



G4S Kenya Limited v David Senema t/a Senema Africa Auctioneers & 3 others (Commercial Appeal E046 of 2024) [2025] KEHC 2173 (KLR) (Commercial and Tax) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E046 OF 2024
BM MUSYOKI, J
FEBRUARY 14, 2025**

BETWEEN

G4S KENYA LIMITED APPELLANT

AND

DAVID SENEMA T/A SENEMA AFRICA AUCTIONEERS 1ST RESPONDENT

BERNARD OYUGI OKECH T/A BLEGIF CONSULT AUCTIONEERS 2ND RESPONDENT

PETER NDICHU KINYANJUI 3RD RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY 4TH RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate’s Court delivered by Hon. Lucy Ambasi (CM) on 2-02-2024 in Milimani Commercial Courts Cmcc number E395 of 2023)

JUDGMENT

1. The genesis of this matter is the process of execution of decree in Kisii Cmcc number 775B of 2021 where the appellant had been sued by one Rael Gesare Moenga and judgment entered against it on 20th June 2022. When the plaintiff in the said suit moved to execute, the appellant herein filed an application for setting aside of the warrants and judgment therein which application was successful on condition that the appellant paid the auctioneers costs. As it would turn out, the appellant did not pay the auctioneers’ costs following which the 1st respondent who was the appointed auctioneer filed in the same court miscellaneous civil application number 4 of 2023 for taxation of his costs which was ultimately taxed and warrants for recovery of the costs totaling to Kshs 323,463.00 issued. The 1st respondent moved to execute for the costs through the 2nd respondent by attaching the appellant’s



motor vehicle registration number KBB 732M which it eventually sold to the 3rd respondent at Kshs 500,000.00.

2. Following the sale of the said motor vehicle, the appellant moved to the Chief Magistrate's Court at Milimani court through civil case number E395 of 2023 in which it vide application by notice of motion dated 24-05-2023 prayed for among others the following orders;
 1. A temporary injunction be issued to restrain the 3rd defendant, his agents, servants, employees or otherwise from registering and transferring to himself ownership of motor vehicle registration number KBB 732M pending the hearing and determination of the suit.
 2. A temporary injunction be issued to restrain the Director General of the 4th defendant from registering the 3rd defendant as the owner of the motor vehicle registration number KBB 732M pending hearing and determination of the suit.
 3. A temporary injunction be issued to restrain the 3rd defendant from modifying, stripping, altering or transferring the motor vehicle registration number KBB 732M pending the hearing and determination of the suit.
 4. An injunction be issued compelling the 3rd defendant, their servants, agents, employees or otherwise to release motor vehicle registration number KBB 732M to the plaintiff pending hearing and determination of the suit.
 5. Costs of the application be awarded to the plaintiff.
3. The Honourable Magistrate heard the said application and in her ruling delivered on 2-02-2024 dismissed the same thereby prompting this appeal. In its memorandum of appeal dated 22-02-2024, the appellant has raised the following grounds;
 1. The learned magistrate erred in holding that the proper proceedings to have sought orders to preserve motor vehicle registration number KBB 732M was in Kisii Cmcc number 775B of 2021 Rael Gesare Moenga v G4S Kenya Limited when the appellant tendered proof that the motor vehicle was in the court's jurisdiction.
 2. The learned magistrate erred in holding that the grant of interim orders would be prejudicial to the suit in Kisii Cmcc number 775B of 2021 Rael Gesare Moenga v G4S Kenya Limited.
 3. The learned magistrate erred in failing to grant interlocutory injunction to preserve the subject matter of the suit.
4. The appellant therefore asks this court to allow the appeal by setting aside the ruling and substitute therefor an order allowing its application.
5. This court on 2-10-2024 ordered the parties to file written submissions on the appeal. The respondents did not file any submissions despite the court having granted them fourteen days to do so on 12-11-2024 on which date the matter was reserved for judgement. The appellant filed submissions dated 9th October 2024 which I have considered together with the authorities cited therein.
6. This being a first appeal, this court is obligated to look into the evidence produced before the trial court and do its own analysis, evaluation and consideration as if it was conducting a retrial and come to its own independent conclusion. I have read the notice of motion dated 24-05-2023, the supporting and supplementary affidavits of Laurence Okello, the replying affidavits of the 1st and 3rd defendants in the suit and submissions of the parties before the lower court. The application was for an interlocutory injunction and as such the applicant was duty bound to establish that it had a prima facie case with



a probability of success and at the same time demonstrate that if the application was not granted, it stood to suffer loss which was not capable of being compensated by an award of damages. If the court was to be in doubt of the existence of these conditions, it would decide the application on a balance of convenience.

7. It is common ground that the appellant's motor vehicle was sold to the 3rd respondent at Kshs 500,000.00. It is also common ground that the said sale was in execution of a valid court decree and warrants in Kisii Chief Magistrate's Court miscellaneous application number 4 of 2023 which was related to costs ordered in favour of the 1st respondent in Kisii Cmcc number 775B of 2023.
8. The appellant has averred that it had paid the decretal sum before the motor vehicle was sold but the documents availed to the court show otherwise. By the time the appellant paid the balance of the Kshs 270,463.00, the motor vehicle had already been sold to the 3rd respondent. The appellant stated that it paid the balance on 4-05-2023 while the 1st respondent sold the vehicle on 3-05-2023. A cheque forwarded to Gichana & Co. Advocates by the 2nd respondent as proceeds of the sale was returned to the 2nd respondent since the appellant had already paid the decretal sum.
9. The respondents contended that the sale was lawful as the warrants in miscellaneous application number 4 of 2023 were valid and were never set aside. I have seen an application dated 19-05-2023 in the miscellaneous cause which sought to set aside the taxation, stay of execution and release of the motor vehicle. The respondent avers that this application was not allowed whereas the appellant is silent on the outcome of the same. Nevertheless, no order emanating from the said application has been exhibited.
10. With the above facts, I hold the opinion that there was an unresolved matter of taking accounts and establishing whether the motor vehicle was sold when there were valid court orders against the sale or when the decretal sum had been paid in full. If that were to turn out to be the correct position, the appellant would then be entitled to claim damages arising from the sale. I have looked at the supporting affidavit and have not seen anything to suggest that the 1st and 2nd respondents were served with a court order stopping the sale or compelling them to release the motor vehicle. The orders the appellant is pursuing in this matter especially release of the motor vehicle would translate to restitution under Section 91 of the *Civil Procedure Act*. The Section states that;
 - '(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.
 - (2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).'
11. I have also given thought of the facts of this matter and I come to conclusion that the issues raised by the appellant were issues related to satisfaction of decree in Kisii Chief Magistrates Courts miscellaneous civil application number 4 of 2023. In that scenario, the matters raised by the appellant would fall under Section 34 of the *Civil Procedure Act* which provides as follows;
 - '1. 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.



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.’
12. In *Shah v National Bank of Kenya Limited* (2023) KEHC 1324 (KLR) the Honourable Justice C. Meoli acknowledged and restated those questions arising from satisfaction of a decree should be canvassed in the court which issued the decree. She held that;
- ‘While it is evident that the second decree and execution thereon were irregular albeit premised on court orders, the question of refund of excess payments to the Respondent by the Appellant was not canvassed before the lower court in respect of the motion dated May 22, 2012 and cannot be entertained in this appeal. That matter lies with the executing court before which it can be canvassed pursuant to the provisions of Section 34 of the [Civil Procedure Act](#).’
13. Flowing from the above, it is my position that the magistrate was right in holding that the application should have been filed in the Kisii matter as only that court could order restitution of the property or determine whether the decree had been satisfied. This of course does not mean that if the appellant’s motor vehicle was wrongly or unlawfully sold, it cannot file a suit for damages. As things stand now, the existence of the two suits poses a possibility of having conflicting orders in matters in this court and the Kisii matters. If the lower court had issued orders as prayed in the application with the knowledge of valid and enforceable warrants in force which for all intents and purposes is a court order, it would have amounted to the court in milimani interfering with execution of live warrants of a court of concurrent jurisdiction. That would have been prejudicial to the proceedings in the Kisii matters.
 14. The appellant had leveraged its claim on the alleged illegal or unprocedural sale of its motor vehicle. The respondents produced documents to confirm that the motor vehicle was sold through valid court warrants. Sale of motor vehicle or any other property through a valid court warrant cannot be unlawful unless it is shown that there was a breach of the law. Even if there was a breach of the law in this matter, the 3rd respondent was not a party to the process. His only action was to buy the vehicle which was advertised and sold in execution of a court warrant. The appellant did not in my view sufficiently show any breach or violation of the law that attended the sale. The property in the vehicle is now in the hands of the 3rd respondent who was not aware, privy or a party to the court proceedings which culminated to the sale.
 15. It is notable that the orders the appellant was asking for were for injunction against transfer or modification of the motor vehicle. These orders were against the 3rd and 4th respondents only who had no role to play in the sale and such there could not be a cause of action against them. This being the position, it would be unfair and violation of the 3rd respondent’s right to encumber him from enjoying an asset he had lawfully bought. Any illegality in the process should be loaded on the 1st and 2nd respondents yet there were no prayers against them in the application. In the circumstances, I am not satisfied that the appellant made out a prima facie case with a probability of success against the 3rd and 4th respondents.
 16. On the limb of damages, I note that the plaintiff in its plaint has asked for an alternative prayer for the value of the motor vehicle which it puts at Kshs 1,600,000.00 plus loss of business until the date of the judgment. This makes it clear that the damages the appellant is likely to suffer are quantifiable. There



is no evidence to show that the respondents will not be in a position to compensate the appellant in the event it is successful in its suit. The damages that it is likely to suffer if the application is not allowed are therefore definite and quantifiable and cannot be termed as irreparable.

17. Having stated the above, I hold that even the balance of convenience tilted to the advantage of the respondents. The status quo at the time the application was made was that the vehicle had been sold to the 3rd respondent. It would then be inconvenience to the respondents if an order restraining registration of the 3rd respondent's interest in the motor vehicle including getting the necessary, important and statutorily compulsory documents in his name was issued.
18. The upshot of the above is that the appeal herein is not merited and I dismiss it with no orders as to costs since the respondents did not participate in the appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Njiru holding brief for Mr. Makori for the appellant and in absence of the appellant.

