



Ngaruiya (Suing as the administrator of the Estate of Samuel Mbugua Mungai (Deceased) v Kassam Hauliers Limited (Civil Suit 009 of 2019) [2023] KEHC 21613 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 009 OF 2019
MW MUIGAI, J
JULY 31, 2023**

BETWEEN

JULIA WAMBUI NGARUIYA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL MBUGUA MUNGAI (DECEASED)) PLAINTIFF

AND

KASSAM HAULIERS LIMITED DEFENDANT

RULING

1. Vide an Application dated 15.12.2022, the Applicant seeks the following orders from this court, that;
 - a. A stay of execution proceedings be granted in relation to the ruling dated 18th September 2022, by the Hon Deputy Registrar entered herein against the Defendants pending hearing and determination of this application.
 - b. The Hon Court does direct the Plaintiff/Respondent to produce a full accounting and or audit of all proclamations, executions, auction sales documents and all other relevant decretal documents of all assets of the Plaintiff/Respondent it took possession of pending hearing and determination of this Application.
 - c. The Hon Court does order an independent audit of all proclamations, executions, auction sales, documents and all other relevant decretal documents of all assets of the Plaintiff/Respondent it took possession of pending the hearing and determination of this application.
 - d. The Hon Court does grant the Applicant leave to table a proposal for settlement of any remaining decretal sums should there be so established pending the hearing and determination of this application.



- e. A permanent stay and or revocation be granted to the Decree dated 18.09.2022 by the Hon Deputy Registrar upon determination of the application herein.
 - f. The Hon court does direct the Plaintiff/Respondent and her agents and or auctioneers to refund, return and or pay the Defendant/Applicants any differences in the sums of monies exceeding the judgment and or decretal sums awarded by this Hon. Court.
 - g. The costs of the application be provided for.
2. The Application is supported by the Affidavit of Mohammed Kassam, the director of the Applicant deposed on 15.11.2022 in which he contends that by board resolution, the firm of Messrs Musyoki Mogaka and Co Advocates was granted requisite consents to represent the company herein. That the Ruling dated 18.9.2022 requires the Defendant to comply with the decretal orders in the matter herein.
3. It was contended that the Defendant is in full compliance of the payment of the decretal sum and has made the following payments;
- a. Kshs 1,000,000 in favour of the Plaintiff's on 28.08.2021
 - b. Kshs 1,000,000 in favour of the Plaintiff's on 28.09.2021
 - c. Kshs 500,000 in favour of the Plaintiff's on 28.10.2021
4. It was contended that the Defendant was carrying on the business of general transporters in Mombasa and all its motor vehicles and trailers that were attached in execution of the decree were seized in terms of the proclamation of attachment of movable property by Galaxy Auctioneers on 21.09.2020 consequently forcing them to shut down business operations. The vehicles and valuation at the time of possession were listed as follows;
- a. KSM 389 SCANA Kshs 3,500,000
 - b. KBR 439F PRIME MOVER Kshs 2,500,000
 - c. KBW 866R PRIME MOVER Kshs 2,800,000
 - d. KBT 268H PRIME MOVER Kshs 2,600,000
 - e. KBT 419Q Kshs 2,500,000
 - f. KBW 867R Kshs 2,800,000
 - g. KBW 863R Kshs 2,800,000
 - h. KCB 024T Kshs 2,920,000
 - i. KCB 026T Kshs 3,200,000
 - j. KBX 834M Kshs 2,700,000
 - k. ZC 9126 Kshs 1,300,000
 - l. ZC 6928 Kshs 1,500,000
 - m. ZE 0439 Kshs 1,600,000
 - n. ZE 0442 Kshs 1,500,000
 - o. ZE 1891 Kshs 1,600,000



- p. ZE 5482 Kshs 1,700,000
 - q. ZE 5490 Kshs 1,700,000
 - r. ZF 0304 Kshs 1,800,000
 - s. ZF 0310 Kshs 1,800,000
 - t. ZF 0307 Kshs 1,800,000
 - u. ZF 1671 Kshs 1,800,000
 - v. ZF 1892 Kshs 1,600,000
 - w. ZF 1215 Kshs 1,800,000
 - x. KBN 110A Kshs 3,500,000
 - y. ZE 5491 Kshs 1,500,000
 - z. ZD 8257 Kshs 1,500,000
 - aa. ZE 1875 Kshs 1,500,000
 - ab. ZE 5489 Kshs 1,700,000
 - ac. KBT 419Q Kshs 2,500,000
 - ad. KCA 985T Kshs 2,920,000
5. It was deposed that the valuations were made by professional auctioneers using regular market rates and bare minimum accounting totaling to Kshs 64,740,000 and coupled with personal payments amounts to Kshs 67,240,000 thereby exceeding the principle sum as per the decree and warrants.
 6. It was opined that an immediate audit and refund of sums owed to the Defendant needs to be assessed before any further execution. The defendant is unable to immediately raise funds owing to lack of liquidity as their vehicles were their only income generating activities and any further attempts at proclaiming the remaining assets shall be ripping through the company's ability to stay in business or remain solvent in the harsh reality of post-election and post Covid 19 economy.
 7. The defendant stated that they have come with clean hands to have an audit of the matter and come up with a proposal that does not bankrupt the company and leave its employees and beneficiaries without a source of survival. They are willing to settle with the Plaintiff only not quite in the harsh terms issued by the orders and subsequent ruling. He prayed that the same be reviewed, suspended and or set aside in favor of a proper hearing with all stakeholders in the matter.

Replying Affidavit

8. The Plaintiff filed its response on 30.11.2022 in opposition of the Application and while asking the court to dismiss the same stated that there is no official letter appointing the said firm of Messrs Musyoki Mogaka and Co. Advocates and as such was a stranger to their appointment as the Applicant is currently represented by the firm of Messrs J. Mbugua Mburu & Associate and not Messrs Wandau Matheka advocates who are their predecessors. It was contended that the Applicant was dishonest and has not served the application leading to the issuance of the orders of 18.09.2022. They confirmed that the decretal sum is yet to be settled in full nor have they been approached by the Applicant on arrangement on how they will settle the remainder of the decretal sum. Further, that they are entitled to execute until their decree is settled.



9. It was deposed that since 21.09.2020 when the Plaintiff first proclaimed as against the Defendant and revived execution on 5.08.2021, the Defendant had not redeemed the attached goods by settling the decree in full hence the attachment of 21.09.2020 as revived on 5.08.2021 is still in force and will remain so until the decretal sum together with costs and interest is realized in full.
10. The Plaintiff admitted that her advocates and the Defendant in person agreed that they would settle the decree by way of monthly instalment of Kshs 500,000 from the end of October 2021 till payment in full but would in August and September 2021 pay Kshs 1,000,000. They further agreed that there would auctioneer charges of Kshs 100,000 per month with lump sum payment being made so that the auctioneers would release the attached vehicles. The Auctioneers released the attached vehicles but the Defendant did not comply with the agreement however made payments totaling to Kshs 2,800,000/-;
 - a. 30.08.2021 Kshs 200,000
 - b. 02.09.2021 Kshs 500,000
 - c. 02.09.2021 Kshs 300,000
 - d. 01.10.2021 Kshs 500,000
 - e. 14.10.2021 Kshs 500,000
 - f. 19.11.2021 Kshs 500,000
 - g. 30.11.2021 Kshs 300,000
11. As per the agreement, Kshs 400,000 was applied toward auctioneer charges and Kshs 2,400,000 towards the decree. It was stated that the auctioneer filed statements of accounts on all the respective vehicles detailing the vehicle attached, value of each, what has been realized from the sale and the Plaintiff's advocate had it. Further, that the auctioneers also shared all the certificates of sale indicating when the vehicles were sold.
12. It was opined that no grounds of stay had been met and it appeared as if the Judgment debtor did not want her to realize the fruits of the decree and judgment and was once more engaging her in court in academic battle. The Plaintiff admitted to having engaged the Defendant on a settlement that would take 7 years to recover the whole decretal sum but having failed to honor that proposal, they are unlikely to honor any other. However, the Plaintiff was willing to resume the agreement that they are paid Kshs 500,000 per month and in default, resumes execution.
13. The Plaintiff contended that she had lost her husband at a prime age and had 3 children and she has felt the effect of post-election as well as Covid-19 and is as much as the Defendant was in fear of being bankrupt, her husband was not coming back and with the little compensation, she was beginning to pick back her life. As such she would be greatly prejudiced if the application is allowed. It was opined that this was the 4th application for stay of execution being made by the Applicants and prayed that the same be dismissed with costs.
14. The Application was canvassed by way of written submissions.

Submissions

15. The Defendant/ Applicant did not file any submissions.
16. The Plaintiff/Respondent filed submissions on 15.03.2023 and raised two issues. As to whether stay of execution should be granted as sought, it was submitted that on following an application by the



- Applicant herein dated 25.09.2020 , on 1.12.2020 Odunga J (as he then was) granted conditional stay to the applicant to deposit half the decretal sum within 30 days.
17. Before the orders lapsed, the Applicant on 29.12.2020 filed an application being Machakos HCCA E9 od 2020 Kassam Hauliers Limited vs Takaful Insurance of Africa Limited & Juliah Wambui Ngaruia (Suing as the Administrator of the estate of Samuel Mbugua Mungai (deceased) interested party seeking stay which was dismissed on 13.04.2021.
 18. Thereafter filed an application dated 20.04.2021 in these proceedings which was dismissed on 26.07.2021 and the current application was the 4th seeking stay of execution. It was submitted that the application should be struck out as it offends the mandatory provisions of Section 7 of the Civil Procedure Act. On the grounds for stay of execution, it was submitted that the application was filed late and offends the rule of res judicata. The application was filed on 15.11. 2022 whereas the decree sought to be stayed was issued on 18.09.2020. Reliance was placed on the case of Jaber Mohsen Ali & Another vs Priscillah Boit & Another [2014] e KLR on the definition of unreasonable delay.
 19. As regards substantial loss, it was submitted that the Applicant had failed to demonstrate the loss it will suffer if the decree is enforced as required by law. Odunga J held on 1.12.2020 that the parties herein entered into a consent judgment on liability and on 17.07.2019 and that issue could not be contested even on appeal. It was submitted that the court made its observations in the judgment which could only be visited on Appeal.
 20. That execution is a lawful process and the Applicant has not established other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party. The likelihood of the respondent's business may cripple as a result of execution does not amount to substantial loss. She cited the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR.
 21. It was submitted that the Applicant was in the past granted conditional stay that he refused to comply with. Has approached the plaintiff in settling the decree by way of monthly instalments and has refused to comply with the same.
 22. On security, while relying on the case of Gianfranco Manenthi & Another, it was submitted that no security had been given or proposed and even the earlier orders of security were not complied with. There was still a pending sum of Kshs 24,796,257 without factoring interest from 21.09.2020 even with the payment of Kshs 17,953,946. Further, the Applicant has a fleet of vehicles which are still operating thus deriving an income and which can be disposed to settle the decretal sum.
 23. On the issue of forensic accounts, it was submitted that the same had been filed by the auctioneers and the report filed by the Applicant did not have photographs, detailed report showing the depreciated manner of the vehicle which were attached and were made on assumption rather than inspection hence cannot defeat the sale price provided by the Auctioneers. The report stated;

“NB

The Vehicle Not Physically Examined Features And Value Approximated From The Logbook Provided”
 24. It was contended that no contrary sale prices were provided and evidence that the auctioneers for unknown reasons sold the vehicles from much higher values and diverted part of the sale price is criminal and ought to have now been reported to the police. Further, that the prayers on accounts have since been spent and should be marked as such.



25. On setting aside, while citing Order 10, Rule 11 and the cases of David Bundi vs Timothy Mwenda Muthee [2022] e KLR and National Industrial Credit Bank Limited vs S.K Ndegwa Auctioneers, Civil Appeal 195 of 2004, it was submitted that the Applicants are not seeking setting aside of the applicant's judgment or any of the court's orders but rather warrants of attachment of movable property in execution of the decree for money. It was contended that from the moment the goods were proclaimed, the judgment debtor was deprived of the legal possession and physical control of the goods instead the goods are placed in the custody of the law and court through the auctioneers. Further that the judgment debtor could only redeem them by paying the debt (decree) and it is unknown in law for the court to issue set aside warrants of attachment.
26. On review, the Plaintiff/ Respondent relied on section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules as well as the case of Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] e KLR and George Gikubu Mbuthi vs Kenya Power & Lighting Company Limited [2004] eKLR, it was submitted that no new evidence had been presented by the Defendant/ Applicant to warrant the court to grant an order of review. In addition, it had failed to prove that there was an error on the face of the record which error would be apparent if it is self-evident and requires no examination or argument to establish it.
27. On payment of instalments, the Plaintiff was not opposed to a consent or order on payment of the decretal amount by installments of Kshs 837,016.05 till payment in full and in default execution to issue for the entire amount due.

Determination

28. The Court considered the Application, the affidavit in support and opposition thereto, the Replying Affidavit and written submissions of the parties and address/consider the issues arising as follows;

Legal Representation after judgment

Order 9 Rule 9 CPR 2010 provides

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
29. The issue of legal representation was dealt with during the proceedings thus, on 17/11/2022 Certificate of Urgency was filed and certified urgent due to the subject-matter and was mentioned on 1/12/2022, when the application was adjourned to 14/12/2022 and status quo was maintained.
30. On 15.12.2022 when the issue of legal representation was heard interpartes and leave granted to the Applicant to file a further Affidavit where the court directed that the issue of representation be resolved in compliance with Order 9 of the CPR 2010 where the advocate is changed after judgment is delivered. I note that the same was not resolved and therefore under Order 9 Rule 9 CPR 2010 grant leave as prayed in the instant application for the Advocates now on record to represent the Applicant after judgment.

Execution Of Judgment And Decree Of The Court

Court Record



31. Judgment delivered 6.02.2020 by Hon. G.V.Odunga J in favor of the Plaintiff in the following terms ;
- a. General Damages of Kshs 38,775,682 plus interest at court rate from the date of judgment till payment in full.
 - b. Special damages with interests at the same rate from date of filing suit till payment in full.
 - c. Costs of the suit.

32. Section 38 CPA & Order 22 Rules 19-22 CPR 2010 provide for execution of money decree. The Auctioneer has from the attachment to the Replying Affidavit indicated that they realized Kshs 19,150,000 from selling 30 motor vehicles which were sold, retained Kshs 3,596,054 and remitted Kshs 15,553,946 to the decree holder's advocates. The Certificates of sale have been considered. The decree is yet to be settled.

From the record, the following is the chronology of events;

39. The Deputy Registrar delivered Ruling on 3/9/2020 the Bill of Costs and taxed it at Kshs 1,195,985.32/-
40. The Defendant/ Applicant filed a Notice of Motion Application dated 25.09.2020 seeking an order of stay of execution pending Appeal which was granted vide Ruling dated 1.12.2020 on condition that the Applicant deposits half of the decretal sum in a joint interest earning account in the names of the advocates for the parties herein in Kenya Commercial Bank, Machakos within 30 days of the Ruling.
41. The Defendant/ Applicant filed a Notice of Motion Application dated 20.04.2021 seeking to have the interested Party (Takaful Insurance Of Africa Ltd) herein do provide security in this matter as per the Ruling of the court on 1st December 2020 and there be stay of execution pending the hearing and determination of the declaratory suit (HCCC E9 OF 2020 Kassam Hauliers Limited Vs Takaful Insurance Of Africa Ltd). Through Ruling dated 26.07.2021 the Application was found to have no merit and was dismissed.
42. A Notice of Motion Application dated 10.08.2021 was filed by an Objector. Klick Hauliers Limited who claimed that the attached properties belonged to the Company and the Deputy Registrar delivered Ruling on 11.11.2021 and lifted the proclamation made on the Objector's property.
43. A Chamber summons application dated 16.11.2021 was filed by the Decree Holder/ Applicant seeking to set aside the decision of the Deputy Registrar delivered on 11.11.2021, that his appeal by way of a reference be allowed and the Court dismissed the 1st Respondent's objection proceedings with costs to the decree holder and order restraining the judgment debtor/Respondent from transferring or otherwise alienating all its motor vehicles as then registered until the decretal sum is settled in full.
44. In addition, the Applicant sought to restrain the Objector from transferring or otherwise alienating all motor vehicles transferred from the Defendant on 19.10.2021 and now registered in the Objector's name until the decretal sum is paid in full and also sought costs of the reference. Vide Ruling delivered on 18.10.2022, the Chamber Summons was on dismissed.
45. The judgment debtor/Applicant seeks information from the Auctioneers to refund, return and or pay any differences in the sums of monies exceeding the judgment and or decretal sums awarded by this Honorable Court. The right to information is guaranteed under Article 35 (1) of *the Constitution* that provides as follows;

Every citizen has the right of access to--



- (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
46. The list that has been attached to the Replying affidavit as filed statements of accounts on all respective vehicles attached, their value and what has been realized appears to be incomplete. It starts from number 15 but I have seen a letter in the Court Record dated 25.11.2022 written to the Deputy Registrar that indicates amounts realized from 30 motor vehicles.
47. The Applicant's pleadings disclose that pursuant to the judgment of the Court, the Respondent(s) made payments of Ksh 1,000,000/- on 28/8/2021; Ksh 1,000,000/- on 28/9/2021 and Ksh 500,000/- to the Plaintiff//Respondents. Thereafter, it is deposed that 30 motor vehicles of the Applicant were proclaimed attached and/or sold to realize and settle the decretal amount. The Motor vehicles were valued at Total Ksh 64,720,000/- way beyond the decretal sum non-disclosed interest and cost and the taxed Bill of Costs.
48. This Court notes with concern that the vehicles were valued by motor vehicle Assessors based on Logbooks but not physical examination and assessment of the vehicles.
49. The Defendant/Applicant is apprehensive that further execution to realize the debt before reconciliation of accounts would amount to ripping the Company's ability to stay in business and/or remain solvent and the Applicants are willing to settle the decretal amount once accounts are confirmed.
50. On the other hand, the Respondent vide the Replying Affidavit averred that based on agreement, the Applicant was to defray the decree by payment in instalments which was done between August & November 202. The total of Ksh 2,800,000/- paid to the Respondent by Applicant Ksh 400,000/ settled Auctioneers Fees; so only Ksh 2,400,000/- was paid.
51. The Plaintiff stated that Galaxy Auctioneers on 21.09.2020, 5.08.2021 and 16.08.2021 proclaimed 93 of the Defendant's vehicles and managed to attach 30 which were sold and recovered Kshs 15,552,946 which amounts were sent to her advocates, so in total Kshs 17,953,946/- was realized.
52. The Auctioneer realized Kshs 19,150,000 and forwarded Kshs 15,553,946 having deducted Kshs 3,596,054.
53. Whereas there is a valid, legal and regular decree for execution, the process of execution is not questioned. However, it is not also clear to the Court what has been realized of the execution and what is the balance outstanding. Whereas the Judgment debtor is entitled to the fruits of judgment, the Applicant is also entitled to hold the Plaintiff's agents accountable as to the process of execution and the amount that was obtained to settle the decree.
54. This Court finds the matter requires a stop gap period to stop execution to realize the debt so as to verify and the Court to satisfy itself on the execution money realized, money paid and money released to the Applicant are not in excess of the decretal amount.
55. For purposes of clarity, I direct that a proper record as proof of ALL vehicles proclaimed, attached and/or sold (how much, when sold and how much was realized) remittance of funds, full accounts on payments made and disbursements and the refund made if any and finally what is due and owing before further execution is allowed granted.



No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

56. I find the matter merits stay of execution pending the Report to be filed with Deputy Registrar/MHC within 60 days of the Ruling which is a sufficient reason and to allow the process of transparency and accountability as enshrined in Article 10 of Constitution and the right to information under Article 35 of *the Constitution* on condition, the Applicant continues to make payments/remittance to settle agreed outstanding debt/decreed.
57. On the issue of payment in instalments, that is at the disposal of the parties who can reach out to each other on how they would want the balance of the decretal sum settled. I will therefore leave that issue to the parties.

Disposition

I direct as follows;

- a. Stay of execution granted pending the Plaintiff/Respondent and her agents and/or auctioneers to file a report of the status of the all the judgment debtors vehicles proclaimed, attached, sold and those returned within 60 days from the date of this Ruling pending further orders. Further, the vehicles sold and at how much, when sold, how much was realized, payment made, the amount refunded and outstanding decretal amount due.
- b. The Applicant shall continue to make payments to settle the outstanding debt /decree as reconciliation of Accounts is ongoing, whether by consent or not.
- c. Parties/Counsel take the next date in the New Term from DR MHC.
- d. Each party shall bear its own costs.

RULLING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 31ST JULY 2023 (PHYSICALLY/VIRTUALLY)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR THE APPELLANT

NO APPEARANCE - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

