



**Mara Machinerics v Onsongo t/a Hegeons Auctioneers (Civil Appeal
72 of 2020) [2023] KEHC 18324 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 72 OF 2020
REA OUGO, J
MAY 26, 2023**

BETWEEN

MARA MACHINERIES APPELLANT

AND

**HEZRON GETUMA ONSONGO T/A HEGEONS
AUCTIONEERS RESPONDENT**

*(Being an appeal from the ruling and order of the Magistrate's
court Hon. S.K. Onjoro (SRM) dated 14th February 2020)*

JUDGMENT

1. This appeal was filed following the trial magistrate's assessment of the respondent's bill of costs. The respondent had filed an application seeking to have his bill taxed. This application was on grounds that the respondent received warrants of attachment and sale against the movable properties of the appellant on November 9, 2018. He proclaimed the movable properties of the appellant on November 27, 2018 and upon the proclamation the appellant moved court to stay further execution of the decretal amount. The respondent's case was that the appellant had not paid their charges and that it was incumbent on the appellant to bear the costs of proclamation in terms of Rule 7 of the [Auctioneer Rules](#).
2. The application was opposed by the appellant who filed its grounds dated January 8, 2019. The appellant maintained that the application was incompetent, misconceived and bad in law as the respondent was not entitled to payment.



3. The trial magistrate in his ruling considered the regularity or lack thereof of the execution process. The trial magistrate found that:

' I note from Kisii Misc 318/2015 which was availed in court that stay of execution for 30 days was granted on August 31, 2018 and by September 1, 2019. The execution was thus commenced after the expiry of the stay of execution'

4. The trial magistrate therefore taxed the bill and it is this ruling that has occasioned the appellant to file this appeal raising the following grounds:

1. 'That the learned trial magistrate erred in law and in fact in not holding that there existed an order of stay of execution of the decree at the time of purporting to execute it.
2. That the learned magistrate erred in law and in fact in arriving at a decision against the weight of evidence and submissions on record by the appellant.
3. That the warrants of attachment as issued are irregular having been issued before the extraction and service of the order of assessment of auctioneer's costs.'

5. The appellant argues in its submissions that at the delivery of judgment in Civil Case No 318 of 2015, the court granted orders of stay without time limits. Therefore, the commencement of the execution process was not proper without lifting of the interim orders of stay of execution. It contends that the application before the trial magistrate was without merit as the execution process was irregular.

6. The respondent in his submissions argue that the trial magistrate interrogated the issue of irregularity of the execution process before assessing the auctioneer's bill of costs. The respondent was issued with warrants of attachment and sale against the appellant's movables and upon receipt of the said warrants proclaimed the appellant's property on November 27, 2018. The respondent argues that even if there was a pending appeal, the same could not bar the plaintiff in Kisii CMCC 315 of 2015 from instructing the respondent to commence execution against the appellant. The 30 days order of stay issued in Kisii CMCC 315 of 2015 on August 31, 2018 had lapsed.

Determination

7. The main issue raised in this appeal was whether the execution process was proper in light of the trial court's order on stay of execution. The trial court after delivery of its judgment in Kisii CMCC 315 of 2015 did grant an order of stay of execution. Although the appellant has argued in its submission that the orders of stay of execution was made without time limits, nonetheless, it refers to the same as interim orders. The order of stay of execution was granted merely to delay execution for a period of time given that it was an interim order. In the case of *Co-operative Bank of Kenya Limited -vs- Banking Insurance & Finance Union (Kenya) [2015] eKLR*, the Court of Appeal held as follows: -

' An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a 'positive order' – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of



Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal No 13 of 1984) where it was stated:

‘An order for stay of execution must be intended to serve a purpose.’

8. The purpose of the stay of execution could not have been to deny a successful party the fruits of its judgment. It is not in dispute that the order of stay of execution was granted on August 31, 2018 and the execution process commenced on 9th November after the lapse of the interim orders that were made on August 31, 2018. The execution was therefore regular and I cannot find fault in the trial magistrate’s ruling.
9. The appeal is without merit and is consequently dismissed. The respondent shall have the cost of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY 2023

R.E. OUGO

JUDGE

In the presence of:

For the Appellant

For the Respondent

Aphline C/A

