



**Mshanga v China Henan International Co-operation (Group) Company Limited  
(Environment & Land Case 245 of 2017) [2022] KEELC 3435 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3435 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 245 OF 2017**

**JO OLOLA, J  
JULY 28, 2022**

**BETWEEN**

**GILBERT CHARO MSHANGA ..... PLAINTIFF**

**AND**

**CHINA HENAN INTERNATIONAL CO-OPERATION (GROUP) COMPANY  
LIMITED ..... DEFENDANT**

**RULING**

1. This Ruling relates to two applications. The first application dated and filed herein on 30<sup>th</sup> March, 2021 was instituted by the Defendant seeking for orders:
  - (b) That the purported auction conducted by the 2<sup>nd</sup> Respondent on 9<sup>th</sup> March, 2021 be declared unlawful and/or unprocedural and therefore null and void;
  - (c) That the 2<sup>nd</sup> Respondent be compelled to produce the proceedings of the auction conducted on 9<sup>th</sup> March, 2021 including but not limited to public notice of sale and the evidence of advertisement in one of the daily newspapers and evidence of compliance with Order 22 Rule 57 & 58 of the *Civil Procedure Rules*;
  - (d) That the Applicant be granted damages for the illegal execution process by the 2<sup>nd</sup> Respondent;
  - (e) That the 2<sup>nd</sup> Respondent be cited for contempt outside of Court for want of following of the due process governing the conduct of the auction sale;
  - (f) That an order of Prohibition be issued against the 2<sup>nd</sup> Respondent from auctioning the proclaimed movable property of the Applicant/Judgment Debtor without following the due process of law as envisaged in the *Civil Procedure Rules* 2010 to wit, advertisement for sale notice, 15 days' notice to the Judgment Debtor, independent valuation of the motor vehicles before sale;



- (g) That the Honourable Court be pleased to make such other and further orders as it may deem just and expedient; and
  - (h) That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by the Defendant's Business Manager Wu Peng Chao and is based on the grounds:
- (a) That an ex-parte Judgment was delivered herein on 31<sup>st</sup> January, 2019 and the Applicant was aggrieved therewith;
  - (b) That the Applicant moved this Court by way of an application seeking inter alia the setting aside of the ex-parte Judgment but the application was dismissed by a Ruling delivered on 22<sup>nd</sup> January, 2021;
  - (c) That the Applicant filed an application dated 22<sup>nd</sup> February, 2021 for stay of execution of the Judgment and decree as it intended to appeal the Judgment of 31<sup>st</sup> January, 2019 and the Ruling of 22<sup>nd</sup> January, 2021;
  - (d) That the 2<sup>nd</sup> Respondent made a Proclamation Order dated 3<sup>rd</sup> February, 2021;
  - (e) That on 9<sup>th</sup> March 2021, the 2<sup>nd</sup> Respondent purported to conduct a public auction based on the proclamation order dated 3<sup>rd</sup> February, 2021 before advertising the public auction on a local newspaper as required by Rule 16 of the Auctioneers Rules, 1997;
  - (f) That the 2<sup>nd</sup> Respondent conducted the public auction without giving the Applicant the requisite 15 days notice informing them of the auction and/or sale;
  - (g) That as a result of the unprocedural and flawed auction, the Applicant's operations have been adversely affected;
  - (h) That this application is brought in good faith and without prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; and
  - (i) That the Applicant is reasonably and justifiably apprehensive that unless this matter is dealt with urgently and the 2<sup>nd</sup> Respondent's carrying out of the public auction is declared unprocedural and therefore null and void, it stands the risk of suffering further irreparable substantial loss and the application for stay dated 22<sup>nd</sup> February, 2021 and the intended Appeal will be rendered nugatory.
3. The second application dated 14<sup>th</sup> April, 2021 and filed on 16<sup>th</sup> April, 2021 has been instituted by the Plaintiff seeking orders:
- (ii) That Blue Swift Contractors and General Supplies Limited be enjoined in the execution proceedings and be served with the application;
  - (iii) That this Honourable Court be pleased to grant an eviction order against the Defendant/ Respondent and its agent Blue Swift Contractors and General Supplies Limited for the suit property Kilifi/Gede/Mijomboni/973;
  - (iv) That this Honourable Court to grant a demolition order of the permanent structures that the Defendant and its agent Blue Swift Contractors and General Supplies constructed on the suit property;



- (v) That the OCS Watamu Police Station be directed to provide security during the eviction and demolition exercise; and
  - (vi) That costs of this application be provided for.
4. The second application is supported by an Affidavit sworn by the Plaintiff himself and is based on the grounds that:
    - (i) The Defendant after the Judgment was delivered on 31<sup>st</sup> January, 2019 and dismissal of the application to set aside the Judgment, has brought in a stranger – Blue Swift Contractors to occupy the suit land Kilifi/Gede/Mijomboni/973 belonging to the Plaintiff with the sole purpose of circumventing the decree and frustrate the decree-holder from effecting the decree on the ejection of the Defendant; and
    - (ii) The Defendant’s intentions are not to comply with the decree by operating under a separate entity, to frustrate the decree and that this Court has the power to issue an order of eviction of the Defendant and its agents as well as demolition of the permanent structure on the suit land.
  5. The First Application by the Defendant lists Kameta Enterprises Auctioneers as the 2<sup>nd</sup> Respondent herein. In a Replying Affidavit sworn on 16<sup>th</sup> April, 2021 and filed herein on 21<sup>st</sup> April 2021, in response to the application, one John Kameta trading as the said Kameta Enterprises Auctioneers avers that they served the Defendant/Judgment-Debtor with a Proclamation Notice on 3<sup>rd</sup> February, 2021 and that they proceeded to proclaim some 11 motor vehicles.
  6. The Auctioneer further avers that the proclamation gave the Judgment Debtor 7 days within which to pay the decretal amount of Kshs.10,452,554/- and that upon expiry of the Notice, they managed to attach some 4 motor vehicles belonging to the Debtor whereupon they served the Debtor’s Manager with a Notification of Sale but he declined to receive the same.
  7. The Auctioneer further avers that they proceeded to advertise the vehicle for sale in the Star Newspaper of 2<sup>nd</sup> March, 2021 indicating that the same would be sold by auction on 9<sup>th</sup> March, 2021. On the said date, the Auctioneers aver that they sold the said motor vehicles for Kshs.3,760,000/-.
  8. The Defendant/Judgment-debtor is equally opposed to the Plaintiffs Application. In a Replying Affidavit also sworn on its behalf by its Business Manger Wu Peng Chao and filed herein on 26<sup>th</sup> April 2021, the Defendant avers that it has no association whatsoever with the said Blue Swift Contractors and General Supplies Limited. The Defendants further aver that they have no proprietary interest in the suit land as they were merely tenants in the land leased to them by one Leonard Mbonani Bikanga.
  9. The Defendant further ravers that at the expiry of the lease agreement, it did move out of the land on 14<sup>th</sup> December, 2018. The Defendant avers further that they have since learnt from their former landlord the said Leonard Mbonani Bikanga that he is the one who has leased the suit premises to the said Blue Swift Contractors and General Supplies Limited in much the same way as he had leased it to the Defendant.
  10. The Defendants aver that they have suffered a miscarriage of justice through the ex-parte Judgment where as tenants they are being punished yet they have no proprietary interest in the said parcel of land.
  11. I have carefully perused and considered the two applications and the respective responses thereto. I have similarly perused and considered the rival submissions filed herein by the Plaintiff/Decree-holder as well as the Defendant/Judgment-debtor in respect of the two applications.



12. By the Motion dated 30<sup>th</sup> March, 2021 the Defendant urges the Court to declare unlawful and unprocedural the auction conducted by Messrs Kameta Enterprises Auctioneers on 9<sup>th</sup> March, 2021. The Defendant further urges the court to compel the said Auctioneers to produce the proceedings of the auction including the public notice of the sale as well as an advertisement of the same in a daily newspaper.
13. The Defendant prays for damages for the said execution process terming it illegal and urges the Court to cite the Auctioneer for contempt outside of Court for failure to follow the due process governing the conduct of auction sales. It also prays for an order of prohibition to issue restraining the Auctioneer from auctioning the proclaimed movable properties.
14. The gist of the Defendant's application is that the Auctioneer whom it refers to repeatedly as the 2<sup>nd</sup> Respondent herein flouted the rules and procedures in carrying out the execution of the decree of this Court dated 2<sup>nd</sup> December, 2019. In particular the Defendant contended that the Auctioneer proceeded to carry out the auction without making an advertisement thereof in the local dailies as required in law. In addition, the Defendant accused the Auctioneer of failing to provide the details of the public auction to the Defendant.
15. In response to the Defendant's position, the Auctioneer has sworn an Affidavit indicating that they served the Proclamation Notice upon the Defendant on 3<sup>rd</sup> February, 2021 at 4.29 p.m. The Proclamation Notice gave the Defendant 7 days within which to pay the decretal sum of Kshs.10,452,554/-. The Defendant does not deny that the 11 motor vehicles said to have been found in the premises as listed in the proclamation were their own. Nor do they dispute that the 4 motor vehicles eventually attached by the Auctioneers were their own. The Auctioneer has indeed sworn in the Supplementary Affidavit that the Proclamation was served upon a hostile Chinese Manager of the Defendant who declined to receive them and that the documents were left in the premises.
16. While the Defendant contended that the Auctioneer attached the movable properties before the expiry of the time provided for and in breach of Order 22 Rule 58 of the Civil Procedure Rules, I was unable to find any basis for that contention. Section 12 of the *Auctioneers Act*, 1997 details the steps to be taken in an auction process and I was unable to see how the same had been breached. The said section provides for an advertisement to be placed within 7 days of the removal of goods and for arrangements to be made for sale not earlier than 7 days after the first newspaper advertisement.
17. From the material placed before me, the attachment was done on 26<sup>th</sup> February, 2021 and some 7 days later and contrary to the Defendants averments, the Auctioneer placed an advertisement of the sale in the Star Newspaper of 2<sup>nd</sup> March, 2021. The Auction again took place 7 days later on 9<sup>th</sup> March, 2021.
18. In the premises I was not persuaded that the Auctioneer had failed to abide by the Rules in carrying out the public auction and I was therefore not persuaded that there was any merit in the Defendant's Motion dated 30<sup>th</sup> March, 2021. I disallow the same.
19. On their part, the Plaintiff/Decree-holder prays for orders to evict the Defendant and an entity known as Blue Swift Contractors & General Supplies Limited which entity the Plaintiff refers to as the Defendant's agent. The Defendant on the other hand denies that the said entity is its agent. On the contrary, the Defendant offers that they have learnt from their former landlord that the said Blue Swift Contractors & General Supplies Limited is the new tenant in the premises after the Defendant's Lease Agreement expired and they moved out of the suit premises on 14<sup>th</sup> December, 2018.
20. That assertion by the Defendant was certainly untruthful and reveals a certain propensity on the part of the Defendant to contemptuously mislead this Court ever since the proceedings herein commenced.



As at 14<sup>th</sup> December, 2018 when the Defendant purports to have moved out of the suit premises, the impugned Judgment herein was yet to be delivered. In its Prayer to set aside the Judgment upon being served with the Proclamation Notice, the Defendant came to court praying for stay of execution on the purport that they were in physical possession of the suit premises and that their equipment and machines were in danger of being wasted.

21. That position was affirmed as we had seen earlier in the Affidavit sworn by its then Manager Cheng Ju sworn on 16<sup>th</sup> December 2019 in which the Defendant admits to have been served with a Proclamation Notice in the suit premises on 10<sup>th</sup> December, 2019. The Defendant has not bothered to explain what it was doing with its property in the premises during the proclamation when its lease had expired and it had purportedly moved out of the suit premises a year earlier.
22. Indeed, the Defendants were still in the suit premises several years later on 26<sup>th</sup> February, 2021 when Messrs Kameta Enterprises Auctioneers served them with the Notification of Sale and proclaimed their Motor vehicles.
23. As it were the issue of a tenancy agreement between the Defendant's purported landlord and the new entity said to be in occupation of the suit premises has never been disclosed to the Court at any time either when the Judgment was delivered and/or during the hearing of the application to set aside the same. That the issue is only coming up after the application to set aside was dismissed is a clear demonstration that the Defendant is working in cahoots with other parties to circumvent the Judgment of this Court.
24. By the said Judgment this Court had declared the Plaintiff to be the registered proprietors of the suit property. From the Defendant's own averments herein it was clear that the Defendant's purported landlord who is said to have placed the new entity into the suit premises is aware of this case and the decision herein. It is telling indeed that the Defendant has never sought to seek any indemnity herein from the purported landlord and one cannot but agree with the Plaintiff that they are all working together to circumvent the Judgment and to continue frustrating the decree-holder from enjoying the fruits of his Judgment.
25. It follows therefore that I am persuaded that there is merit in the Plaintiff's application dated 14<sup>th</sup> April, 2021 and I allow the same as prayed.
26. The Plaintiff shall have the costs of the two applications.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

In the presence of:

No appearance for the Applicants

No appearance for the Respondents

Court assistant - Kendi

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**J. O. LOLA**

**JUDGE**

