



**Wayaffe v Toner Holdings Limited & another; Muthaiga Heights Management Plc (Objector)
(Environment & Land Case E112 of 2022) [2025] KEELC 4453 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E112 OF 2022**

**CG MBOGO, J
JUNE 12, 2025**

BETWEEN

ALEXANDREE WAYAFFE PLAINTIFF

AND

TONER HOLDINGS LIMITED 1ST DEFENDANT

CORRINE MARIE MADELEINE GENEVIEVE 2ND DEFENDANT

AND

MUTHAIGA HEIGHTS MANAGEMENT PLC OBJECTOR

RULING

1. Before this court for determination is the amended notice of motion dated 25th January, 2025 filed by the plaintiff, and it is expressed to be brought under Sections 1A,1B, and 3A of the [Civil Procedure Act](#), Order 51 Rule 1 of the Civil Procedure Rules, and Article 159 of the [Constitution](#) seeking the following orders: -
 - a. Spent.
 - b. That upon hearing inter-partes, a breaking in order be issued to the plaintiff/ applicant against the defendant/respondent allowing the plaintiff, her agent, servant or any person acting under her instructions and authority to break in and gain access into the 1st defendant's company's premises at grounds floor Muthaiga Heights, Parklands within Nairobi County in compliance and to give effect to the orders of this honourable court issued on 13th September 2024.
 - c. That the said breaking in order be supervised and overseen by the Nairobi area Country Policy Commander to ensure compliance and maintenance of peace together with the Deputy Registrar of this Honourable court.



- d. That upon (b) and (c) above, the Deputy Registrar do file a report on the exercise with this court to give full effect to the orders of this court issued on 13th September 2024.
2. The application is premised on the grounds inter alia that on 14th November 2024, this court issued an order dismissing the objector's notice of motion dated 30th September 2024, thus permitting execution against the judgment debtor by way of attachment of movable goods situate at Muthaiga Heights in Parklands.
3. The application is supported by the affidavit of Elijah Nyakundi Mogeni, a licensed auctioneer sworn on 22nd November, 2024. In his affidavit, the auctioneer deposed that on the strength of the orders issued on 14th November 2024, he moved to cart away the goods that he had proclaimed on 25th September, 2024 but he could not do so as the 1st defendant hired goons to disrupt the process. He deposed that he was unable to carry out lawful execution of the decree of this court against the judgment debtor, and it would be in the interest of justice and fairness that the orders are granted.
4. The application was opposed by the replying affidavit of Thomas Masaki sworn on 20th February, 2025 for the 1st defendant. The 1st defendant deposed that it has no office or premises at the alleged ground floor at Muthaiga Heights, and also, that the plaintiff has failed to produce evidence to demonstrate that the premises belong to the 1st defendant. Further, that it is absurd that the application is supported by the affidavit of the auctioneer making it defective in form and in substance. That having appointed an auctioneer to aid him in the lawful execution, the plaintiff has no locus to prosecute the instant application. It was deposed that the Auctioneer should have moved this court in accordance with Rule 9 of the Auctioneer Rules by way of a miscellaneous application.
5. The 1st defendant further deposed that without an office space in Muthaiga Heights, the plaintiff could not be permitted access into the property, and that the denied access was done by the entity with proprietary rights and not the 1st defendant. Further, it was deposed that the plaintiff has not demonstrated that the goods sought to be attached belong to it, and thus the orders to break in cannot issue. He deposed that the grant of the orders sought would significantly prejudice Muthaiga Heights Management and the residents while providing no tangible relief to the plaintiff as the goods and office do not belong to the 1st defendant.
6. In addition, the 1st defendant filed its notice of preliminary objection dated 4th February, 2025 challenging the amended notice of motion on the following grounds: -
 - a. This honourable court lacks the requisite jurisdiction to hear and determine the plaintiff's application as filed.
 - b. The plaintiff's application as filed herein, is patently bad in law given the mandatory wording of Section 2 (2) of the [Auctioneers Act](#), Cap 526 Laws of Kenya.
 - c. The subject application is materially defective in form and substance as it contravenes the tenor and purport of the mandatory wording of Rule 9 of the Auctioneers Rules 1997.
 - d. Given the mandatory provisions of Section 2(2) of the [Auctioneers Act](#) as read together with Rule 9 of the [Auctioneers Rules](#) the plaintiff lacks the requisite locus standi to bring and/or prosecute the application herein.
 - e. The plaintiff's application herein-which is wanting in both form and substance-is not only scandalous, frivolous and vexatious but also constitute a gross abuse of this honourable court.



7. The application was canvassed by way of written submissions. The plaintiff filed his written submissions dated 10th March 2025, where he raised three issues for determination as follows: -
 - a. Whether the premises upon which execution was being carried out and the goods that the auctioneer was seeking to cart away belonged to the 1st defendant or the objector.
 - b. Whether the 1st defendant objector hindered execution by calling goons upon the auctioneers.
 - c. Whether the notice of motion should be struck out as sought by the 1st defendant/ judgment debtor.
8. On the first issue, the plaintiff submitted that the issue on ownership of the goods is res judicata having been determined in a ruling delivered on 14th November, 2024. To buttress on this submission, reliance was placed on the case of *William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR.
9. On the second issue, the plaintiff submitted that there is evidence on video proving the averments raised by the auctioneer in his supporting affidavit. Further, that the 1st defendant has not denied that the persons who prevented the auctioneer were goons. It was submitted that the 1st defendant has failed to discharge its evidential burden under Sections 107 (2), 108 and 109 of the *Evidence Act*. Reliance was placed on the case of *Ragbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR.
10. On the third issue, the plaintiff submitted that the reasonable intention of the law makers as to why the auctioneer ought to seek the breaking in order was to ensure certainty of facts before granting the orders noting the nature of the said orders. Further that the acts have been deponed to by the auctioneer himself thus achieving the objective of the Auctioneer's Act. The plaintiff further submitted that the circumstances of the case would have been different if the affidavit would have been sworn by the plaintiff himself thus achieving the objective of Section 2 (2) of the Auctioneer's Act. While inviting the court to look at the approach within which the application has been made and the reasons opposing the same, the plaintiff urged the court to adopt a purposive interpretation as against a literal interpretation of the law. He submitted that to promote rigid application of the rules to elevate form over substance would fly against Article 159 of the *Constitution* and the overriding objective of the law under Sections 1A, 1B and 3A of the *Civil Procedure Act*. To buttress on this submission, the plaintiff relied on the cases of *Ruth Wambui Mwangi & another v Alfarah Wholesalers Limited* [2017] eKLR and *Stephen Wachira Karani & another v Attorney General & 4 others* [2017] eKLR.
11. The 1st defendant filed its written submissions dated 17th April 2025, where it raised one issue for determination which is whether this honourable court has a requisite jurisdiction to grant the orders as sought in the application. If so, does the application have any merit to warrant the grant of the orders sought.
12. On this issue, the 1st defendant submitted that for this court to issue any breaking order, such a prayer must be supported by the plaint and parties must be heard and evidence called on the same. Further, it was submitted that the judgment delivered in this matter does not provide for breaking in orders as the same were never sought by the plaintiff in the main suit. That by dint of judicial precedents, this court has no jurisdiction to deal with the application or issue the orders sought as it would be tantamount to reopening the suit for trail and reviewing judgment. The 1st defendant further submitted that the plaintiff lacks the requisite locus standi to file and prosecute this application on the grounds that he is not an auctioneer capable of filing such an application. The 1st defendant relied on the cases of *Namu Wachira & 2 others v Njeru Wachira* [2015] eKLR and *Kioko v Muchendu t/a Icon Auctioneers & 2 others* (Civil Appeal E543 of 2021) [2024] KEHC 14986(KLR)(Civ).



13. On the merit of the application, the 1st defendant submitted that the plaintiff has not made effort to link it with the offices other than to allege that it went to attach goods in the said office. It was submitted that the application is without merit and the orders cannot be granted.
14. I have considered the amended application, the notice of preliminary objection, the response and the written submissions filed by the plaintiff and the 1st defendant. Upon consideration of such pleadings filed, I am of the view that the issue for determination is whether the orders sought in the amended notice of motion should issue.
15. The grounds in the application lay basis of the matter before this court. While in the process of carting away goods proclaimed, the licensed auctioneer faced resistance that he was unable to carry out the duties assigned to him. The plaintiff has thus moved the court seeking orders to break in to enable the auctioneer effect the orders issued by the court on 13th September, 2024.
16. In challenging the manner in which the plaintiff has moved the court, the 1st defendant argued that the court lacks jurisdiction and thus the court cannot grant the orders sought. The 1st defendant further argued that it has not been demonstrated that the goods actually belong to it, and in any case, it does not own any office or space at the alleged Muthaiga Heights.
17. In his submissions, the plaintiff urged the court not to give a literal interpretation to the meaning of the cited provisions under the Auctioneer Rules, and instead called for substance over form. He submitted that the 1st defendant has not denied the presence of the goods and neither has it been shown any prejudice to be suffered.
18. Rule 9 of the [*Auctioneer Rules, 1997*](#) provides: -
 - “(1) Where an auctioneer has reasonable cause to believe that—
 - (a) he may have to break the door of any premises where goods may be seized or repossessed; or
 - (b) he may be subject to resistance or intimidation by the debtor or other person; or
 - (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
 - (2) An application under this rule shall be by motion by way of a miscellaneous application support by an affidavit and may be heard ex parte.”
19. Looking at this provision, the same gives clear procedure to be followed by any auctioneer intending to carry out his duties. In this case, the auctioneer deposed that he attempted to cart away the goods proclaimed on 25th September, 2024 but met resistance from goons hired to disrupt the process. It behooves the auctioneer to move the court accordingly to obtain the necessary orders. Instead, an application is filed and an affidavit sworn by the auctioneer in total ignorance of the above provision of the law.



20. The Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2014] eKLR, held as follows;

“A five judge bench of this court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows; “In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”

21. Also, in the case of *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, the Supreme Court stated as follows: -

“(65) For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case- management. It may also regulate the confines within which a court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a court may make a determination of the case before it. This is the context in which the conduct of proceedings before our courts is governed by the *Civil Procedure Act*, the *Criminal Procedure Code*, the Appellate Jurisdiction Act, the Supreme Court Act, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.”

22. While I place reliance on the above two authorities, I cannot stress enough the place of procedure in our judicial system. Procedure gives order and fairness. The plaintiff in this case is urging the court to ignore existing rules and procedures with a rider on the provisions of Article 159 (2)(d) of the *Constitution*. I am afraid, Article 159 (2)(d) of the *Constitution* does not come to the aid of those who seemingly ignore laid down procedures.

23. It is my finding that the instant application is not properly before the court. While I consider justice and fairness in the matter, I would not wish to preempt the merits of the application at this stage. The amended notice of motion dated 25th January, 2025 is hereby struck out. The auctioneer to move the court accordingly. I make no orders as to costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE, 2025.

HON. MBOGO C.G.

JUDGE

12/06/2025.

In the presence of:



Mr. Benson Agunga - Court assistant

Mr. Hans Oichoe for the Plaintiff/Decree holder

Mr. Agwara for the 1st Defendant/Respondent

