



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Power & Lighting Co Ltd v Kimondiu (Environment & Land
Case 1034 of 2007) [2023] KEELC 18615 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1034 OF 2007**

OA ANGOTE, J

JULY 6, 2023

BETWEEN

KENYA POWER & LIGHTING CO LTD PLAINTIFF

AND

PHILIP AM KIMONDIU DEFENDANT

RULING

1. The Plaintiff/Applicant filed an application dated 13th June 2022 in which it has sought for the following orders:
 - a. That pending the hearing and determination of the Application filed herewith inter-partes, the Honourable Court be pleased to stay and/or suspend the Warrants of Attachment and Proclamation Notice issued by the Defendant/ Respondent's agents Messrs. Betabase Auctioneers dated 20th May 2020.
 - b. That pending the inter-partes hearing and determination of this Application, the Honourable Court be pleased to Stay execution of the proclaimed property being Motor Vehicle Registration No. KBT 285N.
 - c. That pending the hearing and determination of this Application inter-partes, the Honourable Court be pleased to issue an order directing the Defendant/ Respondent's Agents, Messrs Betabase Auctioneers to unconditionally release forthwith the proclaimed and attached Motor Vehicle Registration NO. KBT 285N into the custody of the Plaintiff/ Applicant.
 - d. That pending the hearing and determination of the Application herein inter-partes, the Defendant/ Respondent either by himself, his employees, officers, servants, assignees and/ or agents, including Betabase Auctioneers be restrained forthwith from alienating, selling, disposing off, transferring and/ or in any way whatsoever interfering with the Plaintiff/



Applicant's assets proclaimed by the Defendant/ Respondent's Agents Messrs. Betabase Auctioneers in satisfaction of the decretal sum.

- e. That this Honourable Court be pleased to issue a declaration that the Warrants of Attachment and Proclamation Notice issued by Defendant/ Respondent's agents Messrs. Betabase Auctioneers on 20th May 2020 are null and void ab initio.
 - f. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the application and the Affidavit sworn in support by Justus Ododa, an employee of the Plaintiff. According to the application, the Proclamation Notice and Warrants of Attachment dated 20th May 2022 have been procured through fraud and material non-disclosure of the fact that the Plaintiff has fully complied with the Judgement dated 28th October 2010.
 3. According to the Plaintiff, this suit was instituted vide an application dated 22nd May 2003 seeking inter alia orders to restrain the Respondent from stopping the Applicant from laying electric power transmission lines on Land Parcel No. 6-10967 carved out of L.R. No. 10967 as the Plaintiff had agreed to compensate the Respondent for the sum of KShs. 977,140.00.
 4. It is the Plaintiff's case that the Defendant filed a counterclaim for Kshs. 15,187,000 as well as orders preventing the Plaintiff from entry and use of his land, removal of power lines and putting up lines pending the determination of the suit.
 5. According to the Plaintiff, following the direction of the court that both parties convene a meeting to discuss the amount payable to the Defendants, the parties on 15th April 2004, adopted as an order of the court the consent letter dated 8th April 2004 and agreed that a cheque of Kshs. 975,000/- be drawn in the Defendant's Advocates favour and that on 30th April 2004, the Plaintiff forwarded to the Defendant's Advocates Messrs. T.T.M. Aswani cheque No. 642415 dated 22nd April 2004 for Kshs. 975,000.
 6. It has been averred that vide a Judgement dated 28th October 2010, the Court awarded the Defendant the sum of Kshs. 5,565,000 being damages on account of trespass and costs of movement which sum was exclusive of costs of the suits and interest thereon, and that on 25th February 2011, the Plaintiff deposited to the Defendant's Advocates account, Messrs R.M. Mutiso & Co. Advocates, the sum of Kshs. 5,956,530/-, being the decretal sum amount together with costs pursuant to the aforementioned judgement.
 7. The Plaintiff averred that they inadvertently failed to net off the sum of Kshs. 975,000 from the decretal sum of Kshs. 5,956,530; that in a shocking turn of events on 20th May 2022, the Plaintiff was served with Warrants of Attachment and a Proclamation Notice dated 19th and 20th May 2022 respectively demanding payment of the decretal sum of Kshs. 602,290 together with Auctioneers charges for the sum of Kshs. 240,000. According to the Plaintiff, these actions are fraudulent in nature.
 8. The Defendant's Counsel deposed that the Plaintiff's application is incompetent for failure by the Plaintiff to disclose that two different law firms of advocates have filed two similar applications seeking the same orders; that vide an application dated 23rd May 2022, the firm of Wairagu & Wairagu Advocates filed an application for the Plaintiff seeking a stay of execution of the warrants and that on 6th June 2022, this Court issued an order that the application be served on the Defendant for inter partes hearing on 30th June 2022 but did not grant an order for stay.



9. It is the Defendant's case that the Plaintiff filed another application dated 22nd June 2022 seeking a stay of the execution of the proclaimed property being motor vehicle Reg No. KBT 285N; that this Court directed on 30th June 2022 that the application dated 23rd May 2022 be withdrawn and the Plaintiff files submissions within 14 days in regard to the application dated 13th June 2022 and that as the Plaintiff failed to file submissions as directed, the Court directed that the order of stay be vacated for failure to file submissions.
10. According to the Defendant, the Plaintiff filed a third application on 3rd November 2022 seeking a stay of execution of Motor Vehicle KBT 285N pending determination of the application; that the court directed that pending the determination of the application dated 13th June 2022, a stay of execution be allowed on condition that Kshs. 800,000 is deposited within 7 days and that the amount was deposited outside the timelines stipulated by the Court.
11. The Defendant averred that the Plaintiff filed an appeal dated 25th January 2011; that the appeal was unsuccessful and the appellate court awarded the Defendant a further Kshs. 100,000 plus interest at court rates which has been accruing for over 10 years and that the sum of Kshs. 975,000 paid to the Defendant was not part of the judgement and was not raised in the appeal.
12. It was deposed that before payment of the decretal sum on 25th February 2022, the Judgement had attracted interest of Kshs. 238,261.20; that the interest of Kshs. 238,261.20 and the Appellate court amount of Kshs. 100,000 and further court interests of Kshs. 66,425 has accumulated to Kshs. 825,357.32 and that this sum is higher than the sum of Kshs. 600,970 reflected in the warrants of attachment.
13. The Plaintiff filed a Further Affidavit dated 10th January 2023 in which it deposed that on 13th June 2022, the Plaintiff withdrew instructions from the firm of Wairagu & Wairagu Advocates; that the application dated 23rd May 2022 was withdrawn on 30th June 2022 with costs and by consent of the parties herein and that the Plaintiff settled the entire decretal amount including costs, and remitted the same through its then advocates, Wairagu & Wairagu Company Advocates.
14. It was deposed that the Plaintiff fully complied with the order of the court as evidenced by the remittance order dated 11th November 2022; that despite being informed of such remittance vide a letter dated 14th November 2022, the Defendant declined to release the Motor Vehicle in breach of the court order and that the Plaintiff is a public institution and stands to suffer substantial loss and damages if the orders sought in its application dated 13th June 2022 are not granted.

Submissions

15. The Plaintiff's Counsel submitted that the Plaintiff/Applicant has demonstrated that as a public institution relying on public funds, it stands to suffer substantial loss and damage if the orders are not granted. According to the Plaintiff's Counsel, the Applicant duly complied with this court's decisions delivered on 28th October 2010, 2nd March 2018 and 25th October 2018.
16. The Plaintiff's counsel submitted that by virtue of the payment of Kshs. 800,000, such act amounts to a deposit of security for costs and as such, this court ought to exercise its discretion and grant a stay of execution of the Warrants of Attachment and Proclamation Notice and that the Plaintiff is apprehensive that if the orders of stay of execution are not granted, the Respondent may proceed to sell by way of public auction or private treaty the Plaintiff/Applicant's Motor Vehicle in execution of the decree issued by the Appellate Court.



17. Counsel for the Defendant submitted that the subject warrants of attachment and the subsequent attachment of the Plaintiff/ Judgement Debtor's Motor Vehicle Reg. No. KBT 285N were merely a process of execution of the orders issued by the Deputy Registrar dated 17th May 2022 and that the Deputy Registrar was properly seized of jurisdiction to hear and determine issues of warrants of attachment.
18. It was submitted that this application should fail as the Plaintiff/ Applicant did not file a Memorandum of Appeal against the impugned orders within 7 days of delivery of the order as provided under Order 49 Rule 7 (2) of the *Civil Procedure Rules* and that the application does not challenge the manner in which the Deputy Registrar made her decision.
19. Counsel submitted that parties must comply with the timelines provided in law and pleadings and that suits or appeals filed out of time are unsustainable unless a party has obtained an extension of time; that there exists serious mala fides on the Applicant's part that disentitles it from the exercise of discretion of this court in its favour and that while the Plaintiff has given the impression that it learned of the execution process on 20th May 2022, it had exhibited habitual dilatoriness.
20. Regarding the Plaintiff's failure to net-off the sum of Kshs. 975,000/- from the judgement delivered on 28th October 2010, the Defendant submitted that the matter was canvassed in the Court of Appeal, which affirmed the High Court's judgement and awarded a further sum of Kshs. 100,000/- and costs to the Respondent.

Analysis and Determination

21. The Plaintiff/Applicant filed the application seeking to suspend the Warrants of Attachment and Proclamation Notice issued on 20th May 2022, pending determination of this application. This court notes that the Plaintiff in its application made reference to Warrants dated 20th May 2020.
22. It is however clear that this is a typographic error because the only warrants are those dated 20th May 2022, in which the decretal sum indicated is Kshs. 600,790. The Plaintiff also sought declaratory orders that the Warrants and notice were void ab initio on grounds that they were obtained fraudulently.
23. This court issued orders of stay of execution on 13th June 2022. When this matter came up in court on 30th June 2022, it was brought to the attention of the court that there was on record an application dated 23rd May 2022 which sought similar orders. By consent, the later application was withdrawn. The court extended the orders of stay until 1st November 2022.
24. On 1st November 2022, when the matter came up for mention, this court vacated the orders as the Applicant had failed to comply with the court's orders to file submissions. The Applicant thereafter filed an application dated 3rd November 2022 seeking stay of execution or in the alternative, release of the proclaimed property on condition that the Applicant deposits the decretal amount.
25. Consequently, this court issued orders on 3rd November 2022 to the effect that pending the hearing of the application dated 13th June 2022, prayer number 4 of the application be allowed on condition that Kshs. 800,000 is deposited in court within 7 days. The Plaintiff deposited this sum on 11th November 2022.
26. On 19th November 2022, upon confirmation that the sum of Kshs. 800,000 had indeed been deposited, this court ordered that the attached Motor Vehicle be released to the Plaintiff. The court also directed that the issue of costs of the application dated 3rd November 2022 will abide by the decision of this court in dealing with this application.



27. However, the Plaintiff has averred that despite being informed of such remittance vide the letter dated 14th November 2022, the Defendant declined to release the Motor Vehicle in breach of the court order.
28. The Plaintiff has alleged that the Warrants and Notice of Attachment were procured through fraud and material non-disclosure of the fact that the Plaintiff has fully complied with the Judgement dated 28th October 2010. In accordance with the rules of evidence, the Plaintiff bore the legal burden in proving its case. This was persuasively enunciated by Justice Majanja in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR when he said that:
- “...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”
29. The Plaintiff avers that they paid a sum of Kshs. 5,956,530/-, being the decretal amount inclusive of the taxed costs on 25th February 2011. As evidence of the payment, the Plaintiff attached a bank deposit slip dated 25th February 2011. The Defendant did not dispute this payment.
30. Considering that this sum was paid four months after judgement on 28th October 2019, it attracted interest of Kshs. 238,261.2 by the time it was paid. This is based on a computation of simple interest at 12% p.a. While the Defendant arrived at the same figure, it erroneously indicated that the Judgement award was paid on 25th February 2022 rather than 25th February 2011.
31. The Plaintiff, dissatisfied with the decision of the High Court, filed an appeal to the Court of Appeal, which upheld the Judgement of the court, and further awarded the Respondent Kshs. 100,000 for mental stress and suffering, together with the costs in that court and in the High Court. The Court of Appeal taxed the costs at Kshs. 246,529.50 on 25th October 2018, which the Plaintiff duly paid. The Defendant has not disputed that the said sum was paid to them.
32. The Plaintiff has however admitted that the sum of Kshs. 100,000 remained outstanding. Since delivery of the Court of Appeal Judgement on 25th October 2018, as at May 2022, this sum stood at Kshs 392,000. The sum of Kshs. 392,000, Kshs 238,261.2 and further court fees of Kshs. 66,425 aggregates to a total of Kshs. 696,686. This figure contrasts with the Defendant’s claim for Kshs. 825,357.32/-.
33. The impugned Warrants and Notice for Kshs 600,790 were issued as against the decree of this court dated 4th April 2022 and signed by the Deputy Registrar. This decree was with respect to the judgement of this court delivered on 28th October 2010, in which the court awarded the Defendant Kshs. 5,565,000 together with interests from the date of Judgement until payment in full and costs which were taxed on 18th January 2011 at Kshs. 391,530.
34. Indeed, this decree implies that the decretal sum had not been paid at all, yet it was well known to the Defendant/decreed holder that the sum had indeed been settled, save for a portion of interest.
35. This discrepancy in the sums claimed by the Defendant as against that in the decree point to a failure by the parties to comply with Order 22 Rule 2 of the Civil Procedure Act, which compels a decreed holder to notify the court of payments made directly to itself so that the court may make the necessary adjustments. The said Order provides as follows:

“(1) Where any money payable under a decree of any kind is paid direct to the decreed-holder or the decree is otherwise adjusted in whole or in part to the



satisfaction of the decree-holder, the decree- holder may certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly.

- (2) The judgment-debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.”

36. Order 22 Rule 7(2) of the Civil Procedure Rules stipulates the requirements in an application for execution as follows:

“(2) Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—

- a. the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
- (f) whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
- (g) the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs, if any, awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the court is required, whether —
 - (i) by the delivery of any property specifically decreed;
 - (ii) by the attachment and sale of any immovable property, or by the sale without attachment or by proclamation and sale immovable property;



- (iii) by the arrest and detention in prison of any person;
- (iv) by the appointment of a receiver;
- (v) otherwise, as the nature of the relief granted may require.”

37. Upon review of the Defendant’s application for execution of Decree filed on 25th June 2019 as well as the impugned judgements herein, the Defendant declined to indicate the payments that had already been made by the Plaintiff. The claimed sum of Kshs. 600,790/- was indicated as the balance of the principal with no computation on interests.
38. This contrasts with the evidence presented by the Plaintiff as well as the Defendant’s admissions through the affidavits sworn in this matter. The Defendant filed the application for execution and failed to disclose material facts, i.e. that the Plaintiff had indeed made multiple payments in offsetting the debt owed to him. This court therefore finds merit in the Plaintiff’s application.
39. With respect to the Plaintiff’s claim for the Kshs. 975,000 paid to the Defendant in addition to the decretal sum, The Plaintiff has attached the minutes of a meeting between the Plaintiff’s and the Defendant’s Advocates on 8th April 2004, where the Plaintiff agreed to release Kshs. 975,000 subject to the outcome of the case.
40. It has not been disputed by either party that the said sum was indeed paid to the Defendant’s Counsel, although the Defendant alleges that the said sum was to facilitate relocation and to allow the clients to continue with the power lines infrastructure.
41. The Defendant has averred that should this court allow the Plaintiff to belatedly raise the issue of the Kshs. 975,000 that it paid, this would be tantamount to a review of both the High Court and Court of Appeal Judgements. However, this court is alive to the doctrine of unjust enrichment. This doctrine was expounded in the case of *Joel Mwangangi Kitbure v Priscah Mukorimburi* [2022] eKLR as follows:

“And on the authorities approved by Madan and Wambuzi, JJA (as they then were) in the case of Chase International Investment Corporation (supra), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the Defendant has been enriched by the receipt of a benefit, (2) that he has been so enriched at the expense of the plaintiff to allow the Defendant to retain the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust enrichment are interrelated. They clearly show the nature of restitutionary claims, and how people incur restitutionary obligations.

35. In other words, the idea of unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the Plaintiff. The gist is that a Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to make restitution.”
42. In this case, the unjust enrichment was not a deliberate act of fraud by the Defendant, but rather was due to the negligence of the Plaintiff in not notifying the High Court and the Court of Appeal as to the initially deposited sum.
43. However, if this court is to hold that the issue of the payment of Kshs. 975,000 was belated, it would be a rubber-stamp of the unjust enrichment of the Defendant. As the Plaintiff indeed fully settled



the judgement award, it is only fair and equitable that the sum of Kshs. 975,000 be reimbursed to the Plaintiff.

44. There is also the sum of KShs. 800,000 which was paid as security in order to ensure that the Plaintiff's Motor Vehicle was not auctioned. This court has already found that the Warrants and Notice of Attachment were indeed fraudulently procured through failure to make material disclosure. This renders the said Warrants and Notice void ab initio. This court thereby issues the following orders:
- a. A declaration that the Warrants of Attachment and Proclamation Notice issued by the Defendant/ Respondent's agents Messrs. Betabase Auctioneers on 20th May 2022 are null and void ab initio.
 - b. That the Defendant duly restitutes the sum of Kshs.975,000 to the Plaintiff within 14 days of the date herewith.
 - c. That the Defendant abide by the orders of this court dated 3rd November 2022 and shall unconditionally release forthwith the proclaimed and attached Motor Vehicle Registration No. KBT 285N into the custody of the Plaintiff.
 - d. That the sum of Kshs. 800,000/- shall be retained as security pending the Defendant's re-submission of a duly completed application for execution. Such sum shall be utilized to offset the interests and costs owed to the Defendant, with any remaining balance being refunded to the Plaintiff.
 - e. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF JULY, 2023

O. A. ANGOTE

JUDGE

In The Presence Of;

Mr. Macharia for Plaintiff/Applicant

Ms Dida holding brief for Mutiso for Defendant/Respondent

Court Assistant - Tracy

