



**Skyheights Development Company & another v Kinyanjui (Environment and Land
Miscellaneous Application 17 'A' of 2021) [2023] KEELC 18556 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 17 'A' OF 2021**

EO OBAGA, J

JULY 6, 2023

BETWEEN

SKYHEIGHTS DEVELOPMENT COMPANY 1ST APPLICANT

SEVENTY SEVEN AUCTIONEERS 2ND APPLICANT

AND

PAPEAS LEWIS NDERU KINYANJUI DEFENDANT

RULING

1. This is a Ruling in respect of two applications brought by the Respondent/Applicant. The first Application is dated 5th March, 2022 and it seeks the following orders;
 1. That this Honourable Court be pleased to certify this application as very urgent
 2. That the service of the application be dispensed with owing to the urgency of the matter
 3. That this Honourable Court be pleased to enjoin the intended 2nd Respondent, Seventy Seven Auctioneers in this suit
 4. That this Honourable Court be pleased to stay permanently the execution of the decree herein dated 7th July, 2021
 5. That there be a stay of execution of the warrants of attachment issued herein on 9th September, 2021 and the Proclamation dated 15th September, 2021 pending hearing and determination of this application
 6. That as an alternative to (5) above that there be a stay of further execution of the decree or suspension of the warrants of attachment issued to the 2nd Respondent



7. That this Honourable Court be pleased to declare as fraudulent, null and void the attachment and sale of the Applicant's immovable properties in his garage in Eldoret as of 23rd September, 2021
 8. That this Honourable Court be pleased to declare and hold that the Respondents to this Application have committed the Tort of Trespass to Chattels
 9. That the Respondents do jointly and severally pay the Applicant Kenya Shillings Ninety Four Million, Two Hundred and seventy three, nine hundred and ninety six (Kshs.94,273,996.70) being the overpayment
 10. That the Respondents do pay to the Applicant general damages
 11. That the Respondents do produce books of accounts in respect of all the attached chattels
 12. That this Honourable Court be pleased intervene, investigate and set aside the sales, order for an account of all the items from the auctioneer.
 13. That the hearing of this Application be by way of viva voce evidence and the respective affidavits be treated as witness statements
 14. That the costs of this application be provided for.
2. The second application is dated 21st June, 2022 and it seeks the following orders;
1. That this Honourable court be pleased to certify this application as very urgent.
 2. That the service of the application be dispensed with owing to the urgency of the matter.
 3. That this honourable court be pleased to bring forward the hearing date of the application hearing herein dated 11h July, 2022 to such near as it may deem fit.
 4. That as an alternative to prayer No. 3 above, this Honourable court be pleased to order that here be a stay of execution of any warrants of attachment including the ones issued herein on 9th September, 2021, and the proclamation dated 15th September, 2021, pending hearing and determination of this application on 11th July, 2022.
 5. That the costs of this application be provided for.

Background:

3. The origin of these two applications can be traced to a sale agreement between the Respondent / Applicant and the Respondent in respect of sale of the Applicant's 15 properties which according to the sale agreement then comprised an aggregate of 11.5 acres. The price per acre was agreed at Kshs. 13,500,000.
4. After the Respondent had paid a substantial amount towards the purchase price, it turned out that the acreage of the suit properties on the ground was about 7.5389. The parties agreed to send their respective Surveyors to the ground. The Surveyors confirmed that indeed the land on the ground was less than what had been stated on the Sale Agreement. It was then agreed that an ad corrigenda be prepared in which same property was substituted with another and the acreage reduced to 10.5 acres but the price per acre remained at Kshs. 13,500,000.
5. Despite the Applicant receiving full purchase price with an overpayment, he did not give vacant possession. The Respondent was forced to invoke a clause in the agreement, which required parties to



refer the dispute to arbitration. Consequently Mr. Kalya was appointed an arbitrator. The parties then commenced arbitral proceedings before Mr. Kalya in Arbitral Dispute No.1 of 2019.

6. At the conclusion of the Arbitral Proceedings, it was found that the Applicant had been paid a sum of Kshs.128, 252, 000 in full payment of the consideration of Kshs. 101,775,150 and was bound to make a refund of Kshs. 23,476,850 to the respondent being an overpayment. There were other findings from the Arbitral Proceedings but are not relevant to the matter in issue in the two applications.
7. The costs of the arbitration were assessed at Kshs. 4,358,653.33. It is these costs plus the overpayment which the proposed second Respondent was instructed to recover after the Arbitral award was adopted as judgment of the court. The proposed second Respondent then proceeded to Proclaim the Applicant's goods which were subsequently carried away and sold in a public auction. The first auction realized Kshs.2,330,000. This was far less than the decretal sum. This forced the Respondent to start the process of selling the Applicant's immovable property. This is what prompted the Applicant to file the second Application.

The Second Application;

8. The prayers sought in the second application have all been overtaken by events save for the one on costs. This application was seeking to have the first application brought to an earlier date than 11th July, 2022. This was not granted. When the application was placed before Justice Kibunja on 22nd June, 2022. The request was declined as I was still on leave and I was the one handling the matter. The other prayer was for stay of execution of warrants of attachment issued on 9th September, 2021 and Proclamation dated 15th September, 2021 pending the hearing of application dated 5th March, 2022. This was too not granted and has been overtaken by events. It is therefore clear that what remains for determination are prayers in respect of the first application which have not been overtaken by events as well as the issue of costs which can be addressed while dealing with the first application dated 5th March, 2022.

Applicant's contention;

9. The Applicant has gone to great length to give a background of how he started his garage which was the biggest in Eldoret Town but which has been brought down by the 2nd Proposed Respondent who carried away goods which were not even listed in the Proclamation and that those which were listed were grossly undervalued.
10. The Applicant further contends that what the 2nd Proposed Respondent took is enough to offset what was owed by him and that the attached goods which were carried away were over Kshs.12,000,000 in purported recovery of Kshs.27,837,003.33. The applicant therefore contends that the Respondent and the proposed Respondent jointly owe him a refund of Kshs. 94,273,996.70.
11. The Applicant terms the attachment by the 2nd Proposed Respondent at the instant of the Respondent as extortionist and a fraud committed by people who are envious of his success. He therefore prays that the execution or further execution by the proposed 2nd Respondent be permanently stopped and for a declaration that the Proposed 2nd Respondent committed an act of trespass to chattels.
12. The Applicant states that the Proposed 2nd Respondent did not act in good faith as an officer of the court and he acted fraudulently by claiming that the attached containers were empty including some lorries which had been grounded at the garage yet the video which was taken during the attachment showed those who accompanied the 2nd Proposed Respondent off load goods from the container and vandalize others deliberately to reduce their value.



13. The Applicant further contends that the 2nd Proposed Respondent did not comply with the command of the court given on 4th November, 2021 which required him to return the warrants to court with explanation on what happened.
14. The Applicant complains that the 2nd Proposed Respondent carried away a container which he used to use as his office and that this was meant to incapacitate him from accounting for the items which he had as all the documents relating to the records of what he had were kept in the office container.

Respondent's contention;

15. The Respondent opposed the Applicant's Application through notice of preliminary objection dated 23rd September, 2022. The Respondent contends that this court has no jurisdiction to grant some of the prayers sought by the Applicant as they ought to have been brought through a substantive suit and not through this Miscellaneous Application.
16. The Respondent states that the containers which were on the suit property were empty contrary to the allegation by the Applicant that they contained goods. The Respondent further states that if there were any goods in the containers as alleged, the Applicant would have produced documents to show that the same were received at his premises and delivery notes signed. This is one of the agreements for sale which would have been exhibited to show the transactions between the applicant and other third parties.
17. On the Applicant's contention that there were expensive items in the garage, the Respondent states that the Applicant has not produced anything to show that there were expensive items and that if any were in the garage, he would have sold one item to clear the amount of the decretal sum.
18. The Respondent further states that it is only aware of objection proceedings by Kishan Builders regarding caterpillar Registration No. KBF 225H. These objection proceedings were dismissed on 22nd January, 2022. The Respondent contends that the Applicant's application does not meet the threshold for grant of orders of stay of execution and that in any case the application has been belatedly brought after the attached goods were sold in partial settlement of the decree.
19. The Respondent states that the applicant has grossly exaggerated the value of his goods which were attached because he is bitter for losing in the Arbitral Proceedings and the subsequent appeal against the Arbitral Award which was also dismissed. The Respondent states that it is still owed money and there can be no order stopping further execution or basis for declaration that what was attached has fully satisfied the decree.

Proposed 2nd Respondent's Contention;

20. The Proposed 2nd Respondent contends that this court has no jurisdiction to entertain an application seeking to enjoin him as a Respondent post judgment. He states that he carried out his mandate in accordance with Section 23 of the [Auctioneers Act](#) No.5 of 1996 together with the [Auctioneers Rules](#) of 1997. He states that the Applicant cannot seek to solve any issues he has against him in these Proceedings in the face of Section 26 of the [Auctioneers Act](#) No.5 of 1996 which provides that a party aggrieved by the conduct of an auctioneer has to bring a separate suit against the auctioneer.
21. The Proposed 2nd Respondent states that his joinder in these proceedings will infringe on his rights under Article 48 and 50 of [the Constitution](#) as he will not have a right to claim indemnity from any other person or invoke the law of limitation. He states that the Applicant had the option of filing a complaint against him at the Auctioneers Licensing Board under Section 24 of the [Auctioneers Act](#) No.5 of 1996 but did not do so.



22. The Proposed 2nd Respondent contends that hearing of the Application by viva voce evidence will lead to a second trial which will result in a second decree which is legally untenable. Section 34 of the [Auctioneers Act](#) which the Applicant relies stipulates that all disputes arising have to be dealt with by parties to the suit to the exclusion of the auctioneer.
23. The Proposed 2nd Respondent contends that he carried out his mandate according to the law. All Proclamations were issued as required and that he kept the Advocate of the Respondent informed of the process as well as the court. The Proposed Respondent states that there can be no enquiry on whether there was undervaluation or not as the Applicant had the opportunity to move the court under Rule 10 of the [Auctioneers Rules](#) 1997 to have the attached goods independently valued but he did not follow that route.
24. The Proposed 2nd Respondent states that the claim of Kshs. 94,273,996.70 is in the nature of special damage which has its manner of proof and cannot be brought in a Miscellaneous Application but by way of Plaint which was to be proved by way of evidence. The Proposed 2nd Respondent takes issue with the Applicant branding him as a racketeer, extortionist and terror which he is not and urges the court to expunge any reference to him as such in the application as what he did was in accordance to the law.

Analysis and Determination;

25. The parties agreed to file written submissions. The 1st Respondent filed submissions on 16th December, 2022. The Applicant filed his submissions on 11th May, 2023. The Proposed 2nd Respondent did not file any submissions and if any were filed, then they are not in the file as at 6th June, 2023 when writing this ruling.
26. I have carefully considered the Applicant's application, the opposition thereto by the 1st Respondent and the Proposed 2nd Respondent as well as the submissions by the Applicant and the 1st respondent. The Applicant in his submissions submitted that the 1st Respondent did not file any replying affidavit to the two applications. In fact, the 1st Respondent filed a replying affidavit to the application dated 5th March, 2022 on 27th September, 2022. There was also a notice of Preliminary Objection filed against the application dated 5th March, 2022 on 28th September, 2022.
27. The 1st Respondent also filed grounds of opposition in opposition to the application dated 21st June, 2022 on the 28th September, 2022. Though the Applicant complains that the Proposed 2nd Respondent filed replying affidavits outside the given time, the Applicant is equally guilty of filing a further affidavit on 26th September, 2022 without leave of court. The 1st Respondent had sought leave on 26th September, 2022 to file a further affidavit but what I see on record are grounds of opposition, replying affidavit and notice of preliminary objection which were all filed subsequent to leave to file further affidavit which was granted on 26th September, 2022. I will therefore consider all the responses filed herein including the Applicant's further affidavit which was filed without leave of court.
28. The Applicant in his submissions is proposing that I deal with part of the prayers in this ruling and leave the rest of the prayers to be dealt with through oral evidence. The prayers which the Applicant want reserved for viva voce evidence are prayers 7, to 13 in the notice of motion dated 5th March, 2022. I will not allow this for the simple reason that the application by the 1st Respondent was by way of a Misc. Application which is not a suit. The prayers being sought to be urged through viva voce evidence are of a substantial nature which can only be urged through a separate suit as will become clear when I deal with the issues relating to the said prayers.



29. The issues which stand out for determination are;
- i. Whether this court has jurisdiction to entertain some of the prayers by the Applicant in the Application dated 5th March, 2022
 - ii. Whether the Proposed 2nd Respondent should be joined in these proceedings.
 - iii. Whether the prayer for stay of execution is res judicata
 - iv. Whether the 2nd Proposed 2nd Respondent carried out his duties in accordance with the law.
 - v. Whether the Applicant's prayers for stay of execution can be granted
 - vi. Which order should be made on costs.

Whether this court has jurisdiction to entertain some of the prayers in the application dated 5th March, 2022;

30. The Applicant is seeking for a declaration that the attachment and sale of the applicant's movable properties on 23rd September, 2021 is fraudulent null and void and should therefore be paid damages. These are prayers which cannot be entertained in these proceedings. The attachment and sale was undertaken by the 2nd Proposed Respondent on instructions by the 1st Respondent.

31. Section 26 of the *Auctioneers Act* No.5 of 1996 provides as follows;

“Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action: Provided that nothing in this section shall—

- a. prevent the auctioneer from claiming contribution or indemnity from any other person;
- b. limit the damages recoverable under any other written law.

32. It is clear from the provisions of Section 26 of the *Auctioneers Act* that any party aggrieved with the manner in which an auctioneer goes on with his work can bring an action to claim damages. It is clear from the Applicant's application that the Applicant has heaped all blame on the auctioneer and called him names. The only recourse open to the Applicant is to bring an action for damages against the auctioneer who will then have opportunity to claim indemnity from any other person.

33. The Applicant has relied on Section 34 of the *Civil Procedure Act* to argue that this court has jurisdiction to entertain the prayers in his application. Section 34(1) of the *Civil Procedure Act* provides as follows;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. CAP. 21 [Rev. 2012] Civil Procedure [Issue 1] 20 (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees. (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.



34. The Applicant relied on the court of Appeal decision in *Kuronya Auctioneers Vs. Maurice O. Odhoch & another* {2003} eKLR. The Court of Appeal was dealing with execution process arising from a suit. In the instant case, we are dealing with a Misc. Application which merely adopted the Arbitral Award as a judgment of the court. This Misc. Application is not a suit as to come under the provision of section 34(1) of the *Civil Procedure* Rules. As there is a clear procedure to follow under section 26 of the *Auctioneers Act*, I find that this court has no jurisdiction to declare the attachment null and void or even grant damages in this Misc. application.
35. The Applicant is asking this court to ask the Proposed 2nd Respondent to produce books of accounts in respect of all the attached chattels. Auctioneers account for attached goods through Proclamations which are clearly documented. They keep books of accounts on what they do on day to day basis regarding their daily operations on behalf of their instructing clients. One of the duties of an auctioneer is to maintain such books, accounts, records or other documents as may be prescribed and furnish the same to the Board at such time and in such manner as may be prescribed.
36. The auctioneers report back to court on what they did with the warrants which they take from court. When it comes to books of accounts and other records, they are accountable to the Auctioneers Licensing Board which is the entity mandated to call for the books of account. This court does not have jurisdiction to go beyond what the auctioneer has accounted to court and call for the books of account which is the function of the Board.
37. The Applicant is asking to be paid 94,273,996.70 being overpayment. This is a claim of special damages. The law requires that special damages be pleaded and proved in evidence. This cannot be done in a Miscellaneous Application. It is only in a suit where the same can be addressed. It cannot be done by converting the affidavits into witness statements and then proceeding to give viva voce evidence based on a miscellaneous application. This court does not have jurisdiction to entertain such a claim in a miscellaneous application.
38. The applicant is also asking the court to investigate and order for account by the auctioneer and thereafter set aside the sale. As I have said hereinabove, this is a miscellaneous cause. The auctioneer wrote to court and accounted for what he did and what he realized during the sale. The applicant has not laid any basis for this court to again start fresh investigations or ask the auctioneer to again account for what he did. If there was any impropriety on the part of the auctioneer, the Applicant was at liberty to make a complaint against the auctioneer within one year as per Section 24(1) of the *Auctioneers Act*. If the applicant did not do this, he cannot seek to have the court do what he failed to do within the timelines given by the Act.

Whether the proposed 2nd Respondent should be joined in these proceedings;

39. Joinder of a party to proceedings is to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit. In the instant case, the Proposed 2nd Respondent took warrants of execution from court to go and execute. He took the warrants as an officer of the court. He has no interest in this suit. As clearly set out under Section 26 of the *Auctioneers Act*, if any party is seeking damages from an auctioneer, he can do so through an action.
40. In the case of *Joseph Kotonya Aketch Vs. NSSF Board of Trustees & another* {2014} eKLR it was held as follows;

“joinder of a party to a suit is provided under Order 1 Rule 10 of the *Civil Procedure Rules* which makes it possible for a party to be made part thereof at any stage of the proceedings.

“Proceedings” are defined in *Black’s Law Dictionary* 9th (ed.) at page 1324 as;



‘the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment’.

The purpose of joinder is to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit. As it stands now, the suit has been determined and there are no questions to be adjudicated upon”

41. The Arbitral proceedings were concluded. The process of execution from those Arbitral Proceedings have been conducted and there is partial realization of the decretal sum. There is absolutely no need to join the Proposed 2nd Respondent in these proceedings in view of the provisions of Section 26 of the *Auctioneers Act*.

Whether the Prayer for stay is res judicata

42. The 1st Respondent submitted that the Applicant filed a notice of motion dated 23rd September, 2021. The 1st Respondent relied on the case of Independent Electoral and Boundaries Commission Vs. Maina Kiai & 5 Others {2017}eKLR where the Supreme Court of Kenya stated as follows;
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
43. It is true the Applicant had filed an application dated 23rd September, 2021 in which he wanted stay of execution among other orders. This application was dismissed on 25th October, 2021 for non attendance. The application was not heard on merits and it cannot therefore be argued that the present application is res judicata.

Whether the Proposed 2nd Respondent carried out his duties in accordance with the law;

44. The applicant blamed the Proposed 2nd Respondent for not adhering to the law. One of the accusations was that the Proposed 2nd Respondent did not account to the court on what he did as commanded by the court on 4th November, 2021. Contrary to the allegations by the applicant, the Proposed 2nd Respondent wrote to court and informed it that he had attached the Applicant’s goods and gave a copy of the Proclamation.
45. The other complaint was that the Proposed 2nd Respondent attached the Applicant’s goods without giving seven (7) days’ notice. In a replying affidavit by the Proposed 2nd Respondent in opposition to the Applicant’s Notice of Motion dated 5th March, 2022, there is a Proclamation of attachment of movable property which confirms that the Applicant was given seven (7) days’ notice. The notice was given on 9th September, 2021. The goods were carried away on 23rd September, 2021.
46. The Applicant was present when the goods were carried away. The Applicant’s claim that the Proposed 2nd Respondent vandalized some goods and secretly off loaded goods from the containers was not substantiated. Despite the Applicant claiming that there was a video showing the vandalism and



offloading of goods from the container, there was no such video given as claimed in the further affidavit by the Applicant

47. If there was any impropriety on the part of the Proposed 2nd Respondent, then that should have been reported to the Auctioneers Licensing Board for action. This was not done. The allegations of impropriety without any evidence remains just allegations. I find that the Proposed 2nd Respondent acted in accordance with the law.

Whether the Applicant's prayers for stay of execution should be granted

48. To begin with, the execution which the Applicant was seeking to stop has already been carried through and some of the goods attached have already been sold. From the account by the Proposed 2nd Respondent to the instructing advocate, only Kshs.2,300,000 was realized from the sale. The Proposed 2nd Respondent took his fees and handed over the balance to the Advocate for the 1st Respondent.
49. The Applicant gave estimates of the value of what he claims he had in his garage. He stated that his container office was carried away during the attachment as well as the goods at the garage. There was nothing left in terms of records. One then wonders where the Applicant obtained a detailed record of the items listed in his Supporting Affidavit as those which were declared and the undeclared ones.
50. The attachment was a lawful process. If the sale did not realize the full decretal sum, this court cannot stop any further attachment of either movable or immovable properties of the Applicant in furtherance of full realization of the decretal sum. It is therefore clear that what was initially sought to be stayed having been overtaken by events, this court cannot stop further execution by giving a permanent stay order of execution.

Which order should be made on costs

51. It is said that costs follow the cause. They are granted at the discretion of the court. Some of the considerations taken into account were well captured by Justice Odunga (as the then was) in the case of Republic Vs. Communications Authority of Kenya & another Ex-parte Legal Advice Centre also known as Kituo cha Sheria {2015}eKLR where he stated as follows;

“In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See *Hussein Jannmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd*{1967} EA 287 and Mulla{(12th Edn)P.150”

52. In the instant case, the litigation resulting into this application arose out of Arbitral Proceedings which were occasioned by the Applicant who received money in respect of sale of some 15 properties to the 1st Respondent. Despite the Applicant being entitled to Kshs.101,775,150, he was paid Kshs.128,252,000. He was found to have been overpaid by Kshs.23,476,850. After costs of Kshs.4,358,653.33 were added, the amount came to Kshs.27,835,503.33. The Applicant was unwilling to refund this even after he lost an Appeal to the High Court from the Arbitral Award.
53. It is clear that the Applicant was determined not to pay. This is not conduct of a person who can be spared from payment of costs.



Disposition

54. From the above analysis it is clear that both the notice of motion dated 5th March, 2022 and the one dated 21st June, 2022 are devoid of merit. The two Applications are dismissed with costs to the 1st Respondent and the Proposed 2nd Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 6TH DAY of JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Salim for Applicant

Court Assistant: Laban

E. O. OBAGA

JUDGE

6TH JULY, 2023

