



**Africa Merchant Assurance Company Limited v Otara; Mbogo
& 2 others (Interested Parties) (Miscellaneous Civil Application
E006 of 2024) [2024] KEHC 16345 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CIVIL APPLICATION E006 OF 2024
RL KORIR, J
DECEMBER 19, 2024**

BETWEEN

AFRICA MERCHANT ASSURANCE COMPANY LIMITED APPLICANT

AND

ANDREW OTARA RESPONDENT

AND

THOMAS OSEBE MBOGO INTERESTED PARTY

PAULINE NYABOKE MOMANYI INTERESTED PARTY

KCB BANK KENYA LTD INTERESTED PARTY

RULING

1. The Applicant, Africa Merchant Assurance Company Limited filed the present Application dated 12th April 2024 where it sought the following orders:-
 - I. Spent.
 - II. Spent.
 - III. That in the alternative to prayer 2 above, this Honourable Court be and is hereby pleased to direct the Respondent's advocates M/S Nyamurongi & Co. Advocates to remit the sums transferred from the Applicant's bank accounts held at KCB Bank Kenya Limited into court pending the hearing and determination of the Application herein .
 - IV. That the freezing or refund order be applied only to the extent of the sum Kshs 11,374,496/ = or such other amount as was erroneously received on the basis of the suits between the



Applicant and the Respondent, being Sotik PMCC E10 of 2022 and Sotik PMCC E11 of 2022.

- V. That the Honourable Court be pleased to set aside and/or stay any purported Warrants issued in favour of both Seneca Africa Auctioneers and Odongo Investment Auctioneers in Sotik PMCC E10 of 2022 and Sotik PMCC E11 of 2022.
 - VI. That upon hearing this Application, the declaratory suits filed in the lower court, being Sotik PMCC E10 of 2022, PMCC E11 of 2022, PMCC E81 of 2021 and PMCC E133 of 2022 be consolidated for the purposes of regularizing the Decrees in Sotik PMCC 172 of 2015 and Sotik 189 of 2016.
 - VII. That the Honourable Court be pleased to direct that all subject funds held by the Respondent and/or his advocates be reimbursed and/or returned fully to the Applicant's Account held at KCB Bank Kenya Limited in the name of AFRICA MERCHANT ASSURANCE COMPANY LIMITED in account numbers 59xxxxx and 1305xxxxxx respectively, held at Nextgen Mall Branch for the purposes of regularizing the Decrees in Sotik PMCC 172 of 2015 and Sotik PMCC 189 of 2016.
 - VIII. That the Honourable Court be pleased to issue any other and/or further relief which it deems fit and just to grant to preserve the subject funds and meet the ends of justice.
 - IX. That the costs of this Application be provided for.
2. The Application was brought under Article 165(6) and (7) of *the Constitution* of Kenya, 2010, Order 50 Rule 1 of the Civil procedure Rules and Sections 1A, 1B, 3A and 18 (1) (b) and (2) of the *Civil Procedure Act*. It was based on the grounds on the face of the Application and supported by the annexed Supporting Affidavit of Grace Nyambura sworn on 12th April 2024.

The Applicant's Case.

3. The Applicant stated that the trial court allowed the Respondent's Garnishee Applications in Sotik PMCC No. E10 of 2022 and Sotik PMCC No. E11 of 2022. That the trial court issued a Garnishee Order Absolute allowing the Respondent to attach its money in the Garnishee's (KCB Bank) accounts thereby making the Respondent the beneficiary in Sotik PMCC No. E10 of 2022 and Sotik PMCC No. E11 of 2022. The Applicant further stated that the Respondent was the defendant in both suits (Sotik PMCC No. E10 of 2022 and Sotik PMCC No. E11 of 2022) and had no right to be paid as the real beneficiaries from the primary suits were the 1st and 2nd Interested Parties.
4. It was the Applicant's case that the 3rd Interested Party propagated an illegality by entering into a Consent with the Respondent with the intent of defrauding the Applicant. That the Respondent had irregularly executed the orders of the trial Magistrate and had unjustly enriched himself to the tune of Kshs 11,374,496/= instead of the 1st and 2nd Interested Parties who ought to enjoy the fruits of their Judgments.
5. The Applicant stated that it was not served with the Garnishee Application and it did not participate in it. That it was therefore not aware of the irregular and unlawful actions taken by the Respondent until 11th April 2024 when it came to learn that its funds had been irregularly garnished by the Respondent. It further stated that it stood to suffer substantial loss as it may be exposed to make double payments of the same decretal sums as it had a consent with the 1st and 2nd Interested Parties on how it would settle their decretal amounts.



6. The Applicant averred that the Respondent was aware of the declaratory proceedings which had been filed by the proper Plaintiffs (1st and 2nd Interested Parties) but still went ahead and irregularly entered into a Consent with the Garnishee (3rd Interested Party) in Sotik PMCC No. E10 of 2022 and Sotik PMCC No. E11 of 2022 to transfer funds from the Applicant's accounts to Nyamurongi & Company who were the Respondents advocates. It was its further case that the Respondents whose economic status was unknown had full and unrestricted access to the decretal sums to the detriment of the Applicant.
7. The Applicant stated that it wanted Sotik PMCC No. E10 of 2022, Sotik PMCC No. E11 of 2022, Sotik PMCC 81 of 2021 and Sotik PMCC 133 of 2022 be consolidated for the purposes of paying out the decretal sums. That consolidation would protect them from making double payments.
8. It was the Applicant's case that the Respondent would suffer no prejudice if its Application was allowed.

The Responses.

The Respondent's response

9. Through his Replying Affidavit dated 6th May 2024, the Respondent, Andrew Otara stated that the Application was misconceived as all matters related to execution ought to be raised in the court where execution took place and not through a new suit. That the present Application was contrary to section 34 of the [Civil Procedure Act](#).
10. It was the Respondent's case that the issues raised were res judicata as the same had been addressed and litigated with finality in Sotik PMCC No. E10 of 2022 and Sotik PMCC No. E11 of 2022. That the Applicant had ample opportunity to appeal against the trial court's decisions but chose not to. It was his further case that parties including the Applicant were bound by the Judgements of the trial court.
11. The Respondent stated that the Applicant was in violation of section 2 of the [Civil Procedure Act](#) as the present miscellaneous Application did not meet the definition of the above section of law which defined pleadings as a Petition, Summons, written statements or Defence. That the present Application was groundless and there was nothing for this court to supervise.
12. It was the Respondent's case that it had every right to file the suits in the trial court as the Applicant was in breach of their contractual obligations and exposed him to execution by the 1st and 2nd Interested Parties. He averred that he had paid the auctioneers and partly paid the 1st and 2nd Interested Parties to forestall any execution on his assets.
13. The Respondent stated that the Garnishee Orders had not been vacated and had long been executed. That this court had no jurisdiction to vary lawful orders of the trial court. He stated that the execution proceedings could not be faulted as they were conducted pursuant to lawful Decrees. That the fear of them being subjected to double payment was therefore unfounded and misguided.
14. The Respondent stated that after it had received funds from the Garnishee (3rd Interested Party), his advocates paid Kshs 688,098/= to Senema Africa Auctioneers, Kshs 273,765/= to Odongo Investments Auctioneers and Kshs 7,200,000/= to M/S Ben K. Gichana & Co. Advocates who were advocates for the 1st and 2nd Interested Parties.
15. It was the Respondent's case that the payment to M/S Ben K. Gichana & Co. Advocates was made prior to him reconciling accounts with the 1st and 2nd Interested Parties as at the time of payment, Mr. Ben Gichana Advocate had been bereaved. That even though the 1st and 2nd Interested Parties



contend that the sum of Kshs 1,724,480/= was outstanding, they had not taken into account what he paid to the auctioneers and their advocate before he filed the declaratory suit. It was his further case that he had to recover all payments made prior to filing of the declaratory suit together with interest.

16. The Respondent stated that all payments were made towards the settlement of the Decrees in the primary suits only. That the Garnishee Orders were meant for recovery of the debts in the primary suits and the primary suits had not been consolidated with any other suits.
17. It was the Respondent's case that they demonstrated good faith when his advocate paid Kshs 7,200,000/= to the 1st and 2nd Interested Parties. He contended that the Application was a waste of judicial time and ought to be dismissed.

1st and 2nd Interested Parties response.

18. The 1st and 2nd Interested Parties' response was filed through a Replying Affidavit dated 1st May 2024 sworn by their counsel, Benard Gichana Advocate. Counsel stated that he instituted suits on behalf of the 1st and 2nd Interested Parties being Sotik PMCC No. 172 of 2015 and Sotik PMCC No. 189 of 2016. That Judgements in the suits were entered in their favour but the Respondent failed to satisfy the decrees.
19. It was the 1st and 2nd Interested Parties case that they were awarded Kshs 2,833,965/= and costs of Kshs 283,087/= in Sotik PMCC No. 172 of 2015 and Kshs 1,248,800/= and costs of Kshs 315,730/= in Sotik PMCC No. 189 of 2016. That both awards attracted interest rates of 14% p.a.
20. Counsel further stated that they filed declaratory suits against the Applicant being Sotik PMCC No. 133 of 2022 and Sotik PMCC No. 81 of 2021 and the suits were allowed. That the costs for the declaratory suits were Kshs 223,280/= and Kshs 146,250/= respectively. Counsel further stated that he was not aware that the Respondent had also instituted parallel declaratory suits against the Applicant. That he only came to learn of the said suits when he received cheques amounting to Kshs 7,200,000/= from Nyamurongi & Company who are the Respondent's advocates.
21. It was counsel's contention that the decrees have not been fully satisfied by the Respondent's advocate (Nyamurongi & Co. Advocates). That the amount owed from the primary suits (Sotik PMCC 172 of 2015 and Sotik PMCC No. 189 of 2016) and the declaratory suits (Sotik PMCC No. 133 of 2022 and Sotik PMCC No. 81 of 2021) was a cumulative Kshs 8,924,480/=.
22. Counsel stated that there was a balance of Kshs 1,724,480/= and urged this court to lift the temporary freeze on the Respondent's advocate's account so that they could clear the balance. Counsel further stated that the Applicant had not demonstrated how they stood to suffer substantial loss in the event execution issues before this Application was determined. He faulted the Applicant for trying to delay justice and prevent the 1st and 2nd Interested Parties from enjoying the fruits of their Judgements.

The 3rd Interested Party's response.

23. Through its Replying Affidavit dated 6th May 2024 sworn by Lilian Sogo, the 3rd Interested Party stated that on 20th March 2024, the trial court issued Garnishee Orders Absolute in Sotik PMCC No. E10 of 2022 and Sotik PMCC No. E11 of 2022 affecting the Applicant's account number 1305xxxxxx which was insufficiently funded. That without any service of the Proclamation of Attachment, its goods were attached and carted away. It further stated that through their advocates, they were able to stay and set aside the execution proceedings.
24. It was the 3rd Interested Party's case that it communicated with the Applicant on the threat of execution and the Applicant promised to fund the subject account number 1305xxxxxx without



- success. That their advocates immediately entered into consents with the 1st and 2nd Interested Parties on how they would settle the decretal amounts and the auctioneers' fees. It was their further case that their role was limited to answering debts and not propagating illegalities as alleged by the Applicant.
25. The 3rd Interested Party stated that the Applicant in a lacklustre manner advised them to appeal the orders from the trial court without appreciating the nature of urgency and the stringent rules set out by the regulator, Central Bank of Kenya.
 26. It was the 3rd Interested Party's case that it had given sufficient notice to the Applicant through their email communication and there was no fraud on its part when they entered into consents on payment with the 1st and 2nd Interested Parties to safeguard the Bank's interests. They averred that its movable property in its Kisii Branch was under the threat of execution and the Applicant did nothing to address the issue.
 27. The 3rd Interested Party averred that the execution process was flawed as it was not served the Garnishee Absolute and the Proclamation Notice. That they had instituted disciplinary proceedings against David Senema T/A Senema Africa Auctioneers or their malpractice.
 28. This court directed the parties to canvass the Application through written submissions.

The Applicant's submissions.

29. The Applicant filed their submissions dated 7th June 2024 through Olao & Rai Advocates. The Applicant submitted that the 1st and 2nd Interested Parties filed primary suits against him in Sotik PMCC No. 172 of 2015 and Sotik PMCC No. 189 of 2016 and obtained Judgments in their favour. The Applicant further submitted that the Respondent and the 1st and 2nd Interested Parties all filed declaratory suits against the Applicant namely Sotik PMCC 10 of 2022 and Sotik PMCC No. 11 of 2022 (filed by the Respondent) and Sotik PMCC No. 81 of 2021 and Sotik PMCC No. 133 of 2022 (filed by the 1st and 2nd Interested Parties respectively). That the proper declaratory suits were Sotik PMCC 10 of 2022 and Sotik PMCC No. 11 of 2022.
30. It was the Applicant's submission that all four declaratory suits ran concurrently and they all obtained Decrees. That the Respondent got to execute his decrees (Sotik PMCC 10 of 2022 and Sotik PMCC No. 11 of 2022) first albeit irregularly. The Applicant submitted that it stood the risk of double payment as the 1st and 2nd Interested Parties were at liberty to execute their decrees (Sotik PMCC 81 of 2021 and Sotik PMCC No. 133 of 2022). That it was therefore necessary to consolidate the four declaratory suits together with the primary suits for the purpose of regularizing the decrees.
31. The Applicant submitted that the present Application was not a pleading and did not amount to a new suit. That it arose from an existing suit and did not raise any new cause of action other than seek orders to ensure the just distribution of the parties' already determined rights. It relied on *John Muya Ndugire vs Dickson Kang'ethe Njuguna (2017) eKLR*. It further submitted that the instant Application sought for consolidation of the declaratory suits for purposes of regularizing the decrees.
32. It was the Applicant's submission that the Respondent's contention that it should have raised these matters in the trial court was misplaced. That the present matter cut across six different suits and it would have been pointless to file a miscellaneous Application in the lower court over six concluded decrees. It was its further submission that the only way the suits could be consolidated and the decrees regularized was through this court calling for records of the lower court and issuing proper directions. That it did not wish to defeat justice or challenge the decrees but was willing to settle the lower court decrees but only to the extent allowed by the law and in respect to the rightful Plaintiffs (1st and 2nd Interested Parties).



33. The Applicant submitted that the Respondent (who was the defendant in the primary suits) ought to be the one who filed the declaratory suits and not the 1st and 2nd Interested Parties. That it would be unfair to condemn the Applicant to pay the costs awarded in the 1st and 2nd Interested Parties' declaratory suits. It further submitted that the 1st and 2nd Interested Parties should bear their own costs. It relied on *Francis Mwobobia vs Invesco Insurance Co. Ltd; Mwirigi Muguna Nkoroi (Intended Interested Party/Applicant) (2021) eKLR*.
34. It was the Applicant's submission that the 1st and 2nd Interested Parties had already been paid their legal costs for the primary suits and the only amount it owed them was the unpaid balance of the decretal sums. That the decrees in the primary suits added up to Kshs 7,235,739/= and the 1st and 2nd Interested Parties' advocate confirmed receiving Kshs 7,200,000/= there by leaving a balance of Kshs 35,739/=.
35. The Applicant submitted that there was a statutory limitation on its liability to settle decrees arising out of personal injury claims and the same was pegged at Kshs 3,000,000/=. That this position was inflexible and could not be varied by a court of law unless the section of law was declared unconstitutional. It relied on section 5(b) of the Insurance (Third Party Risks) Act and *Kenya Orient Insurance Co. Limited vs Kennedy Kagai Kiruku (2022) eKLR*. The Applicant further submitted its liability in respect of Sotik PMCC No. 172 of 2015 was capped at Kshs 3,000,000/= and therefore the excess of Kshs 2,628,501/= paid out by the Respondent was in contravention of the law and the same was recoverable by the Applicant from the Respondent.
36. It was the Applicant's submission that the Respondent had not accounted for Kshs 4,174,496/= out of the Kshs 11,374,496/= it received. That it was only just and fair that the Respondent provide a full account of the monies spent by presenting verifiable proof of payments. It was its further submission that in addition to the excess Kshs 2,628,501/= paid out by the Respondent, they sought a total refund of Kshs 6,646,197/=. That this was a substantial amount and it was evident that it stood to suffer prejudice in its business if the said amount was not refunded.

Respondent's written submissions.

37. Through his submissions dated 29th June 2024 and filed by Nyamurongi & Co. Advocates, the Respondent submitted that this court did not have jurisdiction to determine the present Application. That section 34 of the *Civil Procedure Act* stated that all issues arising out of an execution should be raised in the court executing the decree and not through a separate suit. He further submitted that the Applicant had failed to raise his issues in regard to the execution, discharge and satisfaction of the decrees in the declaratory suits being Sotik PMCC No. 10 of 2022 and Sotik PMCC No. 11 of 2022 in the trial court. He relied on *Adiel Muriithi Philip vs Thomas Maingi (2017) eKLR* and *Amollo, Adede & Anyanzwa Advocates v Chelimo t/a Blue Seal Communication & 2 others; Kenya Commercial Bank Limited & 4 others (Interested Parties) (Miscellaneous Application E093 of 2022) [2023] KEHC 2154 (KLR) (9 March 2023) (Ruling)*
38. It was the Respondent's submission that this court could not arrogate itself jurisdiction and that the lack of jurisdiction was fatal to proceedings. He relied on *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 others (2014) eKLR* and *Attorney General & 2 others vs Okiya Omtata Okoiti & 14 others (2020) eKLR*.
39. It was the Respondent's submission that this court did not have jurisdiction to consolidate suits which were not before it. He relied on *Ethics & Anti-Corruption Commission vs Charles Nderitu Maitai & 13 others (2021) eKLR*.



40. The Respondent submitted that this court should expunge the affidavit evidence of Grace Nyambura who deponed on behalf of the Applicant. That in the body of the Applicant's Application, it referenced to the supporting affidavit of Grace Njuguna and not Grace Nyambura. That a sworn affidavit was evidence which could not be amended. He further submitted that if the affidavit evidence is struck out, the Application remained bare and unsupported with evidence.
41. It was the Respondent's submission that the prayer for setting aside the Warrants of Attachment had been overtaken by events as execution had been fully completed and payment of the decretal sums done.
42. The Respondent submitted that the Application was res judicata. That when he applied for garnishee orders, he prayed that the decretal sums be paid into his advocate's bank account. He further submitted that the essence of the present Application was that the decretal sums should not have been deposited in his advocate's bank account but rather the 1st and 2nd Interested Parties (then Plaintiffs). That it was res judicata as the trial court had already settled the same and this court could not be called to re-litigate the same issue by way of a miscellaneous Application.
43. It was the Respondent's submission that the present Application was a disguised Appeal. It was his further submission that the Application did not disclose a reasonable cause of action. That some of the monies paid out included auctioneers fees and he supplied documentary evidence demonstrating the same. That through his advocate, he paid Kshs 688,098/= to Senema Africa Auctioneers, Kshs 273,765/= to Odongo Investments Auctioneers and Kshs 7,200,000/= to the 1st and 2nd Interested Parties through their advocate which they acknowledged.
44. It was the Respondent's submission that until the decrees were fully paid, they continued to attract interest. That the issue of the capping of the award to Kshs 3,000,000/= was introduced in the submissions and not in the Application. It was his further submission that parties are bound by their pleadings and he relied on Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others (2014) eKLR.
45. The Respondent submitted that all payments were made towards the settlement of the primary and declaratory suits together with the interests and costs. That the present Application was a waste of judicial time.

1st and 2nd Interested Parties' written submissions.

46. Through their submissions dated 16th June 2024 and filed by Ben K. Gichana & Co. Advocates, the 1st and 2nd Interested Parties submitted that the questions and issues arising out of a decree including issues of re-computation were exclusively judiciable by the court executing the decree. That the prayer for consolidation of the suits and re-computation of the decretal amounts could have been done by the trial court. They relied on among others section 34 of the *Civil Procedure Act*, Law Society of Kenya vs Centre for Human Rights and Democracy & 13 others (Civil Appeal 308 of 2005) [2013] KECA 172 (KLR) (18 October 2013) (Judgment) (with dissent – AK Murgor & F Sichale, JJA) Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] eKLR which gave principles governing the exercise of supervisory jurisdiction of the High Court under Article 165 (6) of *the Constitution* of Kenya and Alice Sisina vs Land Registrar Kajjado & another (2015) eKLR which stated that this court's supervisory jurisdiction should be exercised sparingly and in exceptional circumstances.
47. It was the 1st and 2nd Interested Parties' submission that it was settled law that this court's supervisory jurisdiction could only be invoked if there were improper acts, omissions and illegality by the lower



court and in the present case, there were none. That what the Applicant asked this court to do was to take over the lower court execution proceedings, consolidate the same and re-compute the decretal sums, a recourse that would breed multiplicity of issues and chaos. It was their further submission that the Applicant should not use supervisory jurisdiction to defeat the validity of the decrees as such jurisdiction ought to be used sparingly and in exceptional circumstances. They relied on *National Social Security fund vs Sokomania Ltd & another* (2021) eKLR.

48. The 1st and 2nd Interested Parties submitted that the Respondent remitted money in adherence and in satisfaction of the decrees and orders whose competence was not subject to any appellate or review proceedings. That as evidenced by their Replying Affidavit, they were owed a balance of Kshs 1,724,480/= and not the Kshs 35,739/= alleged by the Applicant.
49. It was the 1st and 2nd Interested Parties' submission that the issue of capping the payment at Kshs 3,000,000/= only applied to the insurer and did not limit the insured's liability to a third party. That their claim for the outstanding amount was against the insured (Respondent) and not the Applicant.

3rd Interested Party's written submissions.

50. Through its submissions dated 8th July 2024 and filed by Meritad Law Africa LLP, the 3rd Interested Party submitted that it was enjoined in the suit as a Garnishee in the declaratory suits being Sotik PMCC No. 10 of 2022 and Sotik PMCC No. 11 of 2022. That once Judgments were pronounced in the declaratory suits, the 1st and 2nd Interested Parties were unable to enjoy the fruits of their Judgements.
51. It was the 3rd Interested Party's submission that when the Applicant failed to pay the decretal sums, the Respondent filed a declaratory suit against the Applicant and the court found the Applicant liable to settle the decretal amounts but the Applicant failed to do so. That as a result, the Respondent instituted Garnishee proceedings in his capacity as a decree holder. It was its further submission that the Applicant was now estopped from calling for consolidation of the matters in the trial court.
52. The 3rd Interested Party submitted that the Rulings in the declaratory suits remained unchallenged and from this Rulings, Garnishee Orders Absolute were issued against it. That its goods were then carted away and the Applicant did not take any steps to remedy the situation. It relied on *Nyakundi & Co. Advocates vs Council of Governors; Cooperative Bank of Kenya Limited (Garnishee) (Judicial Review Miscellaneous Application 40 of 2019)* [2023] KEHC 1035 (KLR) (Judicial Review) (17 February 2023) (Judgement).
53. The 3rd Interested Party submitted that it was left exposed to the irreparable harm and economic loss in light of the Garnishee Orders Absolute. That it fulfilled all its statutory obligations appurtenant to the Garnishee proceedings.
54. I have gone through and considered the Notice of Motion Application dated 12th April 2024, the Respondent's Replying Affidavit dated 6th May 2024, the 1st and 2nd Interested Parties' Replying Affidavit dated 1st May 2024, the 3rd Interested Party's Replying Affidavit dated 6th May 2024, the Applicant's written submissions dated 7th June 2024, the Respondent's written submissions dated 29th June 2024, the 1st and 2nd Interested Parties' written submissions dated 16th June 2024, and the 3rd Interested Party's written submissions dated 8th July 2024. The following issues arise for my determination:-
 - i. Whether this court has jurisdiction to determine the present Application.
 - ii. Whether this court can exercise supervisory jurisdiction and issue relevant directions.



iii. Who will meet the costs in the Application.

i. Whether this court has jurisdiction to determine the present Application.

55. Jurisdiction is defined in the Black's Law Dictionary, 10th Edition as:-

A court's power to decide a case or issue a decree.

56. In the case of Phoenix of E.A. Assurance Company Limited vs S. M. Thiga t/a Newspaper Service (2019) eKLR, the Court of Appeal stated that:-

“It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?”

In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae”.

57. Further, in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others (2012) eKLR, the Supreme Court held that:-

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

58. The subject matter of the present Application revolved around execution of decrees from the declaratory suits filed by the Respondent (Sotik PMCC No. 10 of 2022 and Sotik PMCC No. 11 of 2022) and the 1st and 2nd Interested Parties (Sotik PMCC No. 81 of 2021 and Sotik PMCC No. 133 of 2022). The Applicant wanted among others, that this court consolidate the declaratory suits for purposes of regularizing the decrees and subsequent payments.

59. Having gone through the pleadings, it is evident to me that the primary suits (Sotik PMCC No. 172 of 2015 and Sotik PMCC No. 189 of 2016) were filed in Sotik Principal Magistrate's Court. The subsequent declaratory suits were also filed and determined by the same court. The resultant decrees that are now subject of this Application also emanated from Sotik Principal Magistrate's Court.

60. Section 34 of the *Civil Procedure Act* provides:-

- (1) 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.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.....



61. The Court of Appeal in *Kuronya Auctioneers vs Maurice O. Odhoch & Another* (2003) eKLR held:-
 “.....Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree.....”
62. Similarly, in *Adiel Muriithi Philip vs Thomas Maingi* (2017) eKLR, the Court of Appeal held:-
 “In this regard, Section 34 of the *Civil Procedure Act* is relevant.....
A plain reading of the above provision shows that matters concerning discharge or satisfaction of a decree are determined by the court executing the decree.....”
63. It is clear to me that section 34 of the *Civil Procedure Act* provided that issues emanating from execution of decrees should be brought up and addressed in the court that issued the decree and in this particular case, Sotik Principal Magistrate’s Court. In the case of *The Speaker of the National Assembly vs Karume* (2008) 1KLR (E.P) 425, the Court of Appeal held that:-
 “In our view there is considerable merit that where there is a clear procedure for the redress of any particular grievance prescribed in *the Constitution* or an Act of Parliament, the procedure should be strictly followed.....”
64. It is trite law that a court must have jurisdiction to hear and determine a suit or an Application from the very beginning. Without it, the court has no option other than to down its tools. The Supreme Court in the case of *R vs Karisa Chengo* (2017) eKLR, held:-
 “By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
65. Flowing from the above, it is my finding that this court has no jurisdiction to the extent of determining the computation of payments contained in the Decrees and the amounts paid, overpaid, owed or owing to any party and in particular that may have been made out of the Applicant’s monies accessed through garnishee proceedings. This also extends to any overpayments to 1st and 2nd Interested parties. As already stated, these were issues that emanated from execution of the Decrees and the best forum for the resolution of these issues was the trial court as envisaged by section 34 of the *Civil Procedure Act*.

(ii) whether this court can exercise supervisory jurisdiction in this matter

66. The above notwithstanding, I have noted two issues raised by the Applicant. Firstly, the Applicant felt aggrieved by the garnishee proceedings and alluded to the fact that the 3rd Interested Party colluded with the Respondent with the intent of defrauding the Applicant. This claim was vehemently denied by the 3rd Interested Party who averred that it was served with Garnishee Orders Absolute and had no choice but to comply with the orders. The 3rd Interested Party also took issue with the Respondent’s Auctioneers and how they conducted themselves.



- 67. To this court’s understanding, the Applicant was aggrieved by the Garnishee proceedings and his recourse lay with applying for a Review of the Garnishee Order Absolute or appealing the same, neither of which he has done. The Applicant’s recourse as stated lay with the trial court in the event of a Review or to this court in the event of an Appeal and not a Miscellaneous Application.
 - 68. The second issue was that the Applicant faced the risk of double payments in satisfaction of the decrees. There were four declaratory suits filed i.e. the Respondent filed Sotik PMCC No. 10 of 2022 and Sotik PMCC No. 11 of 2022 and the 1st and 2nd Interested Parties filed Sotik PMCC No. 81 of 2021 and Sotik PMCC No. 133 of 2022. This was a valid concern given that it was the common ground of the parties in this Application that such suits did exist and both the initial Plaintiffs and Defendant were now decree holders. Suffice to state that the trial court went against both the law and procedure in entertaining multiple separate declaratory suits involving the same parties and subject matter. This court therefore was mandated to exercise its supervisory jurisdiction and direct that the subject declaratory matters ought to be consolidated for the sole purpose of regularizing or harmonizing the settlement of the various decrees. Such direction would prevent any abuse of the court process.
 - 69. In the end and in the interest of justice, I make the following orders:-
 - i. The prayers as crafted cannot be granted.
 - ii. Prayer VI, to wit prayer for consolidation, regularization and harmonization of the decrees is partially granted in terms that the trial court shall take immediate action on the same.
 - iii. The computation of sums paid, payable, overpaid or owing as between the parties shall be determined by the trial court.
 - iv. The temporary freeze order is lifted to enable the parties comply upon regularization and harmonization in (iii) above.
 - v. Any party is at liberty to apply to the trial court
 - 70. Each party shall meet their costs in this Application.
- Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 19TH DAY OF DECEMBER 2024.

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R. LAGAT-KORIR
JUDGE

Ruling delivered in the presence of Mr Ajwang holding brief for Mr Olao for the Applicant, Mr Maronga for the 1st and 2nd interested parties, N/A for 3rd interested party Mr Nyamurongi for the Respondent and Siele (Court Assistant).

