



**Nyachio v Masila (Environment & Land Case 364 of 2017)
[2023] KEELC 20108 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 364 OF 2017
CG MBOGO, J
SEPTEMBER 28, 2023**

BETWEEN

BENSON MORANGA NYACHIO PLAINTIFF

AND

RAPHAEL MUSYOKA MASILA DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion Application dated June 26, 2023 filed by the defendant/applicant and expressed to be brought under Section 1A,1B and 3A of the Civil Procedure Act, Order 22 and Order 40 Rule 1 of the Civil Procedure Rules and Article 40 of the Constitution seeking the following orders: -
 1. Spent.
 2. That the plaintiff/respondent in their own capacity or through his agents, servants, workers and/or representatives be restrained by way of injunction from disposing and/or selling motor vehicle registration no KCV 691G pending the hearing of this application.
 3. That the honourable court do grant an order of release of motor vehicle registration number KCV 691G pending the hearing of this application.
 4. That in the alternative to the foregoing prayers in the event the same motor vehicle has been disposed by way of a sale, the sale be rescinded.
 5. That the respondent be condemned to pay costs.
2. The application is premised on the grounds on the face of it and in the affidavit annexed thereto.
3. The application is supported by the affidavit of the defendant/ applicant sworn on even date. The defendant/ applicant deposed that he was raided by the OCS Kilgoris Police Station and representatives



of NRA NIRA Auctioneers with a copy of an order issued by this court to provide security during attachment. Further, that this was an ambush as he was not served with a proclamation notice and was coerced into signing a notification of sale dated June 23, 2023. Further, that the said sale of the motor vehicle would take place on June 30, 2023.

4. The defendant/applicant deposed that the process involving execution of judgment on attachable property that has interests held by a third-party ought to be exercised lawfully and with extreme caution. Further, that he is currently servicing a loan at NCBA bank who also have an interest in the motor vehicle and their interest will be prejudiced as they are not enjoined in this suit.
5. The defendant/applicant further deposed that he is also aware that the auctioneers have not renewed their warrant of attachment considering that the previous one lapsed in the month of April 2023.
6. The plaintiff/respondent filed grounds of opposition dated July 10, 2023 challenging the application on the following grounds: -
 1. That the application herein is merely speculative and not supported by evidence.
 2. The application at hand does meet the threshold for issuance of injunctive orders.
 3. The applicant herein is misconceived and incompetent.
4. The notice of motion herein contravenes the respondent's right for a fair trial under Article 50 of the Constitution as it is meant to delay conclusion of the case and execution with no just cause.
5. The defendant/applicant is approaching court with unclean hands after blatantly disregarding court orders to pay a decretal sum of KShs 164,000/- despite being duly served.
6. The plaintiff took the court for granted and now wants the court to sanitise his ills by halting the process of execution.
7. The process of execution has violated no law since due process was followed leading to attachment of the vehicle in question.
8. Stopping the process of execution will prejudice the plaintiff/respondent since the defendant/applicant has tabled no proposal on how he is going to pay the decretal sum.
9. The defendant/applicant willingly signed the notification of sale dated June 26, 2023.
7. On July 31, 2023 the defendant/applicant filed written submissions dated July 26, 2023. On the issue of whether or not the applicant has a prima facie case with high chance of success, the defendant/applicant submitted that his application fulfils the grounds as set out in the case of Giella versus Cassman Brown. He further submitted that the intended execution has not procedurally followed the process laid out as per Rule 12 of the Auctioneer Rules, 1997. Further, that it was also notable that the warrants of attachment served upon him had already expired and the auctioneer had not sought to renew the said warrants as per the clear provisions of Rule 12 (4) (b) of the Auctioneer Rules. The defendant/ applicant relied on the case of Karuri Stores Pharmaceuticals Limited & Another versus Acacia Medical Centre Limited [2021] eKLR.
8. In conclusion, the defendant/applicant submitted that the balance of convenience tilts in his favour given the inconvenience suffered if the motor vehicle having been relied on a loan that has been secured by the bank. Also, the inconvenience will also be occasioned on the part of the bank given the collateral for the loan will have been lost and loss incurred.



9. The plaintiff/respondent filed written submissions dated August 14, 2023. The plaintiff/respondent raised four issues for determination as listed below: -
 - i. Whether the proper execution process was followed.
 - ii. Whether the warrants were defective.
 - iii. Whether third party interest can prevent the order for attachment.
 - iv. Whether the defendant/applicant is entitled to the prayers sought.
10. On the first issue, the plaintiff/respondent submitted that upon discovery of the existence of more property belonging to the defendant/applicant and pursuant to Rule 12 (2) of the Auctioneer Rules, he made an application to this court and obtained orders directing the OCS Kilgoris Police Station to provide security during the attachment of the motor vehicle which property was pointed out to the auctioneer and had not been included in the earlier list of items. The plaintiff/respondent submitted that the defendant/applicant is deceiving this court by swearing false information that he was not aware of any intended attachment. He submitted that due process was followed including the issuance of the notice of sale dated June 23, 2023.
11. On the second issue, the plaintiff/respondent submitted that the warrant dated March 30, 2023 was extended by this court and it was legally used during the process of execution.
12. On the third issue, the plaintiff/respondent submitted that the motor vehicle is the property of the defendant/applicant and does not belong to any third party. That pursuant to Section 44 of the *Civil Procedure Act*, the property owned by the judgment debtor can be attached in the execution of a decree and it is immaterial whether the said property has been secured as collateral or not as long as it belongs to the judgment debtor. Further, that the defendant/applicant cannot hide in the interest of a third party and continue disregarding court orders.
13. On the fourth issue, the plaintiff/respondent submitted that the prayers sought in this application have been overtaken by events and this court cannot issue orders in vain and also, that it is worth noting that the defendant/applicant has blatantly defied court orders. He submitted that for this reason, the prayers sought cannot be granted.
14. I have considered the application, the grounds of opposition and the written submissions filed by both parties and the issue for determination is whether the application has merit.
15. In the instant application, the defendant/applicant is seeking that the sale of his motor vehicle registration no KCV 691G be rescinded. The defendant/applicant contended that he was coerced into signing a notification of sale dated June 23, 2023. I have perused the documents relied on by the defendant/applicant in this file and there is a warrant of sale of property issued by this court on March 30, 2023, a letter addressed to this court dated April 3, 2023 forwarding the proclamation note showing the goods proclaimed, the notification of sale of moveable property and proclamation of attachment of goods.
16. It should be noted that prior to this, this court had issued orders to the Officer in Charge of Station (OCS) Kilgoris Police Station to provide security during attachment. In issuing this order, the court was satisfied that due process was followed in arriving at the stage of execution. Execution being a lawful process, this court has no reason to interfere with the process.
17. The claim that the defendant/applicant was coerced into signing the notification of sale and that the motor vehicle was also co-owned by a third party in my view is far-fetched. In fact, the letter dated



by NCBA Bank dated January 5, 2023 further authorised Dominion Auctioneers to collect a sum of KShs 36,589.55/- which indicates that the defendant/applicant is in further arrears.

18. Having said the above, I find the defendant/applicant is buying time to delay the execution process through the instant application which tactic must fail.
19. As such, I find that the notice of motion dated June 26, 2023 lacks merit. It is hereby dismissed. I make no orders as to costs. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL ON 28TH SEPTEMBER, 2023.

HON. MBOGO C.G

JUDGE

