be sustained.
 - c. That the application fails to demonstrate sufficient cause to warrant grant of the orders sought and that Court orders do not operate retrospectively.
 - d. That the Applicant has not demonstrated how it intends to settle the decretal sum which continues to accrue interest.
 - e. That this application is an afterthought since execution already took place pursuant to the orders issued by the Court.



- f. That the application only aims to wrongfully hold the 2nd Respondent in abeyance from the fruits of its judgment and yet litigation ought to come to an end.
- g. That the application dated 14th March 2024, was never served upon the 2nd Respondent.
4. Further, the 2nd Respondent vide its Director, Abdi Barre Abdi, swore a replying affidavit on 28th June 2024, wherein he averred that on 15th January 2024, judgement was issued by this Court in its favour for a sum of Kshs. 16, 438,442/= inclusive of interest and costs. Execution duly commenced against the Applicant by way of warrant of attachment of moveable property and that since the execution already commenced, the Applicant's prayer seeking stay of execution is overtaken by events and it is an afterthought. It was averred that the said applications dated 14th May 2024 and 7th June 2024, were not duly served upon the 2nd Respondent as required under law, and as such the issued orders by the Court were all made ex-parte. Finally, it was argued that the Kshs. 500,000/= which was deposited in the Company's account is not enough to warrant a stay. It was averred that the said applications dated 14th May 2024 and 7th June 2024, should be dismissed with costs as they have been overtaken by events.
5. The parties herein disposed of the application by way of written submissions. Both parties duly complied.
6. In a nutshell, the Applicant vide submissions dated 15th October 2024, argued that the execution proceedings by the Respondent herein be declared a nullity and that this Court ought to cancel and set aside by lifting the warrants of attachment and sale as the same are irregular. According to Counsel for the Applicant, the Respondent failed to abide by the dictates as stipulated under Section 21 of the *Government Proceedings Act* as read together with Order 29 of the Civil Procedure Rules. Counsel relied on the decision of *Kisya Investments Ltd vs Attorney General* (2005) 1 KLR 74.
7. Counsel for the Applicant submitted that the Applicant's school is a government institution under the State Department of Vocational Training and therefore the Applicant's funds requires parliamentary approval for each financial year. Further, Counsel argued that when the Respondent instituted the suit Bungoma Civil Suit No. 239 of 2020, they sued the Applicant and the Permanent Secretary of Higher Education, Science & Technology thus admitting to the fact the Applicant's institution is a public entity. Counsel relied on the case of *Permanent Secretary Office of the Presidential Ministry of Internal Security & Another ex parte Nassir Mwadhbihi* (2014) eKLR.
8. Finally, Counsel argued that the Kshs. 500,000/= paid to the 2nd Respondent was only to secure and prevent government property from being auctioned as they are custodians of the same as mandated by the Cabinet Secretary Basic Education.
9. The 2nd Respondent on the other hand submitted that the Applicant's school is dependent of government funding but it is not government or servant or agent of government. Counsel for the Respondent submitted that the Applicant herein is an independent judicial person capable of being sued and capable of suing. Counsel argued that the Applicant's school may be funded by government or even rely on the exchequer for part of its operations but it is not a government institution under which *Government Proceedings Act* applies. Counsel relied on the case of Board of Management Pumwani Girls Secondary School vs Joseph Mbumbulula t/a Lathematics Engineering Works (2019) eKLR.
10. Counsel for the 2nd Respondent submitted that the execution process against the Applicant herein was procedural and that the deposit of Kshs. 500,000/= was done without the knowledge of the 2nd Respondent and that the same is not enough to warrant a stay of execution. Counsel relied on the case of *Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Other* eKLR. Counsel argues that the



application before this Court is frivolous and an abuse of Court process with intentions to deny the 2nd Respondent the fruits of its judgement. He urged this Court to dismiss the same with costs to the 2nd Respondent.

11. I have considered the applications in this matter and the respective submissions of the parties. The one issue that arises for determination is whether the two applications have merit.
12. It is not in dispute that this court duly delivered its judgement on the appeal on the 15/1/2024. It is also not in dispute that all the subsequent applications other than an application for stay pending an appeal are deemed as post judgement activities and which ought to be lodged before the Deputy Registrar. It is also not in dispute that there is no appeal lodged before the Court of Appeal by the Applicant. It is also not in dispute that the Applicant has not sought for an order of stay of execution pending appeal to the Court of Appeal in the two applications. It is also not in dispute that the matter has already landed with the Deputy Registrar who has jurisdiction to handle the post judgement activities and hence no reason has been given by the Applicant as to why it has again come back to this court. It is also not in dispute that the applications do not seek for an order of review of the judgement dated 15/1/2024. That being the position, it is clear that the Applicant is clearly abusing the court process since even on several occasions the Deputy Registrar has issued orders for which the Applicant ought to approach the said Deputy Registrar for redress. As the Applicant has not properly approached this court, it is my finding that these applications do not serve any purpose in this court other than for academic purposes since this court is already functus officio having determined the appeal and further by the fact that none of the applications seek for a prayer for stay pending an appeal to the Court of Appeal.
13. In view of the foregoing observations, it is my finding that the Applicant's application dated 14/5/2024 and 7/6/2024 lack merit. The same are dismissed with costs to the 2nd Respondent.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024

D. KEMEI

JUDGE

In the presence of:

Kangethefor Applicant

Mulamafor 1st & 2nd Respondents

Kizito/Ogendo.....Court Assistant

