



Taita Taveta University College v Rugut & another (Suing on their own behalf and as the Administrators of the Estate of the Late Cosmas Kipserem) (Civil Appeal E009 of 2021) [2023] KEHC 17929 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E009 OF 2021
GMA DULU, J
MAY 30, 2023**

BETWEEN

TAITA TAVETA UNIVERSITY COLLEGE APPLICANT

AND

JOSEPH KIPROP MARITIM 1ST RESPONDENT

LENAH JEBUNGEI RUGUT 2ND RESPONDENT

**SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE
ESTATE OF THE LATE COSMAS KIPSEREM**

RULING

1. Before me is a notice of motion dated March 18, 2022 (should be 2023) filed 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), by the appellant herein Taita Taveta University College through counsel Njoki Njogu & Company Advocates. The appellant will hereafter be referred to as 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 appellant/applicant to pay the decretal amount herein in 5 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 August 29, 2022 the auctioneers proclaimed for sale and attached the applicant's goods in execution of the decree of the court; that the notice period would lapse on March 24, 2023, and that the applicant was willing and able to pay the decretal amount in five (5) equal monthly instalments commencing April 30, 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 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 respondents filed a replying affidavit sworn by Lenah Jebungei Rugut the 1st respondent on March 29, 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, without disclosing the source of the information, and that even on the merits, the application was misadvised as there was non-disclosure of material facts, and that the application was intended to delay the enjoyment by the respondents of the fruits of their judgment.
6. The application is also opposed by the respondents through a notice of preliminary objection dated March 29, 2023 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 March 18, 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 applicant as well as the submissions filed by S. N. Ngare & Company Advocates for the respondents.
8. The first issue I have to determine herein relates to the preliminary objection 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 herein, it has the jurisdiction to entertain and deal with this application. The respondents counsel on the other hand, has argued that an application for execution and stay of execution herein can only be dealt with in the trial court, the Magistrate's Court at Wundanyi, which is the court of first instance.
9. In determining the issue of this court's jurisdiction, I have to be guided by the provisions of section 29 of the *Civil Procedure Act* (cap.21), which counsel on both sides 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. There is no dispute that the case herein 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, the meaning of the provisions of section 29(a) of the *Civil Procedure Act* above is that, both the High Court at Voi as the appellate court, and the Magistrate’s Court at Wundanyi as the court of first instance, have equal jurisdiction to entertain execution of decree or judgment proceedings. The statutory words “includes, the court of first instance’ in my view mean that both appellate court which is this court, and the trial court or court of first instance, the Wundanyi Magistrate’s Court are competent legal forums for the conduct of execution of decree or judgment proceedings in this matter.
11. Thus in our present case this court and the Magistrate’s Court at Wundanyi have equal and concurrent jurisdiction to deal with these 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 warrants of attachment having been issued therein, this court cannot proceed to entertain and handle the present application as what the applicant has done by filing this application in this court, is to call upon this court to contravene the provisions of section 6 of the *Civil Procedure Act* which states 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 been lawfully instituted earlier in the Wundanyi Magistrate’s Court which had competent jurisdiction, this court is statutorily barred from entertaining and handling this application. The applicant can only apply to the Wundanyi Magistrate’s Court for appropriate orders as he deems fit, subject of course to the law applicable.
13. It is thus my finding that this application is misconceived and incompetent as it is barred by the provisions of section 6 of the *Civil Procedure Act*. Consequently, I uphold the preliminary objection and strike out the application with costs to the respondents. 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:-

No appearance for the applicant

Mr. Mutua for the respondent

Mr. Otolu court assistant

