



Kalama & 4 others v Kwale International Sugar Co. Ltd; Ndutumi Auctioneers (Auctioneer); Kituo Cha Sheria (Interested Party) (Environment & Land Case 220 of 2011) [2023] KEELC 21930 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 220 OF 2011
NA MATHEKA, J
NOVEMBER 28, 2023**

BETWEEN

TSOLA MZUNGU KALAMA 1ST PLAINTIFF

BENDERA CHIMWELI MWANUNGU 2ND PLAINTIFF

KATSIRO MLICHENI NYIRO 3RD PLAINTIFF

MOSE MANGALE MRISA 4TH PLAINTIFF

CHIZI CHITUMBUA CHILOLWA 5TH PLAINTIFF

AND

KWALE INTERNATIONAL SUGAR CO. LTD DEFENDANT

AND

NDUTUMI AUCTIONEERS AUCTIONEER

AND

KITUO CHA SHERIA INTERESTED PARTY

RULING

1. The application is dated 6th July 2023 and is brought under Section IA, 3A, 80 of the [Civil Procedure Act](#), Order 10 Rule 11 Order 45 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules, 2010 seeking the following orders;
 1. That this application be certified urgent, orders be made ex-parte notwithstanding the fact that the Application has not been served.



2. That the firm of M/S Lloyd and Partners Advocates LLP be granted leave to come on record for the Defendant/ Applicant in place of M/S Rachier & Amollo Advocates.
 3. That pending the hearing and determination of this application, Ndutumi Auctioneers, his agents, servants, employees and/or any person whatsoever be restrained from advertising, offering for sale, auctioning either by private treaty or public auction, transferring, alienating, leasing, offering as security or otherwise dealing with Defendant/Applicant's motor vehicles Reg. No.s KBZ 235 B, KBZ 234 B, KBZ 498 J and KCB 695 S.
 4. That pending the hearing and determination of this application, an order does issue compelling the auctioneer to return Motor Vehicle Reg Nos. KBZ 235 B, KBZ 234 B, KBZ 498 J and KCB 695 S to the Defendant/Respondent and/or in the alternative the Officer Commanding Msambweni Police Station be directed to trace and recover the said vehicles and hand them over to the Defendant/ Respondent.
 5. That the purported execution against the Defendant/Applicant property by way of expired warrants issued on 7th March 2023 is illegal and unlawful.
 6. That this matter be transferred to the Environment and Land Court at Kwale.
 7. That the Notice of Change of Advocates dated 27th February 2023 and the Consent dated 27th February 2023 between the firm of Nyange Sharia Advocate, C/O Kituo Cha Sheria and Sharia Nyange Njuguna & Co. Advocates both filed without-seeking leave of court as provided for under the law are irregular, null and void.
 8. That the purported attachment of the Defendant/ Applicant's motor vehicles, trucks and equipment by Ndutumi Auctioneers under instructions of Sharia Nyange Njuguna & Co. Advocates, a stranger to the proceedings, and without service of a Notice to Show Cause are null and void.
 9. That the Settlement Agreement dated 26th May 2016 and filed on 26th October 2016 which was adopted as a judgement of the Court on 2nd October 2017 be reviewed, varied and or be set aside.
 10. That this matter does proceed to full hearing.
 11. That costs of this application be provided for.
 12. Any such order or further order be made as the Honourable Court shall deem just and expedient.
2. It is based on the grounds that on 7th March 2023, the firm of Sharia Nyange Njuguna & Co Advocates instructed Ndutumi Auctioneers (the Auctioneer) to proclaim and sell by auction the Defendant/ Applicant's property in execution of "court warrant" dated 26th October 2016. The Auctioneer on 9th March 2023 attached the Defendant/ Applicant's motor vehicles, trucks and equipment and or any other attachable moveable items belonging to the judgment debtor enough to satisfy the decree plus costs. That the said warrants have since expired, the auctioneer has not accounted for the same and no fresh warrants have been issued as required by law. That on 4th July 2023, the Defendant/ Applicant was taken by surprise to learn that strangers posing as servants and/ agents of Ndutumi Auctioneers attached 3 motor vehicles Reg Nos. KBZ 235 B, KBZ 234 B and KCB 695 S along Likoni Lunga Highway purporting to execute warrants of 7th March 2023 which have since expired. Further, on 7th July 2023, the said servants and/or agents of Ndutumi Auctioneers without any colour of right attached the Defendant's motor vehicle Reg No. KBZ 498 J within sugarcane plantations also



purporting to execute warrants of 7th March 2023 which have since expired. That they are currently roaming within the Defendant' sugar cane estate and all access roads to farmers' cane plantations and along Likoni Lunga Lunga Highway waiting to attach any vehicle/ movable property belonging to the Defendant/Applicant. That no notification of sale of movable property was issued to the Defendant/Applicant's representatives as required by law. That Ndutumi Auctioneers vandalized one of the vehicles KCB 695 S and abandoned it within Tiwi area where well-wishers contacted the Defendant/Applicant to notify of its presence. That the Defendant/Applicant is not aware of the whereabouts of the three vehicles Reg. Nos. KBZ 235 B, KBZ 498 J and KBZ 234 B and is apprehensive that the Auctioneer has vandalized them and or sold them following their illegal and criminal activities. That accordingly, the said attachment is illegal and unlawful.

3. That the proclamation of the Defendant/Applicant assets arose out of a settlement agreement dated 26th May 2016 which was adopted as an order of the Court on 2nd October 2017. However, they note that the said agreement does not fulfill the legal and legitimate threshold of a consent order as it lacks express authority from all Plaintiffs on whose behalf it was made and any compensation thereof was not an intention of the Plaintiffs/Respondent. This matter should be transferred to the Environment and Land Court at Kwale as it has the requisite territorial jurisdiction to handle this matter as the suit property is situate at Lunga Lunga Sub-County, Kwale County and both the Plaintiffs/ Respondents and the Defendant/Applicant are domiciled at Kwale County.
4. That the firms of Sharia Nyange Njuguna & Co Advocates and/or Kituo cha Sheria have been reluctant to reconcile with Defendant on contention issues of disputed balance payments and the details of beneficiaries of monies paid. That Ndutumi Auctioneers was instructed by the firm of M/S Sharia Nyange Njuguna & Co Advocates who are not properly on record. It reasonably follows that the execution process is illegal, null and void obtaining from instructions of a stranger to the proceedings. That the proclamation of the Defendant/Applicant assets refers to a decree of 26th May 2016 which does not exist and if at all, it is more than 3 years old where it's a mandatory requirement to issue a Notice to Show Cause prior to execution.
5. The Respondent submitted that the warrants of attachment were issued by this court. They were valid as at the time of attachment. Contrary the averments made by the Defendant, those warrants had not expired. There is nothing to even suggest that a vehicle was vandalized by themselves. The suggestion that they are roaming within the Defendants sugar plantation is not only incorrect but outrageous. That the Defendant now seeks to challenge the consent filed and adopted which challenge cannot be sustained for reasons that they have partially complied with the consent and the Order sought has been brought after inordinate delay. That the Defendant had failed to meet the requisite threshold for varying a consent order that has not only been adopted but partially complied with by the Defendant/Applicant themselves. That the said consent was filed and adopted as an Order of the Court sometimes on the 26th October 2016. That the consent was for payment of a sum total of Kshs.11,600,000/= where the Defendant made payments and left an outstanding balance. It is now almost 8 years that the Defendant/ Applicant wants to vary the consent for reasons that are unsubstituted.
6. That the Applicant sued him in Kwale after failing to get Orders before this Court i.e. Kwale Civil Suit No E136 of 203 Kwale International Sugar Co Ltd vs Ndutumi Auctioneers. The Orders sought were for the release of the said motor vehicles. That upon raising the question of jurisdiction before the Court in Kwale. The Defendant filed a motion before the Court in Msambweni seeking similar and related Orders as is the case herein, i.e. for the release of the motor vehicles back to the Defendant. Msambweni Misc Civil Application No E006 of 2023 Kwale International Sugar Co Ltd vs Ndutumi Auctioneers. The Application was heard and dismissed by the Court in Msambweni. That there is currently pending before the Kwale Environment & Land Court Appeal No E003 of 2023 Kwale



International Sugar Co Ltd Vs Ndutumi Auctioneers by the Defendant where they seek similar and related Orders as is the case herein and Kwale Environment & Land Court Appeal No E00I of 2023 Ndutumi Auctioneers vs Kwale International Sugar Co Ltd where he seeks to stay and reverse the Orders of Hon Kiongo Kagenyo Resident Magistrate (RM) Kwale. That both motion before the Kwale Environment & Land Court will be heard on the 19th September 2023.

7. The 1st Plaintiff stated that Mr. Allan Nyange had used his position as an employee of Kituo cha Sheria to take their file by false pretence and handed it over to the Law firm of Nyange Sharia Njuguna & Co Advocates without their knowledge, information, authority and/or express instructions/retainer contrary to the law. That Allan Nyange & E W Njuguna proceeded to execute a certain document called "consent" at un-disclosed location on 27th February 2023 and filed in this court. That any execution process by way of fraudulently obtained/illicit instructions should be set aside in its entirety and any damages suffered by the Defendant (Kwale International Sugar Company Limited) should be borne by Leonard Mwangi of Ndutumi Auctioneers and Nyange Sharia Njuguna & Company Advocates. That Auctioneer is an officer of the court and should be very diligent & careful & follow legal procedures when he has been instructed by the lawyers of Nyange Sharia Njuguna & Co Advocate.
8. That he is an old man, a resident of Lunga Lunga, Matuga, Kwale County and very honest & respected in the society. The Plaintiffs reside in Kwale County. The land where they were squatters Kiwegu Jego 24 is in Kwale County. Kwale International Sugar is in Kwale County. Therefore, it is very important that this matter be transferred to Kwale Land and Environment Court for further directions on any pending issue.
9. The Applicant and the 1st Plaintiff has raised a preliminary issue of jurisdiction in this matter. I have perused the court record and find that this property is situate in Kwale County and the Plaintiffs reside in Kwale County. The certificate of title of the suit property is parcel of land known as Kwale/Kiwegu Jego/24. Section 12 of the *Civil Procedure Act* Cap 21 provides for guidelines on choosing territorial jurisdiction. When filing matters it provides thus;

" Subject to the preliminary or other limitations prescribed by any law,

- a. for the recovery of immovable property; with or without rent or profits;
- b. for the partition of immovable property;
- c. for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
- d. for the determination of any other right to or interest in immovable property;
- e. for compensation for wrong to immovable property;
- f. for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the Defendant may, where the relief sought be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides or carries on business, or personal works for gain."



10. Section 13 provides; -

" Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court."

11. In the instant case the suit property is in Kwale County which is served by Kwale Environment and Land Court in Kwale County. Given that the suit property is located within Kilifi County Government, subject to Section 12 the correct forum is the Kwale Land and Environmental Court. It is not disputed that they are pending matters in Kwale touching on the same parties and the suit property namely, Kwale Civil Suit No E136 of 203 Kwale International Sugar Co Ltd vs Ndutumi Auctioneers, Msambweni Misc Civil Application No E006 of 2023 Kwale International Sugar Co Ltd vs Ndutumi Auctioneers and Kwale Environment & Land Court Appeal No E00I of 2023 Ndutumi Auctioneers vs Kwale International Sugar Co Ltd. Indeed, serious irregularities have been raised on the issue of representation and it would appear that the Auctioneer does not have instructions from the Plaintiffs. The consent on record also is alleged to have been entered fraudulently. However, this court cannot determine these issues for lack of jurisdiction and the proper forum will be the Environment and Land Court in Kwale. Consequently, I grant prayer 2 of this application and transfer this matter to the Environment and Land Court Kwale for hearing and determination. Costs to be in the cause.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY NOVEMBER 2023.

N.A. MATHEKA

JUDGE

