



REPUBLIC OF KENYA



**Wairiuko v Muchemi & 5 others (Miscellaneous Application E077 of 2022)
[2022] KEHC 12398 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E077 OF 2022

A MSHILA, J

AUGUST 12, 2022

BETWEEN

JUDY WANJIRU WAIRIUKO APPLICANT

AND

NDIRITU MICHAEL MUCHEMI 1ST RESPONDENT

JULIUS IRUNGU NGIGI 2ND RESPONDENT

WANGOMBE HUMPREY 3RD RESPONDENT

JAMES KIMANI TIA CASH GATE AUCTIONEERS 4TH RESPONDENT

AND

ASHBELL MACHARIA WACHIRA 1ST NOMINAL RESPONDENT

GITHUI MURIITHI PETER 2ND NOMINAL RESPONDENT

RULING

1. The Notice of Motion dated January 26, 2022 was brought under the provisions of article 40 of *the Constitution* of Kenya, Section 1A, 2A, 3A and 63 (e) of *Civil Procedure Act*, Order 22 Rules 51(1), (2) & (3), Rule 52, Rule 54 and Order 51 Rule 1 of the *Civil Procedure Rules*. The Application was supported by the sworn Affidavit Judy Wanjiru Wairiuko and the Applicant sought orders that;
 - a. Pending hearing and determination of this application inter partes the Court to issue a temporary injunction restraining the Respondents either by themselves, their agents, servants and/or personal representatives from selling or otherwise interfering with motor vehicle registration number KCM 020G.



- b. A mandatory injunction to issue compelling the 4th Respondent to immediately and unconditionally release to the Applicant motor vehicle registration number KCM 020G.
 - c. A Declaration do issue that the attachment of motor vehicle registration number KCM 020G by the 4th Respondent in execution of the decree in Miscellaneous Application No. 506 of 2016 Ndiritu Michael Muchemi & others versus Ashbell Macharia Wachira & another is illegal.
 - d. The 1st to 4th Respondents be ordered jointly and severally to pay aggravated damages to the Applicant as compensation for illegal attachment of motor vehicle registration number KCM 020G.
 - e. The costs of this application be borne by the Respondents.
2. The Application was opposed and the Respondents filed a Notice of Preliminary Objection dated 9th February 2022 on the following grounds;
- a) The Court lacks Jurisdiction to hear and determine this Suit as the matter has been substantially in issue regarding the stay /withdrawal of the warrants and/or declaring them illegal and it was decided that the vehicle would only be released upon the payment of the decretal sum which is 1,243,785.24/=, the same determined by a competent court.
 - b) The Husband, the 1st Nominal Respondent had tried to set aside the warrants on the same grounds as adduced by the wife, the Applicant herein and the same has been litigated and decided by Hon. Lady Justice M. Muigai in Misc. 506/2016.
 - c) This Proceeding is malicious, scandalous, frivolous and waste of courts judicial time.
 - d) This matter was substantially before a High Court Judge and the Applicant purporting to appeal to another High Court Judge is frivolous and an abuse of court process.
 - e) The Applicant claiming not to be affected by execution proceedings as she is not a party yet claiming to be a bona fide owner who is affected by the 4th Respondent's continual hold on the vehicle is malicious at best.
 - f) The Applicant claim after Judgment has been passed that she is a joint owner is a waste of court's judicial time and the process for Appeal.
 - g) The suit is otherwise bad in law and fundamentally defective and ought to be dismissed with costs to the 1st -4th Respondents.

Applicant's Case

3. The Applicant submitted that the Notice of Preliminary Objection has failed the test set out in the Mukhisa Biscuits case and ought to be dismissed with costs.
4. It was the Applicant's contention that the 4th Respondent has unlawfully attached and retained motor vehicle registration number KGM 020G in purported execution of a decree issued in High Court Miscellaneous Application Number 506 of 2016 which the Applicant is not a party to and should not be affected by any execution proceedings arising therefrom.
5. The Applicant asserted that she has demonstrated that she has a legal and equitable interest in the attached motor vehicle by producing a log book which shows that the motor vehicle is jointly owned by the Applicant and the 1st Nominal Respondent. (Annexure JWW-5 of the Applicant's supporting bundle of documents.)



6. In the Applicant's view, it is not relevant whether the Applicant is the wife of the 1st Nominal Respondent. The logbook bears the name of the Applicant and therefore she is entitled to use the attached motor vehicle as a bona fide owner of the same.
7. The 4th Respondent in particular disregarded the Applicant's rights to the attached motor vehicle by continuing to withhold the said motor vehicle with the knowledge that a third party other than the 1st Nominal Respondent has a legal and equitable interest in the motor vehicle.
8. In disregard to the law and the orders of the Court, the 4th Respondent failed to release the subject motor vehicle despite receiving payments as directed by the Court in a ruling delivered in Miscellaneous Application No. 506 of 2016 on December 10, 2021. At page 16 of the ruling, the Court directed unequivocally as follows: (Annexure JWW-3 of the Applicant's supporting bundle of documents)

“Once, Kshs.286, 720/-; the Respondent's share of Arbitrator's fees and Auctioneers fees are paid the motor vehicle Reg KCM 020 shall be released to the 1st Respondent.”
9. It was the Applicant's case that on 19th January 2022, the 4th Respondent received two cheques for the sum of Kshs.448, 000 and Kshs.286, 720 being the auctioneer's fees and the share of the arbitrator's fees as directed by the Court. (Annexure JWW-4 of the Applicant's bundle of documents.) However, the 4th Respondent has refused to release the attached motor vehicle despite receiving the payments as directed by the Court.
10. The Applicant concluded that she has a legal and equitable interest in the suit motor vehicle and is not a party to the execution proceedings in Miscellaneous Application No. 506 of 2016.

1St 4Th Respondents' Case

11. It was the Respondents' submission that this matter is Res Judicata as there exists orders in the Ruling of 10th December 2021 by the Hon. Lady Justice Muigai which is yet to be complied with.
12. All issues raised by the Applicant in the Objection Application are the same as raised by Ashbell (husband) at the High Court in Miscellaneous 506 of 2016.
13. There existed two sets of warrants of Attachment and Sale against Ashbell but the Applicant has concealed material facts to court regarding the second warrants and that prayers contained in the Applicant/Objectors Application are similar to the ones raised by Ashbell and which were granted subject to compliance with the orders contained in the said ruling.
14. Execution of the said court warrants cannot be construed to be illegal since they were validly issued and executed and even the Applicant/Objector was properly informed in May 2021 through Whatsapp of the impending sale of the said motor vehicle besides Proclamation which had been served on her at her residence.
15. The Respondent argued that the Application by the Applicant seeks to amend, review and/or to appeal the High Court ruling issued on December 10, 2021 using the wrong procedures and law. The Applicant comes to court with unclean hands as she is coming to court one year after the Proclamation.
16. The said Application is mischievous as the Applicant avoided making the said Application under the mother file Miscellaneous 506 of 2016 for the sole purpose of misleading the courts to grant stay orders. The High Court Hon. Lady Justice Muigai never found any fault in the execution process by the 4th Respondent and in fact both warrants were found to be valid therefore the issue of seeking damages as a result of a legal process does not arise.



17. Moreover, the Affidavit of Ashbell in his previous Application clearly indicated that the said subject motor vehicle was his property despite the Applicant featuring in the log book.
18. The Applicant is hoodwinking the court, by reading just a portion of the Ruling that favors her and not the disposition by court. This is a futile attempt to mislead the court. They have not complied with the orders from court that states in the Disposition.
19. In order for the Order of Hon Justice Muigai to be complied with which was a condition for the release of the Motor Vehicle in question the Applicant ought to cause the sum of Kshs. 1,167,590/= and the Auctioneers' costs to be paid.
20. The Nominal Respondent's attempt to set aside/amend the award was dismissed by the Honorable Justice Olga Sewe. The same remains as no Appeal was preferred which in any event would not have seen the light of day.

Issues For Determination

21. Having considered the pleadings and the written submissions by the respective parties the issues for determination are;
 - a. Whether the Preliminary Objection on the doctrine of res judicata should be upheld?
 - b. Whether an order of stay of execution or a temporary injunction should issue to the Objector?

Analysis

Whether the Preliminary Objection on the doctrine of res judicata should be upheld?

22. The Respondents raised a Preliminary Objection on the ground that the court lacks Jurisdiction to hear and determine this Suit as the matter has been substantially determined on the issues of stay/ withdrawal of the warrants and declaration of their illegality and release of the motor vehicle have substantially been dealt with in Misc.506 of 2016 and there is in existence a determination by a competent court and thus the matter is res judicata. Further the Application is an abuse of due process and should be struck out with costs to the Respondents.
23. The main issue for determination is whether the subject matter and the parties in the current application are directly and substantially the same as in Misc.506 of 2016 which has been determined by a competent court; this court notes that the Applicant/Objector in the application herein makes reference to this Misc. App.506 of 2016 in her prayers and it reads as follows;

‘A Declaration do issue that the attachment of motor vehicle registration number KCM 020G by the 4th Respondent in execution of the decree in Miscellaneous Application No. 506 of 2016 Ndiritu Michael Muchemi & Others versus Ashbell Macharia Wachira & Another is illegal.’
24. The Applicant/Objector does not dispute that the issues raised in the instant Application have already been determined by a competent court with the same jurisdiction and that the order for the release of the attached motor vehicle was conditional to the payment of the decretal sum of Kshs. 1,243,785/24.
25. It is this Court’s considered view that the Applicant/Objector herein is trying to circumvent the doctrine of res judicata by bringing this instant Application under the guise of being a new litigant with a fresh suit. From the submissions made this court reiterates that the subject matter is substantially and directly related to Misc. 506 of 2016 and the filing of this instant Application by the Applicant/ Objector as a new litigant does not validate and/or sanitize the process by rendering it as being a fresh suit.



26. This court can sit and revisit its own judgment only if it is moved under the provisions for review which is not the case herein; the previous matter was before a High Court Judge and this court cannot sit on an appeal of another High Court Judge with concurrent jurisdiction.

27. In this instance this court is satisfied that the application is res judicata and that the Preliminary Objection has merit and it is upheld.

Whether an order of stay of execution or a temporary injunction should issue to the Objector?

28. The applicable law is found under the provisions of Order 22 rule 51(1) of the *Civil Procedure Rules* which provides as follows;

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”

29. In the case of *Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR where the court held as follows;

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. If as the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”

30. Has the objector established a legal or equitable interest in the whole or part of any property attached in execution of the decree herein? The Objector availed a copy of the logbook which indicates that she equally owns the motor vehicle. It is the court’s view that the Applicant has proved that she has equitable interest on the attached motor vehicle.

31. In *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

32. The test for granting of an interlocutory injunction was also considered in the *American Cyanamid Co v Ethicom Limited* [1975] A AER 504 where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy, and
- iii. The balance of convenience lies in favour of granting or refusing the application.”



33. The Applicant argued that despite receiving two cheques for the sum of Kshs.448, 000 and Kshs.286, 720 being the auctioneer's fees and the share of the arbitrator's fees as directed by the court; the 4th Respondent has refused to release the attached motor vehicle despite receiving the payments as directed by the court.
34. Further to the above, it was the Applicant's case that the 4th Respondent disregarded the Applicant's rights to the attached motor vehicle by continuing to withhold the said motor vehicle with the knowledge that a third party other than the 1st Nominal Respondent has a legal and equitable interest in the motor vehicle.
35. It is noteworthy that the Applicant acknowledged that she is not a party to the execution proceedings in Miscellaneous Application No. 506 of 2016. Whereas the court may have been inclined to grant the injunctive and stay orders it is this court's considered view that the right forum for raising the objection herein is in the mother file Miscellaneous 506 of 2016. The Applicant ought to have sought to be included in the execution proceedings as an objector and this court reiterates that by bringing this instant Application does not validate the same; the filing of this Application is found to be mischievous and an attempt to mislead this court into setting aside/amend existing orders and is indeed found to be an abuse of the Court process.

Findings And Determination

36. In the light of the forgoing this court makes the following findings and determination;
- i. The Preliminary Objection has merit and it is hereby upheld.
 - ii. This court finds the Applicant's Objection proceedings to be an abuse of due process.
 - iii. The Application is found to have elements of 'res judicata' and found to be improperly before this court and it is hereby struck out.
 - iv. The Applicant/Objector shall bear the costs of this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Wanjala holding brief for Gitonga for the Applicant/Objector

Kabuga for the 1st and 2nd Nominal/Respondents

Mwangi for the 1st – 4th Respondents

Lucy-----Court Assistant

