



REPUBLIC OF KENYA



**Okero v Abala & 8 others (Environment & Land Case
834 of 2015) [2023] KEELC 17236 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 834 OF 2015**

E ASATI, J

MAY 4, 2023

BETWEEN

ISAAC EDWIN NICHOLAS OKERO PLAINTIFF

AND

MAURICE AKETCH ABALA 1ST DEFENDANT

FRANCIS ONYANGO OMWENGA AYIECHA 2ND DEFENDANT

**PARMOD B. KOHLI (SUED AS ADMINISTRATRIX OF THE ESTATE OF THE
LATE PARDEEP K. KOHLI) 3RD DEFENDANT**

VIJAY KOHLI 4TH DEFENDANT

RAVINDERPAL SINGH WALIA 5TH DEFENDANT

RAJINDER SINGH WALIA 6TH DEFENDANT

FREDRICK OTIENO OUTA 7TH DEFENDANT

LUCY ATIENO OKOTH 8TH DEFENDANT

FREDRICK ENOS NYAMOLO 9TH DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion application dated August 19, 2020 stated to be brought pursuant to the provisions of Order 45 Rule 1 and Order 51 Rules 3 and 4 of the [Civil Procedure Rules](#), 2010 and sections 1A, and 3A of the [Civil Procedure Act](#). The application seeks for orders that;
 - a) The application for execution by M/s. N.E. Mogusu & Associates on record for the 2nd Defendant filed on the July 28, 2020 and the warrant of attachment and of sale issued herein



on July 29, 2020 in purported execution of a decree of this court made on the June 9, 2020 are error on the face of the record which are hereby struck out and expunged from the record.

- b) The proclamation of sale issued by Pambo Investment on July 30, 2020 was void ab initio and of nil effect.
 - c) The sum of Kshs.297,758.50 paid to Pambo Investments be refunded to M/s Beham & Co. Advocates by M/s E.N. Mogusu & Associates and /or the 2nd defendant jointly and severally.
 - d) M/s E.N. Mogusu & Associates and/or the 2nd defendant jointly and severally bear the costs of this application.
2. The grounds upon which the application was brought are that:-
- a) A proclamation of Sale was issued to the 6th defendant by Pambo Investments Auctioneers together with warrants of attachment of and of sale issue herein on the August 29, 2020 on an application by M/s N.E. Mogusu & Associates purportedly in execution of a decree of this court passed on the June 9, 2020.
 - b) The record reflects that proceedings herein had on agreement of counsel been ordered on the August 22, 2019 to remain in abeyance pending appeal, there is no decree of this court passed on the June 9, 2020, and there are no orders made for execution or for issuance of warrants of attachment on any application for execution herein where fore:-
 - b(i) the application for execution by M/s N.E. Mogusu & Associates and the warrant of attachment and of sale purport to execute a non-existent decree without any orders made in respect thereof are errors on the face of the record that ought to be struck out and expunged therefrom as such;
 - b(ii) the process of execution predicated on the documents and processes aforesaid was incurably defective and incapable of founding a valid execution process wherefore the proclamation of attachment issued by Pambo Investments was void ab initio and of no effect.
 - c) A payment of Kshs.297,758.50 was made to the auctioneer to forestall seizure of the 6th defendant's property notwithstanding that the process was incurably defective, irregular and void ab initio.
 - d) Given that the proceedings herein had been stayed pending appeal and that no decree or order for costs exists in this matter, the execution process initiated herein by M/s N.O. Mogusu & Associates was an egregious abuse of the process of this court wherefore M/s N.E. Mogusu & Associates and/or the 2nd defendant on whose behalf he acts ought to meet the costs of this application.
3. The application is supported by the contents of the affidavit in support sworn by the applicant on August 19, 2020 and the annexure thereto and the Supplementary Affidavit sworn by the applicant on November 3, 2020 and the annexure thereto.
4. The application was opposed by the 2nd defendant through his grounds of opposition dated November 2, 2020 and filed on the same day. The 2nd defendant contended that the application is misconceived and should be dismissed in the face of Order 10 of the *Civil Procedure Rules* and the *Advocates Act*. That the execution process was legitimate, lawful and legal for all intents and purposes of the court of Appeal Rules. That the application lacks bona fides and suffers from the ailment of approbation and reprobation.



That the application is merely seeking to intimidate the law firm of N.E. Mogusu & Associates in a bid to making them shy away from representing the 2nd defendant. That the application has been overtaken by events in view of the Ruling of Justice Okwengu and that the same should be dismissed with costs.

5. The 2nd defendant also filed a Replying Affidavit sworn by N.E. Mogusu on November 20, 2020.
6. As part of his reply to the application, the 2nd defendant raised preliminary objection dated November 2, 2020 on a point of law that the court does not have jurisdiction to entertain the application premised on execution proceedings of the Court of Appeal. The preliminary objection was heard and vide the court ruling dated January 31, 2022 dismissed.

Submissions

7. The application was canvassed by way of written submissions. The applicant's written submissions are dated October 30, 2020 and filed in court on November 3, 2020 pursuant to directions given by the court on August 24, 2020. Similarly, the 2nd respondent filed written submissions dated March 26, 2023.

Submissions by the Applicant

8. It was submitted on behalf of the applicant that the application seeks for restitution by Mr. Mogusu and the 2nd defendant of a sum of Kshs.297,798.50 made by the 6th defendant's Counsel to their agent, Pambo Investment to forestall seizure of moveable property proclaimed in purported execution of the warrants and for costs of the application. That the record shows that there is no decree that has been issued in the matter and that this matter has, by agreement of Counsel on record, remains in abeyance awaiting the outcome of the appeal since August 22, 2019. That Mr. Mogusu's application for execution together with the warrant for attachment and for sale are all based on a non-existent decree.

That the court record further shows no issuance of orders by a Deputy Registrar of this court for the attachment of the 6th defendant's assets. That the provisions of Order 22 Rule 13(4) of the [Civil Procedure Rules](#) which are mandatory were not complied with. That the consequence is that the warrant issued without compliance with the provisions of Order 22 Rule 13(4) and all acts and processes flowing therefrom were null and void ab initio.

9. Counsel relied on the case of *Republic -vs- Commissioner of Police & 2 others ex parte Kenya Commercial Bank* [2014]eKLR and [Kimani Karoki v Justus Gakumi Gakunga](#), Nairobi HCCC (Commercial and Admiralty Division), No.815 of 2020 to support his submissions.

Counsel submitted further that by the doctrine embodied in the Latin maxim of Restitutio In Integrum, what must follow, from the invalidity ab initio of the warrant is that all processes that flowed therefrom are similarly null and void ab initio, the consequence of which is the setting aside of the execution proceedings and the refund by Mr. Mogusu and his client jointly and severally of all sums paid by Counsel for the 6th defendant to Mr. Mogusu's agent.

Counsel urged the court to allow the application with costs.

Submissions by the 2nd Defendant

10. The written submissions filed on the 2nd defendant's behalf by the firm of N.E. Mogusu Advocate were dated March 26, 2023. Counsel submitted that the firm of N.E. Mogusu & Co. Advocates is not a party in the suit hence orders sought against the firm are misconceived and malicious and are only meant to intimidate the firm and a direct attack on the independent of the bar.



That the execution complained of was a property and process by the court and that the duty of the 2nd defendant's lawyer ended in moving the court through an application for execution filed on July 28, 2020. That the court had the power either to dismiss or allow the application. That by issuing the warrant of attachment and warrant of sale signed by the Deputy Registrar on July 29, 2020, the court took possession of the execution process. That if the court erred, the 2nd Defendant and/or his lawyer cannot be asked to own the errors of the court. Counsel submitted that the applicant had sufficient time to move the court under the provisions of Order 22 Rule 22 to stay the execution or to have the warrant set aside. But instead, he proceeded to pay the amounts shown in the warrants and that by so paying, the applicant is deemed to have acquiesced to the execution process.

That the amount sought to be recovered vide the present application were costs taxed by the Court of Appeal No.93 of 2019. That the decree in the warrant referred to the unsatisfied certificate of taxation in the Court of Appeal Misc. Application aforementioned. That the Court of Appeal is not an execution court and any set decree or certificated costs issued by the Court of Appeal is to be executed by the Deputy Registrar of the High Court who receives orders, decree or certificated costs in the substantive matter where the matter in the Court of Appeal emanated from.

That Hon. Okwengu, JA issued directions in her ruling dated August 24, 2020 on the monies that were paid by the applicant and that the 2nd defendant had complied with these directions. That therefore the current application is spent. That two courts cannot be decided on the same issue simultaneously.

That as regards monies paid to the auctioneer on account of his fees, the 2nd defendant does not know how the applicant and the auctioneer arrived at the figure.

That the application is misconceived and should be dismissed.

Determination

11. It is not in dispute that the suit herein is yet to be heard and hence there is no decree in the suit yet. It is not disputed that as at the time the warrants were issued, there was no order in this file directing the applicant to pay the 2nd defendant the amounts shown in the warrant or any other monies. The 2nd defendant does not deny making and filing the application for execution filed in court by his advocate on July 28, 2020. I have perused a copy of the application for execution attached to the application. It indicates that the date of the decree in respect of which it was made was June 9, 2020. There is no decree in the file with that date or at all. The application is made in this file and there is no mention of the court of appeal file in which the costs were taxed.
12. It is clear that the Applicant paid the monies shown in the proclamation to the auctioneer just to avoid seizure of its clients (6th defendant's) assets. In the pendency of the application, there was a reference filed in the court of appeal and from the copy of the ruling on the same attached to the Supplementary Affidavit, the money the subject matter of the present application was a subject therein. The Court of Appeal in the ruling dated August 24, 2020 found that the payment of the taxed costs was only made to avert execution. The court remitted the bill of costs back to the taxing officer for the officer to properly exercise her discretion by re-taxing the instructions fees in accordance with paragraph 9(1) of the Third Schedule to the *Court of Appeal Rules*. The court further ordered the 3rd respondent (the 2nd defendant herein) to within 7 days from the date of the Ruling (24/8/2020) deposit in court the amount paid by the Applicant to him awaiting the retaxation and further orders of the court.



No evidence was placed before this court as to whether the re-taxation has taken place, or whether the 2nd defendant complied with the court order and deposited the money or whether the court of appeal has issued further orders or directions.

13. I find that the application for execution by M/s. N.E. Mogusu & Associates on record for the 2nd defendant filed on the July 28, 2020 and the warrant of attachment and of sale issued herein on July 29, 2020 in purported execution of a decree of this court made on the June 9, 2020 was erroneous as there was no decree or order for payment of such money. The same are hereby expunged from the record. I further find that the proclamation of sale issued by Pambo Investment on July 30, 2020 was void ab initio and of nil effect. As regards refund of the sum of Kshs.297,758.50 paid to the 2nd defendant by the applicant, the Court of Appeal has already made orders and given directions on the same vide the ruling dated August 24, 2020. Let the parties comply. Costs of the application to the applicant.

It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 4TH MAY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

No appearance for the Applicant.

Nyamweya Advocate for the Respondent/2nd Defendant

