



**Wanjala v Walukhuchi & 3 others (Environment & Land Case  
177 of 2013) [2023] KEELC 21540 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21540 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 177 OF 2013  
EC CHERONO, J  
NOVEMBER 16, 2023**

**BETWEEN**

**AGNESE OKWAKAU WANJALA ..... APPLICANT**

**AND**

**PATRICK SITATI WALUKHUCHI ..... 1<sup>ST</sup> DEFENDANT**

**DAVID MAELO BIKETI ..... 2<sup>ND</sup> DEFENDANT**

**DAUDI SITATI ..... 3<sup>RD</sup> DEFENDANT**

**MZEE SITATI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application that is the subject of this ruling is that dated May 26, 2023 filed by the Applicant for the following orders;-
  - a. Spent.
  - b. Spent.
  - c. That this Honourable court be pleased to restrain the Respondents by themselves and or their agents or servants from selling or disposing of the Applicants movable property simultaneously seized on the 25<sup>th</sup> day of May,2023.
  - d. That the honourable court be pleased to declare that the seizure or attachment of the Applicants movable assets on the May 26, 2023 without notice of proclamation of attachment was unlawful.
  - e. That this Honourable court be pleased to order that the Respondents do restitute to the Applicants 2 brown bulls, 2 calves, 2 goats, 1ram and 1 ewe which the Respondents irregularly



purported to simultaneously proclaim and attach on the 26<sup>th</sup> day of May,2023 or pay their market price as follows:-

1 brown bull- Kshs.45,000/=1 brown bull -Kshs.45,000/=1 calf -Kshs.15,000/=1 black calf - Kshs.12,000/=1 goat – Kshs.4,000/=1 goat – Kshs. 4,000/=1 ram – Kshs. 5,000/=1 ewe – Kshs.4,000/=

- f. Cost of this application.
2. The application is premised on the grounds as set out on the face of the application and supported by the sworn affidavit of the applicant dated 26<sup>th</sup> May, 2023. It is the applicants case that on 26<sup>th</sup> May,2023 in the morning auctioneers ambushed him at his homestead accompanied by armed police officers and carted away his cattle claiming to be attaching the same for purposes of recovering costs as a result of a court case. The inventory of the cattle said to have been removed from the Applicants possession and their market value was as stated in her prayers. The Applicant averred that she had never been served with any proclamation notice or any documentation relating to attachment of her movable property. It was stated that the Respondents did not follow due process since it is a procedural requirement to be served with a notice of proclamation allowing her 7 days to make good the claim as per section 7 of the Auctioneers Act before attachment can be carried out.
  3. The application was opposed by a replying affidavit sworn by the 1<sup>st</sup> Respondent Patrick Sitatai Walukhuchi dated 10<sup>th</sup> June,2023. The Respondent deposed that upon the dismissal with costs of the Applicants application dated 16<sup>th</sup> June,2021, they filed a bill of costs on the 5<sup>th</sup> July,2022 which was eventually taxed off in the absence of the Applicants who failed to respond to the bill of costs. It was stated that the Respondents engaged the M/S Ongumwe auctioneers to execute for costs and that on 19<sup>th</sup> April,2023 the 1<sup>st</sup> Applicant accompanied the representatives of the firm of auctioneers to the Applicants homestead where they found the Applicant and his son namely Gerald Ekidapa, and in their presence carried out proclamation. The Respondents averred that attachment of the proclaimed goods was carried out on 26<sup>th</sup> May,2023 and sold on 29<sup>th</sup> Ma,2023 at 10:00 a.m before they were served with the court order.
  4. It was deposed that after the sale the auctioneers forwarded Kshs.15,000/= being part of the taxed costs from the proceeds of the sale. The Respondents averred that they were served with the court order on 29<sup>th</sup> May,2023 at 19:50Hours and 20:00hrs. It was argued that therefore it was not true that proclamation had not been done since the 1<sup>st</sup> Respondent himself pointed out the Applicants homestead and witnessed the proclamation being done.
  5. Parties thereafter took directions to canvass the application by way of written submissions.
  6. The Applicant vide submissions dated 3<sup>rd</sup> July,2023 submitted on two issues. On the first issue as to whether the attachment levied on the applicant was lawful it was argued that the law requires the auctioneer proclaims the property to be attached and present a copy of notice of attachment of property known as proclamation notice to the debtor to create awareness and enable the debtor to redeem the proclaimed property within a prescribed period to avert attachment. Counsel quoted the provisions of the Auctioneers rules 1997 rule 13 on procedure for attachment of perishable goods and livestock.
  7. It was submitted that in the current case the Applicant is lamenting that due process was not followed since proclamation was not done prior to attachment thus it was premature for failure to comply with rule 13 of the Auctioneers Act. Reliance was placed in the case of Maina Wanjigi & another v Bank of Africa Ltd & 2 others eKLR. The Applicant argued that the Auctioneer was required to swear an affidavit to the extent of how the proclamation process was done and present himself for



cross-examination and that in the absence of that it cannot be said for sure that he complied with the procedure. Further, it was submitted that the proclamation notice attached in the Respondents replying affidavit is suspect for being unclear on the proclaimed assets more so where it listed two motor cycle whose registration details were not availed. Counsel argued that the proclamation notice was done in contravention of rule 14 of the Auctioneers Rules which is drafted in mandatory terms

8. Further, the Applicant submitted that they were not notified of the sale of the attached assets as required under rule 13 (c) of the Auctioneers Rules. Counsel quoted Kitale ELC Case No. 42 of 2015 Robella Betty Ayode Omaido v Eliphineas Jackson Ekim Omaido and Eshikoni Auctioneers & 2other and Nairobi HC Appeal No. 336 of 2010 K-Rep Bank Limited v John Onchoke eKLR.
9. The Respondents filed their submissions dated 15<sup>th</sup> July, 2023 and submitted on three issues. It was submitted that from their replying affidavit they attached a proclamation notice to prove compliance with provisions of Rule 12 of the Auctioneers Rules. It was submitted that when the auctioneer proclaimed the Applicants goods, the Applicant declined to sign causing the auctioneer sign both the proclamation notice and certificate. They place reliance in the case of Real People Kenya Limited & another v Nyandeya t/a Akmal Enterprises & another Civil Appeal No.23 of 2020.
10. The second issue the Respondents submitted on was whether the orders sought had been overtaken by events. They stated that the attached assets were sold by auction on May 29, 2023 at 10:00a.m before they were served with the court order. They attached as PWS vi(a) a notification of sale intimating when, where and what time the auction would be carried out in compliance with the 17hours rule on disposal of perishable goods and livestock by public auction. It was therefore submitted that the restraining order as sought has been overtaken by events. Reliance was place in the case of Kalysoi Farmers Co-operative Society v Paul Kiryi & another (2013)eKLR.
11. The third issue as to whether an order for restitution can issue, it was submitted that for such an order to be issued, a decree had to be varied or reversed. It was argued that in the current case, the Applicant had not challenged the Decree/order that gave rise to the issuance of warrants of attachment but has instead challenged the auction. The Respondent referred the court to the provisions of section 91 (1) of the Civil Procedure Act and the case of Cyrus Komo v Hannah Nyambura Gikamu (2018) eKLR.
12. I have assessed the application, the affidavit in support alongside the replying affidavit, grounds and submissions by both parties and I find that the issues for determination are whether the Applicant is entitled to the orders sought and who bears the costs.
13. The Applicant argues that the auctioneers did not follow due process in executing for costs. An auction includes three essential steps, proclamation, attachment and sale. Each must be done on a different day. Order 22 rule 6 of the Civil Procedure Rules 2010 (CPR) , under the heading “Application for execution”, provides:

“Where the decree holder desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court..... and applications under this rule shall be in accordance with Form No. 14 of Appendix A.
14. Therefore, on the issue of the process of execution by auctioneer of an order of the Court, the following steps must ensue:
  - a. A Judgment expressed in money terms, and



- (b) That the judgment debtor is given notification of the entry of judgment in other words the judgment debtor must know what they must do in order to comply with the order and/or avoid enforcement (CoK 2010 articles 47 and 50, order 22 rule 6),
  - (c) If the judgment debtor(s) fail to comply with the order by making a payment, the judgment creditor can pursue the avenues of enforcement (Form No 14 under Order 22 rule 6).
  - (d) One avenue of enforcement is by auction.
  - (e) Before an auctioneer is appointed and/or is empowered to act, the judgment creditor must obtain a warrant of execution. The warrant of execution must include the amount of costs awarded to the judgment creditor following the process of taxation (Order 22 rule 7(h) and Form No. 14 point 8).
  - (f) The Judgment Debtor(s) must be identified (Order 22 rule 7(i) Form 14 point 9).
15. The Auctioneer's Act (Cap 526) Section 21 sets out the rules regulating sales by auction. These must be abided by for the auction to result in a legitimate sale. The Section provides:

Section 21. Auction Sales

1. The date, time and place of every sale by auction shall be advertised in the prescribed manner and such sale shall take place on the date, at the time and at the place so advertised.
2. Where any movable and immovable property is put up for sale by auction in lots, each lot shall prima facie be deemed to be the subject of a separate contract of sale.
3. It shall be stated in the particulars or conditions of any sale by auction of any property whether such sale shall be subject to a reserve price or not or whether a right to bid is reserved....”.

An Auctioneer is also bound by the Auctioneers Rules. In the context of this case Rules 12 and 13 are relevant. Further, upon the warrants of attachment and sale of movable property having been issued, the procedure and process to be followed is as provided under Section 13 of the Auctioneers Act Chapter 526 of Laws of Kenya which states;

“ 13. Perishable goods and livestock upon receipt of a court warrant or letter of instruction, the auctioneer shall in the case of goods of a perishable nature or livestock;-

- a. record the court warrant or letter of instruction in the register.
- b. Prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item which inventory shall be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached, and where a person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.
- c. Give in Sale Form 3 to the owner of the goods seventy two hours notice within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction:

Provided that in the case of perishable goods, no such grace period shall be necessary;



- d. on expiry of the period of notice without payment remove the goods;
  - e. ensure safe storage of goods pending their auction;
  - f. arrange immediate advertisement and sale.”
16. Therefore, aside from the Civil Procedure Rules 2010, an Auctioneer too must follow the process laid down in the Auctioneer’s Act and the Rules made thereunder. An essential step in this process is that the judgment debtor must have the opportunity to pay the debt and redeem his property. The steps are:
- a. Proclamation
  - b. Attachment
  - c. Auction by notice
17. Each step is distinct and must take place on a separate date within the timelines set out thereunder. The Act and the Rules expressly provide for the judgment debtor to be afforded an opportunity to pay the judgment debt.
18. The Applicant argues that she was not served with a proclamation notice and notification of sale prior to the attachment of her assets. It is further argued that the firm of auctioneers visited her home on 26<sup>th</sup> May,2023 and drove away her herd of cattle without any prior notification. On the other hand, the Respondents argued that they obtained a Certificate of Taxation the auctioneers followed due process in executing against the certificate of costs.
19. From the Court record, it is clear that the court on 7<sup>th</sup> March,2023 delivered a ruling taxing the respondents bill of costs at Kshs.159,093.33 and a certificate of costs was issued on 18<sup>th</sup> April,2023. The Respondents thereafter applied for execution and warrants of attachment were equally issued against the Applicant. The Respondents in their replying affidavit attached a proclamation notice of movable property dated 18<sup>th</sup> April,2023 as PSW v issuing a 7days notice to the Applicant to settle the amount owed and further attached PSW vi being a Notification of sale of movable property indicating that there will be a public auction on 29<sup>th</sup> May,2023 at 10:00a.m. The respondents indicated that the Applicant declined to sign the notices as to the inventory and the auctioneers therefore proceeded to sign a certificate to that effect.
20. That in view of the foregoing and order 50 rules 2 and 8 of the Civil Procedure Rules, the earliest the auction could have taken place after the expiry of 72 hours from May 26, 2014 which could have been on the 31<sup>st</sup> May,2023 bearing in mind that 27<sup>th</sup> and 28<sup>th</sup> was a weekend.
21. That the attachment and sale of the eight heads of cattle of the Applicant was not carried out in accordance with section 13 of the Auctioneers Act. The Law required the Auctioneer to first issue a proclamation detailing the value and description of the four cows. Thereafter the auctioneer was required to issue the Sale Form 3 and after the expiry of the 72 hours, remove the eight cows and store them. This was to be followed with the appropriate advertisement for the auction and the auction itself. This procedure was not followed and the Applicant cannot be faulted for reading mischief in the way the whole process was conducted. That flowing from the finding in (18) above, the sale of the four cows by the auctioneer was done without following the due process and therefore was illegal and irregular.
22. On prayer two, the Respondents deposed that the cattle were sold on 29<sup>th</sup> May,2023 and therefore this prayer cannot be granted having been overtaken by events.



23. With regards to prayer number 5 in the notice of motion, I note that the 2 bulls, 2 calves, 2 goats, 1 ram and 1 ewe had already been disposed off by the auctioneer and are not available. It is therefore not possible that the same can be recovered. However, the applicant in the alternative, sought Kshs134,000/= being the market value for the said livestock. In my view, the alternative limb to prayer 5 are in the nature of special damages which must be pleaded and strictly proved. It is not clear how the applicant determined that the market value for the cattle was Kshs. 134,000/=. I note that at the time of issuing the notification of sale, the auctioneer indicated that the value of the cattle was Kshs.57,500/=. Having been presented with two conflicting figures, I find that the value of the cattle was therefore not ascertained. In my view, based on the evidence on record, the applicant failed to demonstrate the market value for the cattle which was sold and this was crucial as his claim is for special damages. This prayer therefore fails.
24. In the final analysis, I find the application dated 26/5/2023 has merit to the extent that there was no compliance with section 13 of the *Auctioneers Act*.
25. The respondents shall jointly and severally bear the costs of this application.
26. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023

**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of**

PARA 1.

Mr. Bw'onchiri for plaintiff/Respondent

PARA 2.

Defendant/Applicant-absent

PARA 3.

Okwaro C/A

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**BUNGOMA      ELC**

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