



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION 530 OF 2019

MUSA CHERUTICH SIRMA.....PLAINTIFF

VERSUS

JANE NDUTA KIGURU & ANOTHER.....RESPONDENTS

R U L I N G

1. The application before me is dated 7th November, 2019. It seeks orders;

1. THAT this application be certified as urgent and heard ex-parte in the first instance.

2. THAT this Honourable court be pleased to issue break in orders to M/s Saddabri Auctioneers to enable them remove the proclaimed goods from the respondent's premises in Milimani estate within Nakuru County and Mumberes within Eldama Ravine Constituency for realization of the sums of Kshs. 3,067,967 being the decretal sum in Election Petition Appeal no. 9 of 2018.

3. THAT the OCS, Nakuru Central Police Station and OCS Equator Police Station together with their officers to provide security during the execution of the orders sought hereinabove and to ensure compliance with the said orders.

4. THAT cost of this application be provided for.

2. It is predicated on warrants issued on 26th March, 2019 to Saddabri Auctioneers.

3. I have heard arguments for and against the orders sought. For the applicant it was argued that that they were seeking the enforcement of the decree of the court after taxation. That proclamation had been done but attachment was proving difficult, as the respondent had denied the applicant entry into the premises. Responding to the respondent's replying affidavit Mr. Lang'at for the applicant submitted the fact of reference to the Court of Appeal by the respondent could not stop the execution proceedings because THERE was no stay of execution.

4. For the respondent it was argued by Mr. Biko that the applicant was aware of the pending reference to the Court of Appeal and that was sufficient, as it was pending litigation questioning the orders they sought to execute. Further that it was in the public domain that the Court of Appeal at Nyeri was not sitting. That the outcome of the reference could go either way and the respondent would have been prejudiced by the execution proceedings. That pursuant to **Section 108 of the Court of Appeal Rules** the respondent had not served a decree.

5. Further that some of the proclaimed properties did not belong to the respondent but that ultimately the respondent's payment was guaranteed. And that this having emanated from an Election Petition there was the security for costs which the applicant could also discharge.

6. The applicant relied on **Thomas Malinda Musau and 2 others vs IEBC and 2 others (2019) eKLR** where the court said;

However, **rule 108** of the **Court of Appeal Rules** provides that:

(1) When making any decision as to the payment of costs, the Court may assess the same or direct them to be taxed and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed.

(2) For the purpose of execution in respect of costs, the decision of the court directing taxation and the certificate of the

taxing officer as to the result of such taxation shall together be deemed to be a decree.

It is not in doubt that there was an order directing taxation. That order taken together with the certificate of costs are together deemed as a decree. Therefore, no further decree is required to be extracted for the purposes of execution.

and **Stephen Maina Kimanga and 4 others vs Lucy waithira Mwangi and 2 others (2015) eKLR** where the court says;

“However, where it is apparent that a party is unreasonably and unlawfully attempting to obstruct a lawful process or the cause of justice, a court of law will not hesitate to stamp its seal of authority using the lawful agencies of the state. I am satisfied that the current application for the use of external forces to oversee the execution of this court’s order is merited.”

These are not issues that can be dealt with at this stage due to the one glaring gap.

7. All this appears to be predicated on a warrant that had already lapsed and which warrant has a specific inbuilt mechanism for dealing with it. It, the warrants speaks for itself. It states in part;

“You are further commanded to return this warrant on or before the 26th day of April, 2019 **with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.**” (Emphasis added)

8. And the applicant concedes that the warrants have lapsed and ought to have been returned on 26th April, 2019.

Before coming to this court to seek any other orders the applicant was expected to return the warrant, after which directions would be given for the next step. That was not done.

Further, the applicant relies on **Rule 9** of the **Auctioneers Rules**: They state;

Police assistance

(1) Where an auctioneer has reasonable cause to believe that—

(a) he may have to break the door of any premises where goods may be seized or repossessed; or

(b) he may be subject to resistance or intimidation by the debtor or other person; or

(c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

(2) An application under this rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard ex parte

The applicant was expected to demonstrate one of the above situations to warrant the orders sought. The affidavit sworn by Dennis Kirui does not set out the ‘reasonable cause’ that makes the applicant believe that he will need police escort and break in orders.

9. At the time of filing this application, there are no warrants in force. They had lapsed. An extension ought to have been sought and since that was not done. The applicant seeks the extension of the warrants as ground no. g. in support of the application. That is not what is envisaged in execution proceedings. The applicant concedes that the warrants have lapsed and ought to have been returned on 26th April, 2019. At the time of filing this application there are no warrants in force, as they had lapsed and an extension ought to have been sought. I will not go into the merits of the application save, to point out that fact.

10. Without going further into the merits of the application, the fact is there are no warrants before me to warrant the issuance of the orders sought. The applicant ought to have gone back to the Deputy Registrar for their extension before bringing this application as is required by the warrants themselves.

11. The application, based on lapsed warrants is incompetent and is dismissed with costs.

Orders accordingly.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant Edna

Mburu holding brief for Kipkoech for applicant

Momanyi holding brief for Biko for respondent