



Bahati Ridge Management Phase 1A Ltd v Mbote (Environment and Land Appeal 21 of 2020) [2024] KEELC 5149 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 21 OF 2020**

LN GACHERU, J

JULY 4, 2024

BETWEEN

BAHATI RIDGE MANAGEMENT PHASE 1A LTD APPELLANT

AND

KENNEDY MBOTE RESPONDENT

RULING

1. The Respondent/Applicant filed this Notice of Motion Application under Certificate of urgency on 20th February, 2024, which Application is anchored under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act; Order 22, Rule 18 and 22; Order 51, Rule 1 of the Civil Procedure Rules and Articles 47, 50(1), 159(2) (a) and (d) of the Constitution. The Applicant sought for the following Orders; -
 1. That the Court be pleased to issue an order of stay of execution of judgment and decree issued by this court on 21st July, 2022, pending the hearing and determination of this application.
 2. That the Court be pleased to find, deem and/or order that the Respondent/ Applicant has indeed paid and settled the entire decretal amount in this claim in full.
 3. That the court be pleased to order and direct that the auctioneers MS/ Compliance Auctioneers, do proceed to tax their costs raised on the proclamation notice dated 18th January, 2024.
 4. That the court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 5. That the costs of this Application be provided for.
2. The Application is premised on the grounds stated thereon and on the Supporting Affidavit of Kennedy Mbote, the Respondent/Applicant herein, sworn on 20th February, 2024.



3. The Respondent/ Applicant contended that the Appellant/ Respondent has commenced execution of the Ruling on taxation delivered on 21st July, 2022, through warrants of attachment dated 18th January, 2024, which was issued by the Respondent's agents namely, Compliance Auctioneers, who have also served a Proclamation Notice dated 29th January, 2024, upon the Applicant? Respondent herein.
4. He further averred that upon receipt of the aforesaid Proclamation Notice, the Applicant instructed his Advocates on record to engage the Appellant/Respondent in negotiations concerning the amount payable, and the mode of payment; However, those negotiations proved futile.
5. Further, that the Applicant has already drawn three (3) cheques, one of which is a current cheque, plus two post-dated cheques; which cheques, collectively, settle in full the amount of Kshs.149,100/=, stated in the warrants of attachment dated 18th January, 2024.
6. The Applicant disputes the amount of Kshs.49,000/- claimed by the Firm of Compliance Auctioneers, as auctioneer's fees, and he described the said amount as exorbitant, and a breach of the Auctioneers Rules/Remuneration order.
7. The Applicant also contended that he stands to suffer irreparable loss and damage, unless the Court grants him a stay of execution, because the assets which the Appellant/ Respondent is threatening to attach forms part of his matrimonial home, and are of sentimental value. Further, that he would be rendered destitute were the Appellant/Respondent to go ahead and attach the proclaimed goods.
8. The Application is opposed by the Appellant/Respondent through the Replying Affidavit sworn on its behalf by Margaret W. Kibe, on 19th March, 2024, the Managing Director of the Appellant/ Respondent.
9. It was her contention that the instant Application is unmerited as it advances falsehoods and conceals true facts; and she accused the Applicant of perjury.
10. It was the Appellant/Respondent's further contention that the Court issued a Ruling on 21st July, 2022, in respect of its Party and Party's Bill of Costs dated 21st November, 2021, wherein the Court taxed the Appellant/Respondent's Costs at Ksh.147,600/- as against the Respondent/ Applicant, which amount the Applicant has not settled.
11. That the Appellant/ Respondent lodged an application for execution by issuance of warrants of attachment against the Applicant's movable property on 23rd September, 2022, which warrants were issued by this Court on 1st November, 2022. The Appellant/Respondent annexed copies of the said application and resultant warrants issued to Eshikoni Auctioneers marked as "MK-1".
12. Further, that due to failure by Eshikoni Auctioneers to execute the warrants issued by the Court on 1st November, 2022, its Advocates on record made a fresh application on 19th October, 2023, for re-issuance of the said warrants, which were issued by the Court on 18th January, 2024. He annexed "MK-2" which is a copy of the application dated 19th October, 2023.
13. The Appellant/Respondent also contended that the time-period between the first and second application for execution is less than 12 months, and therefore, the second application was filed within time, or procedurally thus obviating the need for a Notice to Show Cause.
14. It was contended that the Applicant made a proposal on 8th February, 2024, to settle the taxed amount at an all-inclusive figure of Kshs.100,000/- to be paid in two cheques of Kshs.50,000/- each, one cheque being current, the other post-dated in response to which the Appellant/Respondent stated that the taxed amount would not be discounted and should be paid off in full together with the auctioneer's



- costs before the lapse of the proclamation notice. The Appellant/Respondent annexed a document marked “MK-3” containing copies of the email correspondence dated 8th February, 2024.
15. The Appellant/Respondent refuted the Applicant’s claim that his Advocates forwarded cheques to its Advocates on record, as at the date of mention for the application for directions on the morning of 5th March, 2024. Reference was made to an email sent by the Appellant/Respondent’s Advocates on record dated 5th March, 2024, at 14:28 hours, which pointed out the mischief in the Applicant’s application and reiterating the position stated in the Appellant/Respondent’s email of 8th February, 2024.
 16. The Appellant/Respondent affirmed that on 5th March, 2024, at around 3.15PM, its Advocates received a letter from the Applicant’s Advocates which letter was dated 19th February, 2024, enclosing three (3) cheques, one current cheque dated 16th February, 2024, and two post-dated cheques dated 28th March, 2024, and 30th April, 2024.
 17. It was contended that the Applicant’s letter dated 19th February, 2024, and served on the Appellant/Respondent’s Advocates on 5th March, 2024, was a belated attempt by the Applicant to sanctify the averments contained in his Application, which was under consideration by the Court on the material day.
 18. It was further contended that the said Applicant’s three (3) cheques were an attempt to settle the taxed amount exclusive of auctioneer’s costs and were issued by the Applicant in disregard of communication from the Appellant/Respondent that it was not willing to be a party to any payment plan with the Applicant.
 19. The Appellant/Respondent stated that vide an email sent by its Advocates on 5th March, 2024, at 3.38PM to the Applicant’s Advocates, the latter was notified that the Applicant’s cheques were not acceptable, and that the current cheque dated 16th February, 2024, had an alteration which meant that it could not be accepted by the Bank. It annexed document marked “MK-4” containing the aforesaid email communication from its Advocates.
 20. It was further stated that the Applicant’s three (3) cheques were sent back to his Advocates on 5th March, 2024, who, however, declined to acknowledge receipt of the same, but nonetheless retained the cheques and the Appellant/Respondent’s rejection letter dated 5th March, 2024, which was marked as annexure “MK-5”.
 21. It was contended that the Applicant misled the Court in respect of the submissions made to the Court on 5th March, 2024, and has perjured himself in the instant Application, and the same ought to be punished by this Court.
 22. The Appellant/Respondent further contended that the Applicant has not yet settled the taxed amount, or entered an agreement with it for the settlement of the same. Further, that the Applicant cannot compel the Appellant/Respondent to accept unfavorable terms of payment. The Court was urged to consider the amount of time during which the taxed amount has remained unpaid by the Applicant.
 23. It was further contended that the current Application is meant to waste judicial time, and frustrate the Appellant’s efforts of enforcing lawful Orders of this Court; Further, that the Applicant has approached this Court with unclean hands, which should result in dismissal of his Application.



24. The Application was canvassed by way of written submissions. The Applicant did not file written submissions, and therefore, the Court will rely on his Supporting Affidavit, and the grounds set out in support of the Notice of Motion.
25. The Appellant/ Respondent filed written submissions dated 18th April, 2024, through the Law Firm of Wainaina Ileri Advocates LLP and identified two (2) issues for resolution by the Court as follows:
 - (i) Whether the Respondent has settled the taxed amount in full?
 - (ii) Whether the Respondent is entitled to the orders sought?
26. It was submitted that the Applicant has failed to settle the taxed amount and instead opted to commence the present Application, which is vexatious, contains outright lies and is meant to mislead the Court. The Respondent further submitted that despite its willingness to engage the Applicant to settle the taxed amount, the Applicant failed to settle the same leading the Respondent to make an application on 23rd September, 2022, for execution by issuance of warrants of attachment against the Applicant's movable properties, which were issued by the court on 1st November, 2022, and further re-issued on 18th January, 2024, in favour of Compliance Auctioneers ,as the initial auctioneers were not able to execute the same.
27. The Respondent re-stated its reasons for rejecting the three (3) cheques drawn by the Applicant as set out in the Replying Affidavit of MARGARET W. KIBE, dated 19th March, 2024.
28. Reliance was placed on the holding of the Court in the case of Ecobank Kenya Limited V Bobbin Limited & 2 Others [2014] eKLR, in support of the proposition that Courts are not a refuge for defaulters who run away from their debts.
29. The Respondent urged the Court to find and hold that the Applicant has committed perjury both in the instant application and in respect of the proceedings that took place on 5th March, 2024.
30. Reference was made to the decision of the Court in the cases of George Arab Muli Mwalabu V Senior Resident Magistrate Kangundo & 2 Others; Festus Mbai Mbonye (Interested Party) [2019] eKLR; and, Matattiele Municipality & Others V President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2; 2006 (5) BCLR (CC); 2006(5) SA 47 (CC).
31. Having considered the instant Notice of Motion, the Reply thereto, the written submissions and the relevant provisions of law, the court finds the issues for determination are; -
 - i. Is the (disputed) amount of Auctioneer's fees charged by Compliance Auctioneers compliant with the Auctioneers' Rules/ Remuneration Order?
 - ii. Is the Applicant entitled to the Orders sought?
 - iii. Who shall bear the costs of the Application?
32. Aside from the question of the Applicant's failure to settle the amount of Kshs. 149,100/=, stated in this Court's decree dated 21st July, 2022, another major issue in contention in the present Application concerns the amount of Kshs.49,000/=, charged by the Respondent's agents namely Compliance Auctioneers as auctioneer's fees.
33. The Applicant argued that the auctioneers' fees are excessive and in breach of the Auctioneers Rules/ Remuneration Order.



34. Rule 12 of the Auctioneers Rules provides as follows:

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock:

- a. record the court warrant or letter of instruction in the register.
- b. Prepare a proclamation in Sale Form 2 of the schedule indicating the value of specific items and condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory auctioneer shall sign a certificate to that effect.
- c. In writing give to the owner of the goods seven days notice on Sale Form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.
- d. On expiry of notice without payment and if goods are not to be sold in situ remove the goods to safe premises for auction.
- e. Ensure safe storage of the goods pending their auction.
- f. Arrange advertisement within seven days from date of removal of the goods and arrange sale not earlier than seven days after first newspaper advertisement and not later than fourteen days thereafter.
- g. Not remove any goods under the proclamation until the expiry of the grace period.

35. Rule 14 of the Auctioneers Rules prohibits the removal, interference or alienation of any goods comprised in the proclamation. The Court in the case of National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR, held as follows:

“From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of the sale of the attached goods.”

36. It is evident from Rule 12 as read with Rule 14 of the Auctioneers’ Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment.

37. In the case of National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR, the Court declared as follows:

“We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.”



38. Under the Auctioneers Rules, the auctioneers' charges for attachment/repossession/distrain and expenses must conform to paragraph 4 of Part II of the Fourth Schedule. A perusal of paragraph 4 of Part II of the Fourth Schedule clearly shows that the charges are banded in 3 different categories: Kshs.4,001/= to Kshs.100,000/= at 10%, Kshs.100,001/= to Kshs.1,000,000/= at 5% and over Kshs.1,000,000/= at 2%.
39. Additionally, the Auctioneers' charges on sale of moveable property ought to conform to the bands under paragraph 5- 10% for the first Kshs. 100,000/= and 7% for any amount over Kshs. 100,000/=.
40. The total value of the Applicant's movable property as set out in the Proclamation Notice dated 29th January, 2024, is Ksh.427,000/=. Accordingly, the first Kshs. 100,000/= is charged 10 percent, the maximum as per the aforementioned schedule, resulting in Ksh.10,000/= .
41. The remaining Ksh.327,000/= is charged at 7 percent resulting in the sum of Kshs.22,890/= Therefore, total chargeable amount of auctioneer's fees according to the schedule ought to be Kshs.32,890/-. It is evident from the foregoing that by levying a fee of Ksh.49,000/- as auctioneer's fees, the Appellant/ Respondent's agents have overcharged the Respondent/Applicant by Kshs.16,110/=-, in breach of the provisions of paragraph 5 of Part II of the Fourth Schedule, Auctioneers' Rules.

II. Is the Applicant entitled to the Orders sought?

42. The Court has perused the correspondence shared between the Advocates for both parties via email and marked as annexures "MK-3", "MK-4" and "MK-5" in the Respondent's Replying Affidavit dated 19th March, 2024. The Court has also perused the current cheque drawn by the Applicant dated 16th February, 2024, and affirms that the same contains an alteration in one of the names of the drawee namely, "WAINAINA". In the circumstances, it would not be reasonable to expect the Respondent to accept that particular cheque as part payment.
43. The Respondent rejected the Applicant's invitation to accept payment through instalments and demanded payment in full including auctioneer's charges through an email dated 8th February, 2024. Thereafter, the relationship between the parties soured, with allegations of perjury being levelled against the Respondent/Applicant in the Appellant/ Respondent's email dated 5th March, 2024.
44. Be that as it may, the Respondent is lawfully entitled to the full amount of Kshs.149,100/=-, set out in the decree of this Court dated 21st July, 2022. This Court is not mandated to compel the Appellant/ Respondent to accept piecemeal payment of the aforesaid amount from the Respondent/ Applicant.
45. In the case of *Nyatera v Nyakundi (Civil Appeal E033 of 2022)* [2023] KEHC 3086 (KLR) (16 March 2023), the Court interpreted the import of Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules to require an Applicant seeking for orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree.
46. The Applicant has not satisfied the preceding conditions save for the claim of inflated auctioneer's fees, which has been allowed by the Court.
47. Consequently, this Court is satisfied that the Respondent/Applicant has not made any payment in settlement of the decretal amount, subsequent to the rejection of the three (3) cheques he issued to the Respondent's Advocates.
48. In view of the foregoing, this court finds and holds that prayer No. (3) in the instant Notice of Motion Application is not merited and is hereby dismissed entirely with costs as it amounts to misleading the



Court for the Applicant to claim that he has settled the amount owed to the Appellant/Respondent as per this Court's decree dated 21st July, 2022, while knowing fully well that he has not made any such payment.

49. Further, the Court holds and finds that the Respondent/ Applicant has not approached the Court with clean hands and, therefore, is not entitled to the equitable remedy of stay of execution sought.
50. Having determined that the appropriate auctioneer's charges herein are Ksh.32,890/=, and not Ksh.49,000/=, as claimed, the Court holds and finds that the Respondent/ Applicant owes the Appellant/Respondent Ksh.181,890/=, being the sum total of the decretal sum (Kshs.149,100/=), plus the new auctioneers' charges as revised by this Court.
51. Accordingly, the Appellant/Respondent is at liberty to execute against the Respondent/ Applicant for the total amount of Ksh.181,890/=.
52. Consequently, this Court finds and holds that the instant Notice of Motion Application dated 20th February, 2024, is not merited. The same is thus dismissed entirely, with costs to the Appellant/ Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 4TH DAY OF JULY, 2024.

L. GACHERU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Kabaiku for the Appellant/Respondent

N/A for the Respondent /Applicant

Joel Njonjo - Court Assistant.

