



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 260 OF 2015

JOYCE MUTHINI MULILI APPLICANT

VERSUS

DANIEL MUTISYA MAKAURESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 16th December 2015 expressed to be brought under section 1A, 2A of the Civil Procedure Act, Order 52 of the Civil Procedure Rules and Article 159 of the Constitution the applicant seeks the following orders:
 1. **That the matter be certified urgent and be heard ex-parte in the first instance.**
 2. **That the attached goods be restored back to the Applicant/Defendant unconditionally with costs to the Applicant.**
 3. **That there be a stay of execution of the warrants of attachment herein and all consequential orders pending herein interparties/final determination.**
 4. **That costs of the application be provided for.”**

THE CASE FOR THE APPLICANT

2. The grounds of the application were set out in the application as follows:
 1. *That there is High Court Misc. ELC NO. 43 of 2015 which emerged from the Applicant having filed the said Misc. Application in High Court challenging the Judgment in Machakos CMCC NO. 723 of 2014.*
 2. *That the said High Court Misc. ELC NO. 43 of 2015 was transferred to Nairobi and the matter was finalized by Hon. Justice Mutungi who ruled [that] I was to pay shs. 450,000/= and parties to agree on the untaxed costs which the Applicant/Defendant is disputing as awarded by the magistrate.*
 3. *That I paid the principal amount of shs. 450,000/= as ordered by Justice Mutungi Nairobi leaving out the costs because the advocate for the respondent did not file and or serve me with a bill of cost as ordered.*
 4. *That the Advocate for the Respondent was aware there is an hearing in ELC No. 43 of 2015 on 3rd March, 2016 fixed interparties to determine the dispute on the costs awarded in CMCC NO. 723 of 2014 and was not honest and erred by proceeding to apply for warrants of attachment to recover the costs.*
 5. *That on 9th December, 2015 the Auctioneer and a contingent of armed police officers led by*

- the OCS Machakos police station came to my home with a breaking order and attached my goods.*
- 6. That the OCS and two other women police officers were rough and acted unprofessionally, they held and threw me down and I fell on a wooden chair and got injured on hip joint which has earlier been fractured during an accident I was involved in 2013.*
 - 7. That they caused a lot of destruction by throwing the house hold items all over the place plus food staff which was in the refrigerator which was thrown by the OCS herself who acted as the auctioneer she was the one who was pin pointing the goods to be taken out of the house and loaded in a pickup.*
 - 8. That there be a stay of execution of the warrants of attachment herein and all the consequential orders pending hearing interparties final determination of the issue of costs awarded.”*
3. The application was supported by the affidavit of the applicant sworn on 16th December 2015 setting out at paragraphs 2-10 the facts upon which the application is based as follows:
- 2. That following the judgment in Machakos CMCC.NO. 723 of 2014, I filed an application Misc. ELC NO. 43 OF 2015 challenging the judgment and before the application was heard the file was transferred to Nairobi High Court and this application was disposed interpartes by Hon. Justice Mutungi who ruled I pay within 90 days Kshs. 450,000/= instead of Kshs. 500,000/= and costs. The Ruling further directed the parties to agree on the awarded costs which were not taxed by then. (Annexed proceedings are marked ‘JMM1’).*
 - 3. That the Applicant then paid the amount as ordered by Hon. Justice Mutungi (Annexed cheque marked ‘JMM2’)*
 - 4. That I however did not pay the costs because the Advocate did not comply with the Hon. Justice Mutungi’s order of agreeing on costs and on 13th November, 2015 I filed an application which was fixed to be heard on 23rd November, 2015 to hear and determine the costs in dispute and served the same to the Advocate to the Respondent.*
 - 5. That on 23rd November, 2015, we attended the court and in unknown circumstances the matter was not listed but we took a date interpartes with the Advocate for the Respondent for the matter to be heard on 3rd March, 2016.*
 - 6. That the advocate for the Respondent being aware there is a hearing in ELC NO. 43 OF 2015 on 3rd March, 2016 to determine the disputed costs awarded in CMCC NO. 723 OF 2014, withheld this information and went ahead and applied for warrants of attachment to recover the said disputed costs.(Annexed warrants of Attachment and breaking orders marked ‘JMM3’)*
 - 7. That on 9th December, 2015 the Auctioneer and a contingent armed Police Officers led by the OCS Machakos Police Station came to my home with a breaking order and attached my goods.*
 - 8. That the police led by Machakos OCS acted unprofessionally and added further injury to my hip which was injured in an earlier road accident and should be held responsible for the costs treatment of the injuries.*
 - 9. That the advocate for the Respondent, Auctioneer and police officers ought to be held responsible for damages caused by throwing the house hold items all over plus food staff which was in the fridge.*
 - 10. That the attached household items should be restored unconditionally to the applicant with costs to borne by the Auctioneer.”*

THE RESPONDENT’S CASE

4. In response the Respondent filed a Replying Affidavit sworn on 14th January 2015 in which the respondent sets out at paragraphs 4-16 the history of the dispute as follows:
 - 4. That further this being a land matter, this court does not have jurisdiction to hear this application and there also pends another application in Environment and Land Court*

Milimani being Machakos Miscellaneous Application No. 43 of 2015.

5. *That what is being pursued herein is the costs of the suit and interest in Machakos CMCC NO. 723 of 2014 which costs were assessed vide a decree issued on 29.4.2015(Annexed hereto and marked DMM1 is a copy of the same).*
6. *That on 29.4.2015 warrants of attachment and sale were issued in Machakos CMCC NO. 723 of 2014 for a total sum of Kenya Shillings 668,040/= (Annexed hereto and marked DMM2 are copies of the same).*
7. *That the applicant then rushed to court and filed Machakos High Court Miscellaneous Application No. 43 of 2015 for stay pending filing of an intended appeal (Annexed hereto and marked DMM3 is a copy of the application dated 2.4.2015).*
8. *That on 20.7.2015 Justice Mutungi ordered the applicant to pay me Kenya shillings 450,000/= after discounting Kenya Shillings 50,000/= which the applicant said went to brokers plus costs of the suit within 90 days.*
9. *That even by the time Justice Mutungi made orders for payment of costs, the same had already been assessed by the lower court as per the decree annexed hereinabove.*
10. *That on 21.10.2015 the applicant paid Kenya Shillings 450,000/= and was informed by my advocate that the costs payable were Kenya shillings 188,040/= which is the amount in the warrants (see DMM2) of Kenya shillings 688,040/= less the sum of Kenya Shillings 450,000/= less the discounted sum of Kenya Shillings 50,000/= leaving the said balance of Kenya shillings 188,040/= which she refused to pay.*
11. *That on failure to pay the costs, warrant of attachment and sale were again issued on 4.11.2015 for recovery of the costs in the sum of Kenya shillings 190,840/= (Annexed hereto and marked DMM4 are copies of the same).*
12. *That upon proclamation, the applicant again rushed to court and filed the application dated 13.11.2015 in Machakos High Court Misc. Application No. 43 of 2015(ELC). No orders were issued and the same is pending at Milimani (Annexed hereto and marked DMM5 is a copy of the same).*
13. *That since there were no orders staying execution, the proclaimed goods were taken away by the auctioneers on 9.12.2015(Annexed hereto and marked DMM6 is a copy of the notification of sale).*
14. *That on 16.12.2015 an objector Norman Musomba Kalendu filed the application dated 16.12.2015 in Machakos CMCC NO. 723 of 2014 seeking for the attached goods to be restored back to the objector. (Annexed hereto and marked DMM7 is a copy of the same).*
15. *That on the same date 16.12.2015, the applicant also filed this application seeking for the attached goods to be restored back to her.*
16. *That in view of the objection application dated 16.12.2015, it is clear that the attached goods do not belong to the applicant and the same cannot be restored back to her and so the orders staying the sale of the goods should be vacated.”*

SUBMISSIONS

5. At the hearing of the application on 21st January 2016, the applicant and counsel for the respondent made oral submissions based on the facts deponed to in the affidavits of the parties and ruling was reserved.
6. The central argument for the applicant was that the respondent could not purport to execute for costs before the costs of the suit in the subordinate court were agreed as directed by the Order of the High Court (Mutungi, J.) in ELC Misc. Civil Application NO. 43 of 2015.
7. The respondent's argument was that the costs in the subordinate court had already been assessed by the court in its decree of 29th April 2015 in the lower court suit CMCCC NO. 723 of 2014 before the order of High Court directing that costs be agreed. The respondent also questioned the jurisdiction of the court and pointed out that there was a similar application filed in the Environment and Land Court Machakos Misc. Application No. 43 of 2015 and two other objection proceedings seeking similar relief filed in the lower court by the applicant and husband.

ISSUES FOR DETERMINATION

8. From the pleadings, affidavits and submissions for the parties the following issues arise for determination:
 - a. Whether the court has jurisdiction to entertain and determine the application for stay of execution; and
 - b. Whether on the merits the court will order stay of execution as prayed, if jurisdiction is established.

DETERMINATION

Jurisdiction

9. There is no substantive suit before the court to support the Notice of Motion application for stay. The application lacks a foundation and it is therefore incompetent. Article 159 of the Constitution and the Overriding Objective of the civil process under sections 1A and 1B of the Civil Procedure Act do not excuse flagrant disobedience of the procedure rules for approaching the Court. There is already pending proceedings in which the order for agreement on the costs was made and this application ought to have been made in that suit. The nature of application before this court is not clear- it is framed as an originating suit while it is really an application for stay which should be made pending the hearing of a dispute by way either of an appeal or original suit. No suit exists to found the application for stay.
10. There is a clear abuse of the process of the court where the applicant has filed applications for similar relief before the High Court and the Environment and Land Court and her husband objection proceedings in the lower court challenging the execution on the basis that the attached goods belong to him. The court cannot countenance a multiplicity of suits over the same subject before different competent courts. Such multiplicity only serves to delay the fair determination of the dispute in contravention of the fair and expeditious disposal of cases principle of the Overriding Objective.
11. In any event, section 6 of the Civil Procedure Act on the principle of *sub judice* provides that a court shall not proceed with a suit or application while a similar previously instituted application is pending before another court of competent jurisdiction as follows:

“6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

12. The applicant having filed the application dated 13th November 2015 in Machakos High Court Misc. Application NO. 43 of 2015 in the Environment and Land Court is obliged to pursue this earlier application to determination before filing similar applications in any other court.
13. I, therefore, find that this court has no jurisdiction in this proceedings to entertain and determine the dispute as to execution of decree on costs by the lower court.

On the merits

14. Having established that the court has no jurisdiction to entertain and determine the application for stay of execution herein, the court must in accordance with the Court of Appeal authority of ***The Owners of Motor Vessel “Lillian S”. v Caltex Oil Kenya Ltd [1989] KLR 1*** lay down its tools and refuse to proceed to hear the merits of the application.

ORDERS

15. Accordingly, for the reasons set out above, the applicant’s Notice of Motion dated 16th December 2015 is dismissed with costs to the respondent, and the interim orders herein granted pending

hearing of the application are discharged.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 24TH OF FEBRUARY 2016.

P. NYAMWEYA

JUDGE

In the presence of: -

Joyce Muthini - applicant (in person)

Mr. A.K. Mutua holding brief for Sila -Respondent

Mr. Nicholas- Court Assistant.