



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO.81 OF 2018**

**LILI JOYCE.....APPELLANT/APPLICANT**

**VERSUS**

**ANNAH ITUMBI BENJAMIN & BENJAMIN MUTUA NGOVI**

*(Suing as the legal representative of the estate of the late)*

**JOSHUA MUSINDO MUTUA.....DECEASED**

**R U L I N G**

1. Before this is a Notice of Motion dated 21<sup>st</sup> August 2020 brought by **Lili Joyce**, the Applicant herein, who invoked **Sections 1A,1B, 3, 3A** and **63(e)** of the Civil Procedure Act and **Orders, 5 rule 1, Order 51 Rules 1,3** and **10** of Civil Procedure Rule in seeking the following prayers namely:

**i. Spent**

**ii. That this Hon. Court be pleased to issue stay and conservatory orders to Kande Auctioneers stopping the sale and/or disposition of the Applicant's motor vehicle registration number KCA 246C by public auction, together with other items attached vide notices of attachments dated 16<sup>th</sup> and 17<sup>th</sup> July 2020 pending the hearing and determination of the application herein.**

**iii. That this Hon. Court be pleased to order the review of warrants of attachment issued on 16<sup>th</sup> July 2020 to establish the correct decretal award plus costs and interests of the decree/judgment of Hon. Magistrate issued in Kitui Chief Magistrate's in Civil Suit No.488 of 2015 delivered on the 5<sup>th</sup> September, 2018.**

**iv. That upon review of the said warrants of attachment dated 16<sup>th</sup> July 2020, this Hon. Court be pleased to issue declaratory orders that the total amount of kshs.2,086,952/= paid to decree holder is in full and final settlement of the decree issue herein.**

**v. That this Hon. Court be pleased to issue any order/direction it deems fit to issue in the circumstances.**

**vi. That costs be provided.**

2. The grounds upon which this motion has been brought are listed as follows namely:-

**a. That the Applicant has a pending appeal herein.**

**b. That the Applicant has fully paid and satisfied the decree passed against her.**

**c. That the plaintiff's advocate did unilaterally and arbitrarily issue an erroneous warrants of attachment and proclamations notices dated 16<sup>th</sup> and 17<sup>th</sup> July 2020 demanding total payments of kshs.2,465,485 which amount she posits is excessive and erroneous.**

**d. That the amount demanded is excess of kshs.376,528 which she opines is unjustified.**

**e. That the plaintiff's advocates failed to inform the court that the applicant paid kshs.500,000 on 11/4/2019 and that the**

*warrants extracted did not reflect the said amount.*

*f. That the auctioneers have now proclaimed the applicant's motor vehicle KCA 246Z and that the same is due for sale by public auction.*

*g. That unless this court intervenes by granting a stay, the applicant stands to suffer irreparably.*

*h. That is in the interest of justice that the orders sought are granted and that the respondent stands to suffer no prejudice.*

5. The Applicant has supported the above grounds with an affidavit sworn on 21<sup>st</sup> August, 2020 where she has majorly reiterated the grounds cited above. She has insisted that kshs.500,000/= was paid on 11/4/2019, ksh.1,000,000/= was paid on 8/7/2020 and ksh.586,957 on 19/8/2020 making a total of ksh.2,086,957/=.

6. The Applicant's Counsel in a twist however has conceded that the judgment debtor actually still has a balance of kshs.128,869 but did not state how the amount will be paid and/or whether there is an intention to pay.

7. The Respondents have opposed this application through a replying affidavit sworn on 16<sup>th</sup> September 2020 by **Benjamin Mutua Ngovi**, the 2<sup>nd</sup> Respondent herein suing on behalf of the estate of **Joshua Musindo Mutua** (deceased).

8. The Respondents aver that judgment passed against the applicant was in the time of ksh.1,842,823/= plus costs and interests. The 2<sup>nd</sup> respondent has exhibited a copy of the decree indicating that the total decretal amount as at 25<sup>th</sup> April 2019 was kshs.2,215,826.

9. The Respondents aver that the Applicant paid kshs.1,00,000 on 14/7/2020 after the warrants of attachment had been issued and that she had initially deposited only kshs.500,000/=.

10. The Respondents further aver that even without factoring in further interests the Applicant still has a balance of kshs.128,869. They have posited that they had every right to apply for execution.

11. This court has considered this application the grounds upon which it has been brought and the response made by the respondents. The applicant is basically asking this court to review or revise the decretal amounts as reflected on the warrants of attachment issued in the lower court and declare that the applicant has satisfied the decree.

12. The Applicant however appears quite conflicted because on one hand she says that she has satisfied the decree, and on the other she concedes through counsel that actually she has a balance of ksh.128,869 to pay. The respondents on their response have correctly pointed out the same. Going by the said concession it is quite obvious that the prayers sought in this application are not tenable. This court cannot be asked to issue declaration that the decree passed has been satisfied when the Applicant (judgment-debtor) admits that she still has a balance to pay.

13. Secondly the applicant cannot invoke revisionary powers of this court on issues regarding payments or satisfaction of decrees passed before first moving the court that passed the decree. The applicant states that the amount reflected on the warrants of attachment is erroneous but the proper court to first ascertain the correct figures is the court that passed the decree. The applicant has not demonstrated to this court that she has moved that court and the said court has rendered a decision in order to enable her move this court for revision or any other relief. This application to that extent is therefore premature because the first port of call is the court that passed the decree and issued the warrants. The applicant's sentiments that the decree holder "arbitrarily" and unilaterally issued erroneous warrants of attachments is misleading and misconception because a decree holder or any party in court proceedings do not issue decrees or warrants of attachments. The court that passes judgment or decree issues such decrees in execution and if a party feels aggrieved with the execution process or the decree itself, he/she ought to go back to the same court that issued the decree or allowed the execution of the judgment. A party can only escalate a matter to the High Court if he is dissatisfied with the orders of such the subordinate court.

In the end this court for the aforesaid reasons finds no merit in the application dated 21/8/2020. The application is disallowed in its entirety with costs to the respondents.

**Dated, Signed and Delivered at Kitui this 24<sup>th</sup> day of September, 2020.**

**R. K. LIMO**

**JUDGE**