



**Rwito v Kingori & 2 others (Environment & Land Case
1 of 2008) [2024] KEELC 1250 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 1 OF 2008**

CK NZILI, J

MARCH 6, 2024

BETWEEN

JAMES KIRONGO ITUMA RWITO PLAINTIFF

AND

MARY KINGORI 1ST DEFENDANT

NATIONAL BANK OF KENYA LTD 2ND DEFENDANT

INTERNET DATA SERVICES LTD 3RD DEFENDANT

RULING

1. What is before the court is an application dated 1.12.2023, in which the 1st defendant seeks that the warrants of attachment issued on 28.11.2023 be recalled, canceled, stayed, and the matter be marked as settled. The reasons are contained on the face of the application and in a supporting affidavit of Mary Kingori. Briefly, the applicant says that after the judgment was entered on 10.2.2020, she sought a stay of execution, which was granted on condition that she deposits Kshs.2,000,000/= in a joint interest-earning account and pay the auctioneers fees of Kshs.350,000/=. The applicant says she was unable to raise Kshs.2,000,000/=. As a consequence, Bealine Auctioneers were instructed to execute the decree, who took out properties worth Kshs.2,700,000/= million as per the attached valuation report.
2. The applicant avers that she tried to salvage the attached items by making a further deposit of Kshs.2,000,000/= in the decree-holder advocate's account on 9.12.2022, only for the auctioneers to tell her that they had already sold her seized items, though no accounts have been rendered to court. Therefore, the applicant says she has paid in excess of Kshs—5,000,000/= which is above the decretal amount, yet the decree holder's advocates have failed to respond to her emails, only for the matter to resurface with a fresh execution by different auctioneers.
3. Similarly, the applicant avers since there is no outstanding balance, and the ongoing auction was illegal and an abuse of the court process. She terms the acts by the decree-holder as illegal and in contravention



- of Order 22 Rule 18 (1) of the [Civil Procedure Rules](#) as the decree is more than one year old. The applicant has attached a copy of the judgment, initial warrants of attachment dated 5.8.2021, deposit of Kshs.350,000/=, valuation report for seized items by Bealine Auctioneers, a copy of the notification of sale and deposit slip of Kshs. 2,000,000/= email correspondences and copies of warrants by M/S Clear Real Auctioneers as annexures marked MK 1 – 7 respectively.
4. The 1st respondent opposes the application through grounds of opposition and a preliminary objection dated 9.12.2023.
 - a. The application is res judicata.
 - b. The applicant is guilty of indolence and delay.
 - c. The application is incompetent, superfluous, defective, misconceived, lacks merit, and is an abuse of the court process.
 - d. The court is functus officio.
 - e. Previous orders have not been adhered to.
 - f. The applicant has not requested the Deputy Registrar, who has powers and jurisdiction, to assess the outstanding amount and interest-less payments made as alleged.
 - g. The applicant has been filling a multiplicity of applications whose conditions orders have not been met.
 - h. Justice must come to an end for the decree-holder to enjoy the fruits of his judgment.
 5. The applicant relies on written submissions dated 13.10.2023. It is submitted that since the decree-holder has not filed any replying affidavit, the averments and documents filed in the supporting affidavit must be taken to be true. Reliance was placed on [Kennedy Otieno Odiyo & others v. Kenya Electricity Generating Company Limited](#) (2010) eKLR. The applicant submits that she has provided evidence of all the payments made to satisfy the decree in excess of Kshs.5,000,000/=.
 6. Further, it is submitted that under Order 22 Rules 7 (2) (e) and 13 of the [Civil Procedure Rules](#), an application for execution must show the results of the previous application for the decree and the Deputy Registrar must ascertain compliance by the decree-holder, by accounting for the results of all the previous executions. The applicant submits that the Deputy Registrar did not comply with the law. Reliance was placed on [Nile Hauliers Ltd v. Padam Engineering Works Ltd](#) (2021) eKLR citing Republic v Commissioner of Police & others exparte Kenya Commercial Bank Ltd HCCC No. 784 of 2007, that failure to comply with the law renders the resultant execution illegal, null and void for non-compliance with the law and the failure by auctioneers and the decree-holder to account to the court on all the previous processes by auctioneers.
 7. Additionally, the applicant submits that the decree is over a year old and that even if there was an outstanding balance, still a notice to show cause ought to have been issued to her before the process could commence under Order 22 Rule 18 (II) of the Civil Procedure Rules. Reliance was placed on [Alfred Muyeyeli & another v. Jamin Onyiri & another](#) (2020) eKLR.
 8. Regarding the preliminary objection and grounds of opposition, the applicant submits that the issues now being raised in the notice of motion were never raised and determined on the previous applications or rulings, especially regarding the warrants of attachment dated 28.11.2023. The applicant submits that the court is not functus officio, for it has powers to supervise the execution of its decree. Reliance was placed on [Habiba Sharu Hirbo & another v Ibrahim Sharu Hirbo & another](#) (2021) eKLR,



- that the doctrine of *functus officio* does not foreclose proceedings that are incidental to or a natural consequence of the final decisions of the court, such as execution. In addition, the applicant submits that the Deputy Registrar had to comply with Order 22 Rule 7 (2) (e) & (f) Rule 13 & 21, of the *Civil Procedure Rules* on the accounts and that all the payments made have fully satisfied the decretal sum.
9. The effect of the decree dated 26.2.2021 was that the applicant refunds Kshs.1,025,368/= plus interest to the decree-holder plus interest at court rates, with effect from 28.3.1999 until payment in full. The issues raised by the applicant are that the execution proceeded without notice to show cause pursuant to Order 22 Rule 18 of the *Civil Procedure Rules* since the decree was over a year old and that the issuance of warrants of attachments in favor of Clear Real Auctioneers for Kshs.1,079,634/= omitted vital information accounting for the previous execution processes.
 10. The applicant says that had the accounts been rendered before the ongoing execution, it would have shown that she has overpaid the decretal sum. She, therefore, terms the resultant execution process, warrants of attachment, and sale after 2021 as illegal, null and void. The decree-holder has not denied the payments already made by the judgment debtor, as itemized in her supporting affidavits. Therefore, matters of fact and evidence and payments by the applicant remain unchallenged, uncontroverted and unrebutted.
 11. I entirely agree with the holding in *Kennedy Otieno Odiyo & others v Kenya Electricity Generating Company Ltd (supra)* that the factual and evidential matters in the notice of motion remain unchallenged. The onus was on the plaintiff/decreet holder to justify the basis of Kshs.1,079,634/= contained in the warrants of attachment dated 28.11.2023. It is the decree-holder who prepared the warrants of attachment and requested for their re-issuance. The forms are blank as to money already paid, balance taxed, costs and interests. It was upon the 1st defendant to render an accurate account of all the monies that have been collected from the previous execution processes as of 28.11.2023. The decree-holder filed an irregular and incomplete form of execution contrary to the rules of execution of the decree under the *Civil Procedure Rules* and the *Civil Procedure Act*. The plaintiff cannot benefit from an illegality or irregularity in the name of *res judicata* and *sub-judice*.
 12. This court has both original, appellate, and supervisory jurisdiction under Sections 12 and 13 of the *Environment and Land Court Act* to ensure regularity, legality, and compliance with procedural aspects of the powers of its Deputy Registrar and lower courts in the exercise of their judicial functions. Order 22 Rule 18 of the *Civil Procedure Rules* is in mandatory terms. There is no evidence that the judgment debtor was served with a notice to show cause before the decree-holder requested in a letter dated 12.10.2023 for the re-issuance of warrants of attachments and sale. The letter was not even copied to the judgment debtor or her advocates on record. Therefore, the plaintiff failed to comply with the law and cannot benefit from those omissions. The Deputy Registrar did not give any reason to dispense with the issuance of the notice to show cause as per Order 22 Rule 18 (2) of the *Civil Procedure Rules*.
 13. The upshot is that I find the warrants of attachments and sale null and void. The same is a result of this recalled: cancelled and set aside. As to the lack of accounts and a finding that the decree has fully been satisfied I make no orders given that the parties are yet to reconcile their accounts in line with the initial decree and the judgment. There will be no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6th DAY OF MARCH, 2024

In presence of

C.A Kananu

Mr. Kariuki for the applicant



Kurauka for plaintiff

Respondent

HON. C K NZILI

JUDGE

