



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISII**

**Civil Appeal 17 of 2006**

**K.T.D.A. (OGEMBO TEA FACTORY) ..... APPELLANT**

**VERSUS**

**CHARLES NYAUNDI OKEMWA ..... RESPONDENT**

**RULING:**

The appellant's application dated 27<sup>th</sup> October, 2009 seeks the following substantive orders:

- “1. That this application be certified urgent and service thereof be dispensed with in the first instance.**
  
- 2. That the plaintiff whether by himself, his agents Pave Auctioneers, servants and/or employees be restrained from advertising for sale, disposing of or in any other manner wasting the applicant's motor vehicle registration No. KBC 076 G and/or replacement thereof, motor vehicle registration No. KAV 344 V, Pick Up, pending hearing and determination of this application.**
  
- 3. That there be stay of any form of execution over all those matters hereunder listed pending the hearing and determination of this application, further orders and/or directions of this court.**
  
- 4. That this honourable court be pleased to order release of the applicant's lorry registration No. KBC 076 G and/or replacement thereof, motor vehicle registration No. KAV 344 V, Pick Up, currently being held by M/s Pave Auctioneers pending the hearing and determination**

**of this application.**

**5. That the execution, warrants of attachment, proclamation for attachment of applicant's goods/lorry or motor vehicle registration No. KAV 344 Pick up on 26<sup>th</sup> day of October, 2009 through M/s Pave Auctioneers be declared null and void and all be lifted with all consequential orders therefrom.**

**6. That costs of this application be borne by the respondent.”**

The applicant further prayed that the above sought orders do apply in 18 other files as cited in the application.

The application was supported by an affidavit sworn by **Julius Onguso**, the Factory Manager of the appellant. He deposed that there are various appeals pending before this court emanating from decrees issued by the subordinate court in several matters. Upon institution of the appeals the appellant filed applications in the trial court in all the matters seeking stay of execution which was granted ex-parte pending hearing and determination of the applications inter parties. Those applications have not been disposed of.

He continued to state that on 3<sup>rd</sup> July, 2008 this court issued a temporary stay of any form of execution and/or attachment of the appellant's goods pending hearing and determination of an application for stay of execution. The application is yet to be heard. However, on 26<sup>th</sup> October, 2009, while the orders issued by this court were still in force, **M/s Pave Auctioneers** proceeded without a proclamation to attach the appellant's motor vehicle registration No. KBC 076 G (Isuzu lorry) while carrying green tea leaves. The reason for so doing was purported execution for their charges. The Auctioneers took the lorry to their yard. The deponent stated that Pave Auctioneers are not a party to the various suits pending in court between the appellant and various respondents and therefore had no **locus standi** to execute for a non existent decree.

He added that the warrants which were purportedly being executed had long expired and ought to have been renewed since it was more than one year from the time when they were first issued and no notice to show cause had been taken out. The court was urged to order release of the attached motor vehicle and further order that the loss of the green tea leaves occasioned to the appellant by the said attachment be borne by Pave Auctioneers since the attachment was illegal.

In his submissions, **Mr. Millimo** for the appellant stated that since the subordinate court in **CMCC No. 191 of 2005** had held that the attachment was unlawful, all consequential orders related to the said attachment were invalid. A consent that was recorded between the advocates for the parties in **CMCC No. 180 of 2005** relating to the Auctioneers' costs was also invalid. Following the said consent, Pave Auctioneers instructed Moco Auctioneers to execute for their costs. On 20<sup>th</sup> June, 2008 Moco Auctioneers proclaimed the appellant's goods and an objection was raised forcing the said Auctioneers to refrain from any further attachment. Pave Auctioneers decided to act for themselves and on 29<sup>th</sup> August 2008, caused warrants of attachment and sale to be issued to themselves. That is when they proceeded to attach motor vehicle registration No. KAV 076 G.

The appellant moved to court and secured release of the attached motor vehicle at the ex-parte stage of its application. But when the application came up for inter parties hearing the trial court dismissed it and the Auctioneers proceeded to attach motor vehicle registration No. KBC 076 G. However, that motor vehicle was substituted with another one, registration No. KAV 344 V.

Counsel further submitted that Pave Auctioneers were not parties to any of the suits filed against the appellant and could not therefore apply to execute for their costs as against the appellant. In any event, the court had already found that the warrants of attachment had been issued irregularly. No proclamation preceded the attachment of the appellant's motor vehicle on 26<sup>th</sup> October, 2009. No new warrants of attachment were issued, Mr. Millimo stated.

Mr. Ogwenno for the respondent opposed the application. He referred to a replying affidavit filed by the respondent herein. In the said affidavit the respondent stated that he had wrongly been dragged into this application because the genesis of the same was various consents entered into between Pave Auctioneers and the firm of Mose & Mose Advocates which was acting for the appellant. The consents were in respect of the Auctioneer's costs. He further stated that in CMCC No. 180 of 2005, Wewa, RM, rejected a similar application as the present one. The ruling therein was delivered on 29<sup>th</sup> September, 2009. No appeal had been preferred against that ruling.

With regard to the orders that were issued by this court in HCCA No.13 of 2006, counsel submitted that they were not directed against Pave Auctioneers. They were directed at the various plaintiffs in the subordinate court matters. He urged the court to dismiss the appellant's application.

Mr. Minda for Pave Auctioneers also opposed the appellant's application. He relied on an affidavit filed by Alfred Sagwa Mdeizi, the proprietor of Pave Auctioneers. Mr. Mdeizi deposed that on 6<sup>th</sup> May, 2008, a consent regarding his costs was recorded between his advocates, Okemwa Elijah & Company and Mose & Mose advocates for the appellant. The consent was in respect of the following matters:

**CMCC No. 180, 181,184,159,190,169,168,191,**

**161,192,172,188,186,170,176,189**

**and 183 all of 2005.**

The amount of costs payable in respect of each of those matters was agreed upon and it adds up to Kshs. 510,500/-. The consent further provided that the assessed costs be paid directly to Pave Auctioneers. A stay of execution for 30 days was provided for. The said consent was filed in court and has neither been reviewed nor set aside.

Sometimes in August, 2008 the Auctioneer proclaimed the appellant's movable property, among them motor vehicle registration No. KBC 076 G. The warrants were returnable to court by 28<sup>th</sup> December, 2008.

The appellant filed an application dated 21<sup>st</sup> December, 2008 seeking to forestall the execution process and the application was opposed. The subordinate court heard the application and in its ruling delivered on 29<sup>th</sup> September, 2009, the application was dismissed. No appeal was preferred against the said ruling.

Mr. Mdeizi further deposed that the interim order of stay that was obtained by the appellant on 1<sup>st</sup> December, 2008, restrained him from advertising for sale, disposing of or in any manner wasting the appellant's motor vehicle registration No. KBC 076 G pending inter parties hearing and determination of the appellant's application. But following dismissal of the application on 29<sup>th</sup> September, 2009, he was at liberty to proceed with execution. He caused the warrants of attachment and sale to be extended upto 13<sup>th</sup> November, 2009.

It was further stated that the appellant's lorry registration No. KBC 076 G was carrying gunny bags when it was attached and the appellant's factory Manager requested that it be replaced with pick up registration No. KAV 344 V, a Toyota, which request was granted.

With regard to the orders issued by this court in HCCA No. 13 of 2006, the Auctioneer stated that they relate to execution that was carried out by Victoria Blue Auctioneers in relation to decrees in various matters. The orders did not in any way affect execution for his costs which had been agreed upon by consent.

I have carefully considered all the affidavits on record and all the submissions made by counsel. It is a common ground that nearly twenty cases were filed by several people against the appellant, following an accident that allegedly occurred on 31<sup>st</sup> August, 2004, involving the appellant's motor vehicle registration No. KZX 214. In CMCC No. 180 of 2005 which gave rise to this appeal, judgment was entered on 16<sup>th</sup> January, 2006. The respondent was awarded a sum of Kshs. 60,000/- as general damages and Kshs. 6,500/- as special damages. Stay of execution was ordered for a period of 30 days. On 22<sup>nd</sup> February, 2006 an application for stay of execution pending appeal was filed. The orders sought were to apply in all the cases that had been filed by the various plaintiffs against the appellant. Stay of execution was granted ex-parte pending inter partes hearing and determination of the application. The interim order of stay was extended from time to time and it appears that the application was not disposed of until 8<sup>th</sup> of April, 2008 when the respondent obtained warrants of attachment and sale of the appellant's goods.

On 18<sup>th</sup> April, 2008, an application for stay of execution in respect of all the cases was filed before the trial court. The appellant prayed that the execution be declared as null and void and the attached motor vehicle be released. He stated that judgment in all the matters had been delivered more than a year prior to that date and execution proceedings had been commenced without any notice in contravention of the provisions of **Order XXI rule 18** of the **Civil Procedure Rules**. On 20<sup>th</sup> June, 2008, Wewa, RM, delivered a ruling and held as follows:

- **The application was subjudice and an abuse of the court process and thus the prayer for stay of execution was disallowed.**
  
- **The warrants of attachment and sale dated 8<sup>th</sup> April, 2008 were issued irregularly and in contravention of the provisions of Order XXI rule 18 and were therefore lifted.**
  
- **The applicant was the author of its own misfortune and so each party was to bear its own costs.**

The court did not declare the execution process to be null and void as alleged by the appellant's counsel. Mr. Ogweni rightly submitted that an irregular execution is not necessarily void *ab initio*. He cited **HALBURY'S LAWS OF ENGLAND Volume 17 Page 276 paragraph 459** where the learned authors state as follows:

**“An execution is irregular where any of the requirements of the rules of court have not been complied with, and in such a case the proceedings may be set aside or amended or otherwise dealt with in such manner and upon such terms as the court thinks fit. Such non-compliance must be treated as an irregularity**

**and does not nullify the proceedings, any step  
in the proceedings or any document, judgment  
or order therein.**

.....

**The setting aside of a writ on the ground of  
irregularity does not prevent the plaintiff  
issuing and executing another writ.”**

On 4<sup>th</sup> July, 2008, on an application by the appellant made before this court in HCCA No. 13 of 2006, an order of stay of execution of the decrees issued was ordered in respect of 19 cases including CMCC No. 180 of 2005. The said orders were to remain in force until the pending application was heard and determined.

Before Wewa, RM, delivered the aforesaid ruling on 20<sup>th</sup> June, 2008, the advocates for the Auctioneers and the advocates for the appellant had entered into the aforesaid consent with regard to the Auctioneer’s charges in respect of 17 of the cases including CMCC No. 180 of 2005. The consent stated that the assessed costs be paid directly to M/s Pave Auctioneers but did not state who was to pay the same. The consent was dated 6<sup>th</sup> May, 2008 and was filed in court but was not endorsed by a magistrate or an Executive Officer. Although there was no judgment that was being applied for by the Auctioneers, the provisions of **order XLVIII rule 2 (b)** of the **Civil Procedure Rules** require that where parties file a consent, judgment may on application in writing be entered by the Registrar if it is a High Court matter or by an Executive Officer in a subordinate court matter.

Without taking any further step, the Auctioneers’ advocate applied for warrants of attachment and sale of the appellant’s moveable property as if they were executing a decree. The Auctioneers were not a party in the case before the subordinate court and were not holding any decree in their favour. There was no decree that was capable of any execution. A “**decree**” is defined by **section 2** of the **Civil Procedure Act** as “**the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit..**”

The only decree that was in existence was the one issued in favour of the respondent.

This court had issued an order of stay of execution of all the decrees obtained by the plaintiffs in the subordinate court matters. If the Auctioneers intended to recover their costs before finalization of the pending applications, they ought to have filed a suit based on the agreed costs and obtain judgment and thereafter process a decree. Only then would they have lawfully proceeded to attach the appellant’s property towards recovery of their charges. Mr. Minda’s contention was that the Auctioneer did not require to file a separate suit, he rightly proceeded pursuant to the provisions of **section 34** of the **Civil Procedure Act**. I think counsel misapprehended the provisions of that section. The section states as follows:

34 (1) “**All questions arising between the  
parties to the suit in which the decree  
was passed, or their representatives,**

**and relating to the execution,  
discharge or satisfaction of the  
decree, shall be determined by the  
court executing the decree and not by  
a separate suit.” [emphasis supplied]**

For purposes of that section, an Auctioneer is not a representative of a party.

It follows therefore that the Auctioneer’s move was unlawful. He purported to execute a non-existent decree. The consent did not confer any authority upon the trial court to issue any decree in favour of the Auctioneers and none was issued. The warrants of attachment and sale were void. The court had no jurisdiction to issue the same, notwithstanding the said consent, see **MARY OSUNDWA –VS- NZOIA SUGAR COMPANY LIMITED**, Civil Appeal No. 244 of 2000.

That being the case, the orders sought by the appellant in the application dated 27<sup>th</sup> October, 2009 must be granted, which I hereby do. I further direct that there should be no form of execution against the appellant whatsoever in all the matters stated in the appellant’s application until the pending application in HCCA No. 13 of 2006 is heard and determined. The Auctioneer will bear the costs of this application.

Having made the above orders I urge parties and counsel concerned in the various matters aforesaid to hasten the hearing of the pending appeals so that these matters are finalized once and for all instead of spending so much time on multiplicity of applications.

**DATED, SIGNED AND DELIVERED AT KISII THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**20/11/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Mose for the Applicant

Mr. Ogweno for the Respondent, also HB for Mr. Minda for the Auctioneer.

**Court:** Ruling delivered in open court on 20<sup>th</sup> November, 2009.

**D. MUSINGA**

**JUDGE.**