



**Mukila v Taita Taveta University College (Civil Appeal
E002 of 2021) [2023] KEHC 17932 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E002 OF 2021
GMA DULU, J
MAY 30, 2023**

BETWEEN

**DAVID MUKITI MUKILA ALIAS MUKILA MUKITI DAVID ALIAS DAVID
MKILA APPELLANT**

AND

TAITA TAVETA UNIVERSITY COLLEGE RESPONDENT

RULING

1. In this appeal where judgment was delivered by the High Court on 31st August 2022 with damages payable to David Mukiti Mukila, a Notice of Motion dated 18th March, 2022 (should be 2023) was filed by Taita Taveta University College under order 51 rules 1, and order 10 rule 11, order 40 and order 21 rule 12 of the *Civil Procedure Rules*, and Section 1A, 1B and 3A of the *Civil Procedure Act* (cap. 21), through counsel Njoki Njogu & Company Advocates, though the Notice of Motion is wrongly signed for the appellant/applicant instead of the respondent/applicant.
2. The application has five prayers, some of which have been spent as follows:-
 1. (Spent).
 2. (Spent).
 3. That this court be hereby pleased to allow the respondent/applicant to pay the decretal amount herein in 2 equal monthly instalments.
 4. (Spent).
 5. That this court issue an order that the auctioneers do tax their bill in the event that the same is not agreed upon.
 6. That an appropriate order on costs be made in the circumstances of this matter.



3. The application has grounds on the face of the Notice of Motion which are that after delivery of judgment on 31st August 2022 the appellant's auctioneers proclaimed and attached the applicant's goods in execution of the decree of the court and the notice period would lapse on 24th March 2023; that the applicant was willing and able to pay the decretal amount in two (2) equal monthly instalments commencing 30th April 2023, and that the applicant will suffer irreparable and substantial loss if this court declines to grant the stay of execution orders sought.
4. The application was filed with a supporting affidavit sworn by Catherine Njogu Advocate for the respondent/applicant which amplifies the grounds of the application and annexed copies of warrants of attachment and proclamation of goods for sale.
5. In response to the application the appellants/respondents filed a replying affidavit sworn by David Mukiti Mukila the appellant on 29th March 2023, in which it was deponed that it was wrong for the advocate of the applicant to swear to contentious issues in the supporting affidavit to the application without disclosing the source of the information, and that even on the merits, the application was misadvised and incompetent as there was non-disclosure of material facts therein, and that it was merely geared to delay the enjoyment by the appellant of the fruits of his judgment.
6. The application is also opposed by the appellant/respondent through a Notice of Preliminary Objection dated 29th March 2023 which is in the following terms:-
 1. That the motion contravenes Order 21 Rule 12 as the decree that is the subject of the execution was issued by Wundanyi Law Courts.
 2. That in view of ground 1 above, this court lacks jurisdiction to entertain the motion dated 18th March 2022 (sic).
7. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Njoki Njogu & Company Advocates for the respondent/applicant as well as the submissions filed by S. N. Ngare & Company Advocates for the appellant/respondent. I will hereafter refer to Taita Taveta University College (respondent) as the applicant and David Mukiti Mukila (appellant) as the respondent.
8. The first issue I have to determine herein relates to the Preliminary Objection of the respondent, that is whether this court has jurisdiction to deal with the present application. In this regard, the applicant's counsel has argued that this being the appellate court, it has jurisdiction to entertain and deal with this application. The respondent's counsel on the other hand, has argued that any application for execution herein and stay of execution can only be dealt with in the trial court, the Magistrate's Court at Wundanyi, which was the initial court or trial court.
9. In determining the issue of jurisdiction, I have to be guided by the provisions of Section 29 of the [Civil Procedure Act](#) (cap.21), which all counsel have relied upon. Section 29 provides as follows:-
 - “29. The expression ‘court which passed the decree’ or words to that effect shall in relation to execution of decrees except where the context otherwise requires, include:-
 - a. Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance, and
 - b. Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court to which if the suit wherein



the decree was passed were instituted at the time of making the application for the execution of the decree, could have jurisdiction to try such suit.”

10. It is undisputed that this matter was initially heard and determined by the Magistrate’s Court at Wundanyi. It was later heard and determined on appeal by the High Court at Voi. In my view, in terms of the provisions of Section 29(a) of the Civil Procedure Act above, both the High Court at Voi as the appellate court, and the Magistrate’s Court at Wundanyi as the court of first instance, have jurisdiction to entertain execution of decree or judgment proceedings herein. The words ‘include.....,the court of first instance’ in my view means that both the appellate court and the trial court or court of first instance are competent legal forums for execution of decree proceedings.
11. It is thus clear, in our present case that this court and the Magistrate Court have equal jurisdiction and power to deal with execution of decree proceedings. However, the application for execution of decree having already been made in the Magistrate’s Court at Wundanyi and proclamation and warrant of attachment having been issued therein, this court cannot proceed to handle this application, as what the applicant has done is to file parallel proceedings in another court with competent jurisdiction, while the matter is actually already in another court of competent jurisdiction, which is prohibited under Section 6 of the Civil Procedure Act (Cap.21), which provides as follows:-

‘6. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.’
12. Thus the execution proceedings herein, having already been lawfully instituted in the Wundanyi Magistrate’s Court which has jurisdiction and can grant the reliefs sought, the applicant is barred from coming to this court for same reliefs, and this court is statutorily barred from proceeding to determine the merits of this application. In my view, the applicant can only apply to the Wundanyi Magistrate’s Court for appropriate orders as he deems fit, not to this court.
13. It is thus my finding that this application is misconceived and incompetent in terms of Section 6 of the Civil Procedure Act. Consequently, I uphold the Preliminary Objection and strike out the application with costs to the respondent David Mukiti Mukila. Any interim orders issued by this court are hereby vacated.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF MAY, 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Mr. Mutua for appellant/respondent

No appearance for applicant

Mr. Otolu court assistant

