



Ngetich v Misik & another; Indomitable Auctioneers (Interested Party) (Environmental and Land Originating Summons 97 of 2001) [2025] KEELC 3359 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 97 OF 2001**

LA OMOLLO, J

APRIL 24, 2025

BETWEEN

JOHN KIPROTICH NGETICH PLAINTIFF

AND

SALLY CHEPKOECH MISIK 1ST DEFENDANT

PHILIP KIPLANGANT KORIR 2ND DEFENDANT

AND

INDOMITABLE AUCTIONEERS INTERESTED PARTY

RULING

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 20th September, 2022. The application is expressed to be brought under Sections 1A, 1B, 3, 3A & 63(e) of the *Civil Procedure Act*, Rules 22(1) & (2) (sic), Order 49 Rule 5 of the Civil Procedure Rules, Section 23 of the *Auctioneers Act* and Rules 6, 11, 12, 13, 16 & 17 of the Auctioneers Rules 1997.
2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the delivery of the Taxing Masters' written reasons arrived at vide a ruling delivered on 26th July, 2022 as requested by the Applicant vide a letter dated 26th July, 2022 there be a stay of execution against the Applicant.



- e. That the warrant of attachment and proclamation that has been levied against the Applicant by M/S Indomitable Auctioneers be set aside.
 - f. That the costs of this application be borne by the Respondents and M/S Indomitable Auctioneers.
3. The application is based on the grounds on its face and the supporting affidavit of one John Kiprotich Ngetich.

Factual Background.

4. The Plaintiff/Applicant commenced the present proceedings vide the Originating Summons dated 28th November, 2001
which was amended on 15th October, 2007, Further Amended on 15th March, 2017 and Further Further Amended on 14th June, 2019.
5. The Plaintiff/Applicant sought the following orders;
 - a. That the Plaintiff the families of the late Tabelгаа Chepngeno Tele and the late Tablule Tele have acquired title to the whole of the said parcels of land namely land parcel numbers Kericho/Kapkatet/1390/2334/2335 & 2336 previously known as Kericho/Kapkatet/1390 by adverse possession.
 - b. That the Defendants/Respondents jointly and severally be ordered to sign necessary documents to effect a valid transfer of the said parcels in favour of the Plaintiffs/Applicants and in default, the Deputy Registrar of this Honourable Court to do so.
6. The 1st and 2nd Defendants filed their statement of defence on 22nd May, 2003.
7. This Court notes that initially the suit was filed by the Plaintiff/Applicant John Kiprotich Ngetich against Kipkosge Tele as the 1st Defendant, Sally Chepkoech Misik as the 2nd Defendant, Philip Kiplangat Korir as the 3rd Defendant, The chairman Bureti District Land Control Board 4th as the Defendant, The Land Registrar Kericho/Bureti District as the 5th Defendant and the Attorney General as the 6th Defendant.
8. A perusal of the court record shows that on 6th March, 2019 the suit against the 1st Defendant was withdrawn and on 1st April, 2019 the suit against the 4th, 5th and 6th Defendants was also withdrawn.
9. On 1st April, 2019 the Plaintiff/Applicant was granted leave to amend the Further Amended Originating Summons. On 17th June, 2019 the Plaintiff/Applicant filed a Further Further Amended Originating Summons which did not reflect the withdrawal of the suit against the 1st, 4th, 5th and 6th Defendant.
10. In the application order consideration, the Plaintiff/Applicant
has listed Sally Chepkoech Misik as the 1st Defendant, Philip Kiplangat Korir as the 2nd Defendant and Indomitable Auctioneers as an Interested Party.
11. For purposes of the application under consideration, in the present ruling, this Court will proceed as per the cause title set out by the Applicant.



12. The 2nd Defendant/Respondent and 1st Defendant/Respondent filed their Replying Affidavits on 11th July, 2019 and 3rd October, 2019 respectively.
13. On 2nd March, 2021 the Plaintiff/Applicant's suit was dismissed for want of prosecution.
14. The application under consideration first came up for directions on 14th November, 2022 before Hon. Nyakundi, the Environment and Land Court Deputy Registrar.
15. The said application was mentioned severally before him before
it was placed before this Court on 25th January, 2024. On the said date, the Court directed that the application be served upon the Respondents within seven days and further directed that the Respondents file their responses within fourteen days.
16. On 14th February, 2024 the Court gave directions that the application be canvassed by way of written submissions.
17. The Interested Party neither filed a response to the application nor filed submissions.
18. The matter was mentioned severally to confirm filing of submissions. On 6th November, 2024, it was reserved for ruling.

The Plaintiff/Applicant's Contention.

19. The Plaintiff/Applicant contends that before costs were taxed, his Counsel on record informed the Court that there was a pending appeal.
20. The Plaintiff/Applicant also contends that as at the time of filing the application, the Taxing Officer had not issued a Certificate of Costs.
21. The Plaintiff/Applicant further contends that the Defendants/Respondents have failed to follow the due process of execution and have instead attached his properties including livestock.
22. It is the Plaintiff/Applicant's contention that he is advised by his advocates on record that once he lodged his objection, the Taxing Officer's power to issue warrants of attachment ceased.
23. It is also the Plaintiff/Applicant's contention that he is yet to be served with the Taxing Officer's reasons.
24. He ends his deposition by stating that the Defendants/Respondents are plotting to frustrate him and his family through the sale of his properties without following the legal process. He adds that the Defendants/Respondents main aim is to evict him from land parcel No's Kericho/Kapkatet/1390, 2334, 2335 and 2336.

The 1st and 2nd Defendants/Respondents contention.

25. In response to the said application, the 1st Defendant/Respondent filed a Replying Affidavit sworn on 18th October, 2022.
26. She deposes that she has the authority of the 2nd Defendant/Respondent to swear the affidavit.
27. She also deposes that they are the proprietors of land parcel No's Kericho/Kapkatet/2334, 2335 and 2336.
28. She further deposes that the Plaintiff/Applicant's suit was dismissed for want of prosecution.



29. It is her deposition that the application under consideration is frivolous, vexatious and an abuse of the Court process.
30. It is also her deposition that on 26th July, 2022 the Court delivered a ruling where it taxed the bill of costs as drawn.
31. It is further her deposition that they requested the Court to issue warrants of attachment and sale of the Plaintiff/Applicant's properties in order to get the costs of Kshs. 354,805/= as per the Certificate of Costs issued on 9th September, 2022.
32. She ends her deposition by stating that they followed due procedure and that the Court issued a Certificate of Costs on 9th September, 2022.
33. On 13th February, 2024, the 2nd Defendant/Respondent also filed a Replying Affidavit.
34. He reiterates the averments in the replying affidavit sworn by the 1st Defendant/Respondent on 18th October, 2022.
35. He deposes that the application dated 20th September, 2022 together with the supporting affidavit are incompetent, fatally defective, an abuse of the Court process and ought to be struck out.
36. He also deposes that the application under consideration is time barred as there was a delay in prosecuting it.
37. He further deposes that on 24th March, 2022 the Court delivered a ruling where it vacated all the interim orders that were granted after dismissal of the suit.
38. It is his deposition that the Plaintiff/Applicant has not filed an application for reinstatement of the suit and the application under consideration is in abeyance.
39. It is also his deposition that in addition to the Certificate of Costs issued on 9th September, 2022, the Court issued a Further Certificate of Costs for Kshs. 365,805/= on 14th April, 2023.
40. It is further his deposition that they requested the Court to issue warrants of attachment and sale to recover the costs of Kshs. 367,450/= which were issued on 12th July, 2023.
41. He deposes that they also sought a Notice to Show cause through a letter that was received in Court on 3rd November, 2023 and issued on 7th November, 2023.
42. He also deposes that the Plaintiff/Applicant was 'awakened' after he was served with the said Notice to Show cause which prompted him to take a date for the present application.
43. He further deposes that they wrote a letter dated 28th November, 2023 seeking that the matter be mentioned before the judge on 6th December, 2023 since the matter had been pending for a long time.
44. It is his deposition that the Plaintiff/Applicant is filing applications to delay the course of justice.
45. He ends his deposition by urging the Court to dismiss the Plaintiff/Applicant's application with costs.

Issues for determination.

46. It is important to note that as at the time the Court scheduled the matter for ruling, none of the parties had filed submissions.
47. While the matter was pending ruling, the 1st and 2nd Defendants/Respondents filed submissions on 22nd January, 2025.



48. The 1st and 2nd Defendants/Respondents submit on the following issues;
 - a. Whether the Applicant should be granted stay of execution.
 - b. Whether the taxing master erred in failing to give written reasons for taxation.
 - c. Who should bear the costs.
49. With regard to the first issue, the 1st and 2nd Defendants/Respondents reiterate their averments in their affidavits in response to the application and submit that the Plaintiff/Applicant's intention is to delay the matter.
50. They rely on the judicial decisions of *RWW v EKW* [2019]eKLR, *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, *Kenya Shell Ltd v Kibiru & another* C.A No. 97 of 1986 and submit that orders of stay of execution should not be granted as the Plaintiff/Applicant is the author of his own misfortune. They add that granting the orders of stay of execution will amount to an injustice to them as they have waited for long to enjoy the fruits of their judgement.
51. With regard to the second issue, the 1st and 2nd Defendants/Respondents submit that the Taxing Officer delivered his decision on 28th July, 2022 when he taxed the bill of costs as drawn.
52. They reiterate that they were later issued with Certificates of Costs on 9th September, 2022 and 14th April, 2023.
53. They rely on paragraph 11 of the Advocates Remuneration Order and submit that the decision of the Taxing Officer contained reasons.
54. They also submit that the Plaintiff/Applicant did not object to any item on the bill of costs but only waited for the Taxing Officer to deliver his ruling before objecting to all the items.
55. They rely on the judicial decisions of *Ahmed Nassir v National Bank of Kenya Ltd* [2006]EA, *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & another* [2022] eKLR, *Evans Thiga Gaturu Advocate v Kenya Commercial Bank Limited* [2012] eKLR and submit that the bill of costs was taxed as drawn and there was no need for the Taxing Officer to furnish further reasons.
56. The 1st and 2nd Defendants/Respondents conclude their submissions by urging the Court to dismiss the Plaintiff/Applicant's application.

Analysis and determination.

57. I have considered the application, the responses thereto and the submissions, albeit filed without leave of Court, and my view is that the following issues arise for determination:
 - a. Whether orders of stay of execution should be granted pending the issuance of the reasons by the Taxing Officer for the ruling delivered on 26th July, 2022.
 - b. Whether the proclamation and warrants of attachment levied against the Plaintiff/Applicant by M/s Indomitable Auctioneers should be set aside.
 - c. Who should bear costs of the application.



a. Whether orders of stay of execution should be granted pending the issuance of the reasons by the Taxing Officer for the ruling delivered 26th July, 2022.

58. The Plaintiff/Applicant is seeking that the Court issues orders of stay of execution pending the furnishing of reasons by the Taxing Officer for his ruling delivered on 26th July, 2022.
59. The Plaintiff/Applicant contends that the Taxing Officer delivered his decision on 26th July, 2022 and that he sought reasons vide a letter dated 26th July, 2022.
60. The Plaintiff/Applicant further contends that he is still waiting for reasons from the taxing officer.
61. In response, the 1st and 2nd Defendants contend that the Taxing Officer's decision delivered on 26th July, 2022 had reasons and therefore there was no need for the Taxing Officer to issue further reasons.
62. Paragraph 11 of the Advocates Remuneration Order provides as follows;
- “ 1) Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation which he objects.
 - 2) The Taxing Officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - 3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - 4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have expired.”
63. A perusal of the Court record shows that the Taxing Officer delivered a ruling on 26th July, 2022 where he taxed the Party and Party bill of costs as drawn.
64. It is evident that no reasons for the said decision were given.
65. In the judicial decision of *Wanga & Company Advocates v Dorcas J. Kisorio* [2008] eKLR the Court held as follows;
- “I agree with the Applicant that it is a condition precedent that the Taxing Master gives the reasons for the taxation on the items to which objection is taken before a reference may be filed under Rule 11 (2). For the Taxing Master to give reasons, the Applicant must have within 14 days after the decision given notice in writing to the taxing officer of the items to which he objects.”
66. In the present matter, the Plaintiff/Applicant sought reasons as the Taxing Officer's decision did not contain any.



67. A perusal of the Court record shows that the Plaintiff/Applicant wrote a letter dated 26th July, 2022 addressed to the Taxing Officer seeking reasons for his decision.
68. As at the time of writing of this ruling, there is nothing on the Court record that shows that reasons were furnished.
69. The Plaintiff/Applicant seeks that the Court issues orders for stay of execution pending the furnishing of reasons.
70. Paragraph 11(2) of the Advocates Remuneration Order provides that once reasons have been requested for, the Taxing Officer ought to provide such reasons and the aggrieved party has fourteen days upon receipt of the said reasons to file a reference.
71. What then is the next cause of action in instances where the Taxing Officer fails to give reasons as was in this case?
72. The Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR held as follows;
- “ Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference.” [Emphasis Mine]
73. In the present matter, a period of about two and a half years has lapsed since the Plaintiff/Applicant requested for reasons. It is not in dispute that no reasons have been furnished to date.
74. It is my view that the Plaintiff/Applicant ought to have filed a reference notwithstanding the fact that the Taxing Officer failed to furnish the reasons. A party cannot wait indefinitely for reasons to be furnished.
75. It is upon this background that the Plaintiff/Applicant seeks that this Court issues orders of stay of execution pending the furnishing of reasons by the Taxing Officer.
76. The law relating to stay is Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows;
- “(2) No order for stay of execution shall be made under sub rule (1) unless
- a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”



77. The Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR held as follows;

“[30] The general stand of the law, therefore, is that there will be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution, or for grant of an injunction.”

78. The Supreme Court in *Okoiti v Central Bank of Kenya & 7 others (Application 33 of 2018)* [2019] KESC 27 (KLR) (23 July 2019) (Ruling) also held as follows;

“In addition, there is no substantive appeal before us to enable us make a determination on this application for stay of execution one way or the other. Orders cannot be granted in a vacuum or on a whim.”

79. As aforementioned, a period of more than two and a half years has lapsed since the Plaintiff/Applicant sought for reasons and no reference has been filed. In the absence of the filing of a reference, this court cannot make a determination on whether or not orders of stay of execution should be issued. Doing so would be tantamount to granting orders in a vacuum.

80. I find that orders of stay of execution cannot be granted.

b. Whether the proclamation and warrants of attachment levied against the Plaintiff/Applicant by M/s Indomitable Auctioneers should be set aside.

81. The Plaintiff/Applicant contends that a proclamation and warrants of attachment have been issued against him without following the requisite procedure.

82. He also contends that once he lodged his objection, the Taxing Officer’s power to issue warrants of attachment ceased.

83. The 1st and 2nd Defendants/Respondents admit that warrants of attachment and sale were issued on 12th July, 2023 which they contend were procedurally issued.

84. The Plaintiff/Applicant has attached to his affidavit in support of his application a copy of the proclamation of attachment/Repossession of movable properties issued by Indomitable Auctioneers. It shows a schedule of the Plaintiff/Applicant’s immovable properties that have been attached/repossessed/distained.

85. The Plaintiff/Applicant has also attached a copy of warrants of sale of property in execution of a decree issued by the Deputy Registrar on 9th September, 2022 to Indomitable Auctioneers. It authorized Indomitable Auctioneers to sell the Plaintiff/Applicant’s property attached under a warrant dated 9th September, 2022 to realize a sum of Kshs. 354,805/=.

86. The letter also states that the warrant is to be returned to Court on or before 19th September, 2022 with an endorsement certifying the manner it has been executed or give reasons why it has not been executed.

87. The 2nd Defendant/Respondent has attached to his replying affidavit a copy of a re-issued Warrant of sale of property in execution of a decree for money issued to Indomitable Auctioneers.

88. It authorizes the said auctioneers to sell the Plaintiff/Applicant’s properties that had been attached under a warrant issued by the Court dated 12th July, 2023 to recover the sum of Kshs. 367, 450/=.



89. The letter also states that the warrants ought to be returned on 11th August, 2023 with an endorsement certifying the manner in which it was executed or the reasons why it has not been executed.

90. Rule 12 (1) of the Auctioneers Rules provides as follows;

- “(1) Upon receipt of a Court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and 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, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
 - (c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the Court warrant or letter of instruction;
 - (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
 - (e) ensure safe storage of the goods pending their auction;
 - (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;
 - (g) not remove any goods under the proclamation until the expiry of the grace period.”

91. The Court of Appeal in *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR defined the proclamation process as follows;

“From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the Court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.”

92. In the present matter, it is not disputed that the Plaintiff/Applicant’s goods were proclaimed.

93. It is also evident that warrants of sale of property in execution of a decree were issued by the Court on 9th September, 2022 and they were to be returned to Court on or before 19th December, 2022. From the Court record it is not clear what happened after the said warrants of sale of property in execution of a decree were issued.



94. The 2nd Defendant/Respondent attached to his Replying Affidavit a copy of warrants of sale of property in execution of a decree that were again issued on 12th July, 2023 and they were to be returned to Court on or before 11th August, 2023. Again, the Court record is not clear on whether the said warrants of sale were executed.
95. It is important to note that each of the warrants of sale of property in execution of a decree had a date within which they were to be returned to Court. From the warrants of sale attached by the Plaintiff/Applicant herein and the Defendants/Respondents, it is evident that the time within which they were to be returned lapsed.
96. As things remain, there are no valid warrants of sale of property. I am unable to grant an order setting aside that which does not exist.

c. Who should bear costs of the application.

97. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21) A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

98. Taking the foregoing into consideration, I find that the Notice of Motion application dated 20th September, 2022 lacks merit and it is hereby dismissed with costs.
99. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 24TH DAY OF APRIL, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Sigira for the Plaintiff/Applicant.

Mr. Keter for the Defendants/Respondents.

No appearance for the Interested Party.

Court Assistant; Mr. Joseph Makori.

