



**Kihuba Holdings Limited v Ngulu (Environment & Land Case  
171 of 2015) [2023] KEELC 436 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 436 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 171 OF 2015  
SM KIBUNJA, J  
FEBRUARY 1, 2023**

**BETWEEN**

**KIHUBA HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**CHARO KARISA NGULU ..... DEFENDANT**

**RULING**

1. Charo Karisa Ngulu, the defendant, moved the court through the notice of motion dated the September 15, 2022, seeking for;
  - a. Order of temporary stay of execution of the warrants of attachments and sale issued on the September 8, 2022 in the execution of the decree, pending the hearing of this application.
  - b. An order setting aside the warrants of attachment and sale issued on the September 8, 2022, and unconditional raising or lifting of the attachment.

The application is based on the fourteen (14) grounds marked (15) to (28) on its face, and supported by the affidavits sworn by the defendant on the September 15, 2022 and October 3, 2022, reiterating the said grounds.

2. The application is opposed by the plaintiff through the replying affidavit sworn by Genoveva Wangare Mugo, a director to the plaintiff, on the September 23, 2022. She among others deposed that the application is an abuse of the court process and does not make full disclosure of the facts; that the decree was extracted and served upon defendant's counsel and shows that the deposit of Kshs 1,000,000 was to be by September 16, 2021; that plaintiff had vacated the suit premises by July 2021 and as the defendant owe the plaintiff two months' deposit totaling Kshs 50,000, the only amount the defendant owes him was Kshs 125,000, and that the plaintiff has proposed the Kshs 125,000 be deducted from the deposit of Kshs 1000,000.



3. The court issued directions on filing and exchanging submissions on the November 2, 2022 and January 17, 2023. The learned counsel for the plaintiff/respondent and defendant/applicant filed their written submissions both dated the January 13, 2023, which the court has considered.
4. The following are the issues for the court's determinations;
  - a. Whether the defendant has met the threshold for an order of setting aside, lifting or raising of the warrants of attachments and sale.
  - b. Who pays the costs.
5. The court has carefully considered the grounds on the application, the affidavit evidence by both parties, submissions by the learned counsel the superior court decisions cited and come to the following findings;
  - a. That the heading of the instant notice of motion indicates that the application is brought under order 22 rules 15, 18 and 22 of the *Civil Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act*. That as submitted by counsel for the defendant, order 22 rule 18 requires the court to issue a notice to show cause to a person against whom execution is to issue, before issuing execution processes if more than one year has passed or lapsed from the date of the decree. That was the position taken by the court in the case of *Metro Petroleum Ltd v Turbo Highway Eldoret Ltd* [2006] eKLR.
  - b. That the copy of the decree on the court record was extracted and issued on the October 13, 2021. That the party to party bill of costs dated the January 31, 2022 was then filed on the February 3, 2022, and the record shows it was to come up for taxation on the September 14, 2022. The copies of the warrant of attachment and warrant of sale of property in the record, and which are the subject matter of the instant application, are both dated the September 8, 2022. That taking it that the said warrants were applied for on the same date that they were issued, that is, the September 8, 2022, then there is no doubt that they were applied for and issued before the lapse of one year as the decree in this matter was issued on the October 13, 2021. There was therefore, no need to issue and serve the defendant with any notice before allowing the execution process.
  - c. The court is of the view that whatever issues any of them may have relating to the amounts owing or due to either of them are matters, or issues that their counsel on record can easily help the parties to sort out. That the provision of order 49 rule 7 (b) (x) of the *Civil Procedure Rules*, leaves no doubt that the deputy registrar has powers or jurisdictions to deal with all applications under the said order, except those under rules 28 and 75. That it follows that should the parties and or their counsel fail to sort out or agree on any issue relating to execution, the relevant application, including the instant one, should be filed before the deputy registrar, and not the judge.
  - d. That as the court is of the view that the issues herein are not complex, but can be easily agreed on with good will from both sides, the court is of the view that each party bear their own costs in the application, the provision of section 27 of *Civil Procedure Act*, chapter 21 of Laws of Kenya notwithstanding.
6. That flowing from above the court finds and orders as follows;
  - a. That the defendant's notice of motion dated the September 15, 2022 is without merit and is hereby dismissed.



b. That each party do bear their own costs in the application.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**S.M.KIBUNJA, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF;**

PLAINTIFF/RESPONDENT : Absent

DEFENDANT/APPLICANT : Absent

COUNSEL : M/s Okungu for plaintiff and Mr Mwazongo for Defendant

WILSON .. COURT ASSISTANT.

**S,M,Kibunja, J.**

**ELC MOMBASA.**

