



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 189 OF 2013**

**GEORGE NGURE KARIUKI ..... PLAINTIFF**

**VERSUS**

**WANJIRU GITAU (sued on her own behalf And as the Legal**

**representative of theEstate of GITAU GICHUNGO) ....1<sup>ST</sup> DEFENDANT**

**LUCY MAGIRI KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**PAUL KARIUKI GICHUI ..... 3<sup>RD</sup> DEFENDANT**

**KAIRO THUO ..... 4<sup>TH</sup> DEFENDANT**

**ESTHER WAMBUI KIBORE ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. What is for consideration before this Court is the Plaintiff's Application by way of Notice of Motion dated 5th November 2013. The same is brought under the provisions of **Order 9 Rules 9 (a) and 10** as well as **Order 40 Rule 1 (a)** of the *Civil Procedure Rules, 2010* as well as the inherent jurisdiction sections of the *Civil Procedure Act* being **sections 1A, 1B, 3A, 63 (c) and (e)** of the *Civil Procedure Act*. Apart from seeking leave for the firm of W. J. Ithondeka & Co. Advocates to come on record for the Plaintiff/Judgement Debtor, the Application sought orders that this Court be pleased to issue a temporary injunction restraining the fourth and fifth Defendants from disposing of the Plaintiff's property as described in a Proclamation Notice dated 29th October 2013 pending the hearing and determination of the Application.
2. The Application was grounded as follows:

**“(a) THAT Mr. Anthony Nahashon Ngunjiri t/a A.N. Ngunjiri who was previously on record for the Plaintiff is now deceased.**

**(b) THAT the Plaintiff commenced litigation herein and the 4<sup>th</sup> and 5<sup>th</sup> Defendants subsequently applied successfully of the striking of the suit against them.**

**(c) THAT Plaintiff was condemned to pay costs of the suit to the 4<sup>th</sup> and 5<sup>th</sup> Defendant.**

**(d) THAT in pursuit of the costs awarded to the 4<sup>th</sup> and 5<sup>th</sup> Defendants they instructed, through their advocates on record, M/s John M Mbijiwe trading as Bealine Kenya Auctioneers to execute for the decretal sum which was Kshs. 319,652.**

**(e) THAT the Honourable Deputy Registrar issued warrants of sale of movable property in execution of Decree money in favour of Bealine Kenya auctioneers on the 25<sup>th</sup> January 2013 which was valid for the period of 90 days.**

**(f) THAT Bealine Kenya Auctioneers proclaimed goods and assets of the Plaintiff on the 20<sup>th</sup> March 2013.**

**(g) THAT the Auctioneer subsequently collected cheques for a total of Kshs. 150,000 from the Plaintiff on the 19<sup>th</sup> April 2013.**

**(h) THAT the Cheques have all cleared in favour of M/s Bealine Kenya Auctioneers who was the 4<sup>th</sup> and 5<sup>th</sup> Defendants agent. That the Plaintiff has paid the balance of the decretal sum being Kshs. 174,427 but the 4<sup>th</sup> and 5<sup>th</sup> Defendants are still pursuing the Plaintiff for Kshs. 150,000 paid to their agent.**

**(i) THAT subsequently the 4<sup>th</sup> and 5<sup>th</sup> Defendants instructed M/s Front Bench Auctioneers to execute for the full Decretal sum against the Plaintiff. The defendants issued a Proclamation Notice to the Plaintiff on 29<sup>th</sup> October 2013.**

**(j) THAT the Proclamation Notice is issued inspite of payment in full by the Plaintiff to the Defendants.**

**(k) THAT on the expiry of the seven (7) days from the 29<sup>th</sup> October 2013 the Auctioneers may proceed to attach the Plaintiffs goods and assets.**

**(l) THAT the Plaintiff stands to suffer loss in the event that the attachment proceeds.**

**(m) THAT it is only fair and in the interests of justice that the Application is allowed as prayed”.**

3. The Application was supported by the Affidavit of the Plaintiff sworn on 5th November 2013. The deponent recalled that he had instituted proceedings as against the Defendants herein being *HC ELC No. 283 of 2010*. The fourth and fifth Defendants herein had applied for and the Court granted the striking out of the suit as against them and awarded costs. Those costs were duly taxed in this suit and a decretal sum of Shs. 319,652/- was awarded as against the Plaintiff. Warrants of Sale of movable property in respect of the Decree were issued in favour of Bealine Kenya Auctioneers on 25th January 2013, valid for a period of 90 days. The deponent continued by saying that Mr. Mbijiwe of Bealine Auctioneers had come to his premises in Kitisuru, Nairobi to proclaim his assets in pursuance of the said Warrants of Sale. He had paid the auctioneers costs in cash and issued to him 3 cheques in the amount of Shs. 50,000/- each being a part of the decretal

sum. The cheques were dated 19th April 2013, 24th May 2013 and 26th July 2013. It later emerged that the cheques so issued did not contain the details of the payee, this was left in blank. The Plaintiff then recited that on 10th September 2013 a second firm of auctioneers being **Front Bench Auctioneers** appeared at his home with a fresh set of Warrants of Sale and proceeded to proclaim the Plaintiff's goods a second time. Again he issued cheques for the balance of the outstanding decretal amount of Shs. 174,427/- as well as paying the second Auctioneers fees in full. He had informed the second Auctioneers of the payment that he had already made to Bealine Auctioneers of Shs. 150,000/-. He thought that the conduct of Mr. Mbinjiwe of Bealine Auctioneers was reprehensible and he had lodged a complaint against him with the Auctioneers' Licensing Board.

4. On the 7th November 2013, this Court granted leave for the said firm of advocates to come on record for the Plaintiff and also granted a Temporary Injunction restraining the disposal of the Plaintiff's proclaimed goods. Thereafter, the 4th and 5th Defendants, through their advocate **Isaac Onyango Oloo**, filed a Replying Affidavit sworn on 11th November 2013. The deponent detailed the instructions given by his firm as regards execution of the Warrants of Attachment first through Bealine Kenya Auctioneers but later through Front Bench Auctioneers. The deponent recorded monies received as a result of the second attachment, noting that the said Bealine Auctioneers had returned the Warrants of Attachment issued to them unexecuted on 16th August 2013. Mr. Oloo went on to say that he had received the letter from the Plaintiff dated 11th October 2013 addressed to Front Bench Auctioneers but copied in to his firm. That letter indicated the payment of the said 3 cheques for Shs. 50,000/- each to Bealine Auctioneers. He had requested of the Plaintiff as to why he had issued blank cheques as he had done but later had issued other cheques in his firm's name. He had concluded, upon enquiry, that those three cheques had been paid to the said auctioneers as their fees for abandoning/compromising the whole execution process. Indeed, the deponent had been informed by the manager of Front Bench Auctioneers that apparently Bealine Kenya Auctioneers had agreed with the Plaintiff that upon receiving those payments, there would be no further execution process upon him.
5. As a result, Mr. Oloo had written to the Plaintiff's current advocates on record, a letter dated 18th October 2013 in which he had stated that the three blank cheques were not meant to be paid to his firm otherwise there would have been drawn in the firm's favour. The relevant portion of that letter reads as follows:

**“M/s Bealine Kenya Auctioneers thus was on an adventure and frolic of his own. At that time we had returned the warrants to court and was accordingly not acting upon our instructions (the warrants had expired – M/s Bealine Kenya Auctioneers intentionally delayed the execution of warrants to have this come to pass) clearly thus, in the above circumstances we are strangers to the dealings between M/s Bealine Kenya Auctioneers and yours.**

**The circumstances of this matter clearly show circumstantial impropriety between M/s Bealine Kenya Auctioneers and yours. Why would yours issue the cheques were KShs.174,427/= directly to us and not issue blank cheques?**

**We have previously advised yours to pursue criminal action upon his friend Mr. Mbinjiwe of M/s Bealine Kenya Auctioneers.”**

6. Thereafter, with leave of the Court, the Plaintiff swore a Further Affidavit dated 4th December 2013. He referred to the Replying Affidavit sworn by Mr. Aloo and stated that he did not refuse to settle all the amounts due. He confirmed that by the time Messrs. Bealine Kenya Auctioneers had returned the Warrants to Court and served, they had collected from him the sum of Shs. 150,000/-. The deponent stated that he did not have much choice but to issue the three cheques as he had been distressed by the auctioneers like any other person. He further went on to say that he had not issued the cheques to Messrs. Bealine Kenya Auctioneers in lieu of fees. It was his belief, and he had been so advised by his advocates on record, that until the auctioneers returned the Warrants to

the Court, they were at all times agents of the Respondents and carried out all actions including the collection of the said cheques on their behalf. As a result, the cheques that he had issued in favour of Messrs. Front Bench Auctioneers on 8th and 30th November 2013 were so issued under duress. It was quite evident that the Respondents had not sought to recover the funds from (as the deponent saw it) their agent.

7. Mrs. Ithondeka, learned counsel for the Plaintiff submitted that her clients had paid the decretal sum in full. There was no dispute that the said Bealine Kenya Auctioneers had been instructed to levy attachment by the 4th and 5th Defendants. As counsel saw it, the Auctioneers were the agents of the 4th and 5th Defendants. Bealine calculated Shs. 150,000/- in pursuit of the Proclamation Notice in respect of the Plaintiff's goods on 20th March 2013. On the other hand, the 4<sup>th</sup> and 5th Defendants maintained that the Warrants had been returned to Court on 16th of August 2013 unexecuted. In the Plaintiff's view, the principals are bound by their agent and not the Plaintiff. It had been alleged by the 4<sup>th</sup> and 5th Defendants that it was the Plaintiff who had intended to fraudulently scuttle the execution process. The Plaintiff had given to the auctioneers blank cheques and had now demonstrated that these have been made payable to the auctioneers. Counsel agreed that payments by way of blank cheques was not very smart but the bottom line was that the cheques were completed so far as the payee details were concerned and encashed. In her view, the auctioneers had returned the Warrants allegedly unexecuted but had, in fact, executed the same to the extent of Shs. 150,000/-.
8. Mr. Onyango for the 4th and 5th Defendants relied upon the Replying Affidavit and maintained that it was not in doubt that the Court had issued the said Warrants of Attachment to Bealine Kenya Auctioneers. He agreed that the Plaintiff had shown that the blank cheques which he had issued had been completed as regards the payee details by the said Auctioneers. Over and above the Shs. 150,000/- there was a balance due of Shs. 174,000/-. This was the reason why two further cheques in favour of counsel's firm had been issued, one for Shs. 100,000/- and the second for Shs. 74,000/-. Order 22 rule 1 details that all monies payable under a Decree should either be paid into Court or to the Decree Holder or as the Court directs. An auctioneer expressly attaches as per the Decree of the Court. Nowhere does the rule detail that the auctioneer should be paid rather than the Decree Holder. Counsel noted that as far as the two subsequent cheques issued by the Plaintiff, the first for Shs. 100,000/- had been returned unpaid while his firm was holding on to the second cheque. The Plaintiff had not explained to the Court why he had issued the blank cheques for Shs. 150,000/- in favour of the auctioneer but that the two other cheques had been issued in the name of the advocates for the 4th and 5th Defendants. He maintained that these two further cheques had been issued in bad faith hence the Plaintiff was coming before this Court with unclean hands. Finally, counsel maintained that as regards the auctioneers being the agents of the 4th and 5th Defendants, it is the Court that takes over the process of execution and directs as to how the proceeds of an attachment are to be handled. It was the position of the 4<sup>th</sup> and 5th Defendants that there is a balance of Shs. 150,000/- still due to them under the Decree and the Plaintiff has the obligation to pay this amount to satisfy the Decree.
9. It is the Court's view that the behaviour of Bealine Kenya Auctioneers as regards the execution and attachment herein has left a lot to be desired. The Court notes, with some relief, that the Plaintiff has addressed a complaint as against those Auctioneers with the Auctioneers Licensing Board. Unfortunately for the Plaintiff, this Court cannot agree that the said Auctioneers, in carrying out the execution, were acting as the agents of the 4th and 5th Defendants. I am bound by the finding of the Court of Appeal in the case of **Davis & Shirliff Ltd v the Attorney General (1976-80) 1 KLR 1063**. The Ruling of **Madan JA** (as he then was) at page 1065 is pertinent to the matter before this Court:

**“With respect, I agree with Simpson J, that the court broker was an agent of the court. The tortuous act of conversion of the money must be deemed to have been committed by the Court itself inasmuch as it was committed by an authorized agent of the Court in the course of its duty. Quite apart from the position that in the final analysis the Court can do nothing wrong, the Court is a “person” within the meaning of section 4 (5) (vide**

the definition of “person” in section 3 (1) of Interpretation and General Provisions Act). Therefore, no action lies against the Government for (in this case) anything done or omitted to be done by any person (in this instance the Court) while discharging its responsibilities in connection with the execution of judicial process.

In order to function freely and effectively, Courts of justice must be free from harassment of litigious involvement arising from the bona fide discharge of their responsibilities, not only in connection with the execution of judicial process but generally in connection with their task of administering justice. The appellant must look for redress elsewhere”.

10.The finding of Law JA in the same case was equally pertinent and on point as follows:

“I would only mention one point, and that is whether or not the execution had been completed. Simpson J, following a dictum by Lord Denning MR in *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12, said, “I find that such execution is not completed until payment is made to the judgment creditor”. What Lord Denning said was that an execution was completed in fact when the creditor gets his money. He was then dealing with section 325 of the English Companies Act 1948, which distinguishes between an execution which the creditor has completed in fact and one which has been deemed to have been completed. No such distinction needs to be drawn here. In this case the goods were seized under an order of the court. They were sold, and the proceeds of sale received by the court broker. Those proceeds then became money had and received on behalf of the judgment creditor, and were recoverable by him as such. In these circumstances, I entertain no doubt that the execution was complete. Once he had received the proceeds of sale, the court broker held the money for and on behalf of the judgment creditor and was accountable to him for it. Unfortunately, the court broker dishonestly converted the money to his own use. As the judge held, the court broker was acting as an agent of the court and therefore of the Government. As to whether the Government is liable for this tort, it is with some regret that I agree with Madan JA and with Simpson J that the government is exempted from liability under the provision of Section 4 (5) of the Government Proceedings Act.

The court broker, in failing to pay over the proceeds of sale, was omitting to discharge a responsibility which he had in connection with the execution proceedings, and it seems to me to be immaterial whether the execution had been completed or not”.

11.The Davis & Shirliff case was followed in the case of Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd (1985) KLR 260 as cited to Court by the counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Davis & Shirliff case was not mentioned in the Judgement of Ibrahim J. in the other case cited to this Court by the 4<sup>th</sup> and 5<sup>th</sup> Defendants being National Industrial Credit Bank Ltd v Majani Mingi Sisal Estate Ltd & 2 Ors HCCC No. 1818 of 2000. The finding of the Learned Judge at page 12 was relevant to the matter before Court as follows:

“I hold that the process or act of proclamation (or promulgation) is not a distinct and separate legal process. It is the first act or step in the process of attachment in Kenya as prescribed by Rule 12 of the Auctioneers Rules. Once the proclamation takes place, the law deems that the goods are seized and have come into the custody and control of the court as the Bailiff is the court’s agent.”

12.As a result, I am unable to grant prayer 3 of the Plaintiff’s Notice of Motion dated 5<sup>th</sup> November 2013. Quite clearly, proclamation having been pronounced, Messrs. Bealine Kenya Auctioneers were acting as the court’s agent not the agent of the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The balance of the decretal sum is still owed by the Plaintiff to the 4<sup>th</sup> and 5<sup>th</sup> Defendants. In the words of the Madan JA as above: “The appellant must look for redress elsewhere”, as against the said Auctioneers. The 4<sup>th</sup> and 5<sup>th</sup> Defendants will have the costs of the said Notice of Motion.

**DATED and delivered at Nairobi this 18<sup>th</sup> day of December, 2013.**

**J. B. HAVELOCK**

**JUDGE**