



REPUBLIC OF KENYA



Ogutu (Suing as as leg rep Estate of Jackson Ogutu Osende) v Okumu & another (Civil Appeal E023 of 2022) [2024] KEHC 14949 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E023 OF 2022
WM MUSYOKA, J
NOVEMBER 27, 2024**

BETWEEN

SYLVESTER ODHIAMBO OGUTU (SUING AS AS LEG REP ESTATE OF JACKSON OGUTU OSENDE) APPELLANT

AND

VICTOR ODUORI OKUMU 1ST RESPONDENT

FRANCIS OKUMU WERE 2ND RESPONDENT

(Appeal from the decision of Hon. L. Ambasi, Chief Magistrate, CM, in Busia CMCCC No. 350 of 2009, of 23rd June 2022)

JUDGMENT

1. The suit at the primary court had been initiated against Jackson Ogutu Osende, in respect of whose estate the appellant herein holds a limited grant of letters of administration ad litem, by the 2nd respondent, for recovery of compensation for defamation. The suit was prosecuted, and a judgment was delivered on 20th November 2013, where the suit was dismissed, with costs.
2. After delivery of the judgment, costs were assessed at Kshs. 54,600.00, against the 2nd respondent, and a decree on the costs was processed, and issued, dated 26th November 2013. Thereafter execution proceedings were initiated. The defendant, in Busia CMCCC No. 350 of 2009, died on 2nd February 2016, and the appellant herein was granted limited authority to represent the deceased, by way of the limited grant of letters of administration ad litem, made in Busia P&A Misc. Succession Cause No. 119 of 2019. An order was made on 7th December 2021, for substitution of the dead defendant by the appellant herein. The appellant thereafter sought to have the bill of costs taxed afresh, against the 2nd respondent, but that plea was dismissed by the trial court, on 7th March 2022, on the basis that it was not open for the costs to be assessed twice.



3. Subsequently, the appellant obtained warrants for sale of property in execution of a money decree, dated 19th April 2022, together with warrants of attachment of movable property, to be executed by Eshikhoni Auctioneers. The said auctioneers levied execution on 5th May 2022, and a proclamation was raised the same day, based on warrants that had been issued on 4th May 2022. It was indicated, in the proclamation, that the execution was done in the presence of Scholastica Adhiambo. 6 head of cattle and other unnamed movable assets were purportedly proclaimed.
4. The 1st respondent herein then filed a Motion, under certificate of urgency, dated 13th May 2022, seeking stay of execution and sale of the attached 6 head of cattle, and release of the same to him, and compensation at the tune of Kshs. 200,000.00. He asserted that the 6 head of cattle belonged to him, and execution was levied on them despite he not being party to the suit in Busia CMCCC No. 350 of 2009. He asserted that Scholastica Adhiambo, who was allegedly the witness to the proclamation, was not a member of his family. He asserted that the proclamation notice was never served on him. He stated that he would suffer loss, should the cattle be sold. He filed his application simultaneously with a notice to the attaching creditor, of even date, under Order 22 rule 52 of the Civil Procedure Rules, addressed to the appellant and the auctioneer. A notice of objection to the execution was raised by the court, dated 19th May 2022, under Order 22 rule 52 of the Civil Procedure Rules, requiring them to indicate whether they intended to proceed with the sale, failing which an order was to be made raising the attachment.
5. In the meantime, the auctioneer wrote to the court, a letter dated 16th May 2022, and received by the court on 17th May 2022, indicating that the 6 head of cattle had been sold on 16th May 2022, by public auction, for Kshs. 69,000.00, and forwarding a sum of Kshs. 56,600.00 to court, after deducting his costs of Kshs. 52,560.00.
6. The appellant filed an affidavit on 30th May 2022, dated 27th May 2022, in response to the Motion, dated 13th May 2022. He identified the 1st respondent as a son of the 2nd respondent. He asserted that the 1st respondent had not been caught by surprise as the 2nd respondent had been served with notice of the proclamation. He stated that Scholastica Adhiambo was the wife of the 2nd respondent, and she was the one who received the proclamation. He stated that the auctioneer went back on 13th May 2022, and took the 6 head of cattle away, in the presence of the 2nd respondent, who signed the notification of sale, without complaint. He challenged the 1st respondent to prove to the court that he owned the cattle. He asserted that if the cattle belonged to him, the right way would be for the 1st respondent to sue for compensation. He asserted that there was time for the 1st respondent to redeem the cattle, which he failed to do. He also argued that the 2nd respondent did not seek for valuation of the cattle before sale.
7. In a supplementary affidavit, sworn on 3rd June 2022, in response to the affidavit by the appellant, the 1st respondent asserted that he did not know Scholastica Adhiambo, stating that his mother was Faustina Adhiambo. He averred that, although he resided within the land of the 2nd respondent, he had a separate homestead, where he reared his own cattle, that were wrongly taken away by the auctioneers, on the instructions of the appellant. He assessed their value at Kshs. 200,000.00, and attached photographs of the same. He asserted that he was not party to the suit, and was never served with any notices. He averred that the cattle were taken away on 13th May 2022, and it had been indicated that sale would happen after 72 hours, but they were prematurely sold on 16th May 2022, before the 72 hours had expired. He argued that the 72 hours should have been computed from Monday 16th May 2022, and should have expired on 18th May 2022, based on Order 50 rule 9 of the Civil Procedure Rules. He asserted that his cattle were attached illegally, and sold prematurely.



8. The 2nd respondent also swore a supplementary affidavit, on 3rd June 2022, where he averred that the 6 cattle attached on 13th May 2022 belonged to the 1st respondent.
9. The application was canvassed by way of written submissions. the appellant filed written submissions, and a notice of preliminary objection, both dated 6th June 2022.
10. After considering the application, the trial court ruled on 23rd June 2022, that the attachment was wrongful, as it was against an individual who was not party to the proceedings. It was noted that service of the execution proceedings was not proper, for the court process was never served on the 2nd respondent. It was found and held that the appellant knew that the cattle belonged to the 1st respondent, but allowed the auctioneer to go ahead with the attachment and sale. The application was allowed as prayed.
11. The auctioneer filed his response to the application, on 21st July 2022, together with an application for joinder, long after the trial court had ruled on the application, on 23rd June 2022, despite having been served with court process on 18th May 2022, which he received under protest.
12. The appellant promptly filed a notice of appeal, on 27th June 2022, bearing an even date, and the appeal herein was filed on 6th July 2022. It revolves around the appellant not being accorded a fair hearing before determination of the matter, alleging what was not levelled at the appellant in the issue before the court, misapprehending the response of the appellant and the evidence receivable as proof, and failing to ascertain fiction made on paper about the attachment.
13. I note that the appellant filed an amended memorandum of appeal, on 25th September 2023. The said filing was done without leave of court. I note that subsequent to that filing, without leave, the appellant did not ask the court to deem the amendments duly filed. Consequently, the said amended memorandum of appeal is not properly on record, and I hereby strike it out.
14. Directions were given on 22nd April 2024, for canvassing of the appeal by way of written submissions. In the end, only the appellant filed written submissions, 2 sets, one dated 1st July 2024 and the other 3rd July 2024. I have noted the arguments made in the 2 sets of written submissions.
15. The first ground of appeal is that the appellant was not accorded a fair hearing before the application was determined. I have recited, here above, the events leading up to the ruling of 23rd June 2022. After the application, dated 13th May 2022, was lodged, the same and the other notices were served on the appellant on 18th May 2022. The appellant swore an affidavit in reply, on 27th May 2022, which he filed in court on 30th May 2022. Thereafter, the appellant filed written submissions to that application, and a notice of preliminary objection, on 6th June 2022, bearing an even date.
16. The said application was not canvassed orally, but by way of written submissions. The appellant filed his submissions and more. The 1st respondent did not file any. In the ruling, the trial court recited the documents filed by the parties, including what the appellant had filed, being his replying affidavit, the written submissions and the preliminary objection. The trial court went on to recite the contents of the filings by the appellant. I am not persuaded that the appellant was not given a fair hearing in the circumstances.
17. The second ground is that the trial court alleged against the appellant what had not been levelled at him in the filings by the other side. I am not too clear on what this means. I have gone through the ruling of the trial court, and I am satisfied that it was aligned to the documents filed by both sides. I have read and re-read the 2 sets of written submissions filed by the appellant, and I have not come across any



arguments on the grounds in his memorandum of appeal, for his written submissions address issues other than those raised in the memorandum of appeal, yet parties are bound by their pleadings.

18. The third ground is that the trial court misapprehended his response and the evidence receivable as proof. Again, the appellant has not submitted on this ground, in his written submissions. I have gone through the reply to the application by the appellant, inclusive of the written submissions and the preliminary objection, as against the analysis by the trial court, and I am not persuaded that the trial court did not understand the substance of the documents filed by the appellant.
19. The forth and final ground is that the trial court was unable or failed to ascertain fiction made on paper about the attachment. This ground is related to the third ground, for it is about the trial court misapprehending the filings by the appellant. I reiterate what I have stated above, that I have read through those filings, as against the analysis in the ruling, and I am unable to conclude that the trial court did not apprehend the substance of what was averred in the documents filed by the appellant.
20. Overall, it is my finding and holding that the appeal herein has no merit, and I hereby disallow it. The consequence shall be that the appeal is hereby dismissed, and the orders made by the trial court, on 23rd June 2022, in Busia CMCCC No. 350 of 2009, are hereby upheld and confirmed. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 27TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Sylvester Odhiambo Ogutu, the appellant, in person.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the 1st respondent.

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the 2nd respondent.

