



Naomi Wanjiku Mwangi t/a Mamalo Auctioneers v Januaris Kiko Kasyoki & Boniface Kasyoki Ngui (Suing as the Legal Representatives of the Estate of Eunice Ndinda Kitonyi) & another (Civil Appeal E470 of 2024) [2025] KEHC 2399 (KLR) (Civ) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E470 OF 2024

JN MULWA, J

MARCH 6, 2025

BETWEEN

NAOMI WANJIKU MWANGI T/A MAMALO AUCTIONEERS APPELLANT

AND

**JANUARIS KIKO KASYOKI & BONIFACE KASYOKI NGUI (SUING AS
THE LEGAL REPRESENTATIVES OF THE ESTATE OF EUNICE NDINDA
KITONYI) 1ST RESPONDENT**

**BERNARD MUTURI MWANGI ALIAS MICHAEL MUTURI 2ND
RESPONDENT**

RULING

1. The Notice of motion dated 9/04/2024 was filed by the Appellant seeking numerous orders against the Respondents as hereunder
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. An order of injunction restraining the Respondents from harassment, intimidation, arrest or causing incarceration of the appellant by the OCS central Police Station in execution of orders of Hon. A. Nyoike delivered on 9/04/2024 in Milimani COMMSU No. E. 805 of 2022 pending hearing and determination of the appeal.



- f. An order of stay of execution of the ruling delivered on 9/04/2024 in Milimani Commsu No. E805 of 2022 together with the consent dated 5/02/2024 and adopted by the court on 22/02/2024 pending hearing and determination of the appeal.
2. The applicant invokes Sections 1A, 1B and 3A of the *Civil Procedure Act* as well as Order 42 Rule 6 of the Civil Procedure Rules among others; and Supported by an affidavit sworn on 9/04/2024 by the Applicant Naomi Wanjiku Mwangi.
3. The parties Advocates attended court on 23/09/2024 and directions issued that the Respondents to file responses if any to the application as well as submissions within 15 days; and upon service applicant directed to file its submissions also within 15 days.

As at date of preparing this ruling in January 2025, none of the above had been done by the parties. The application is therefore deemed as unopposed.

4. A brief synopsis of the motion and generally the appeal is that the primary suit, Milimani COMMSU No. E805 of 2022 was between Januaris Kiko Kasyoki & Boniface Kasyoki Nguu as plaintiffs vs. Bernard Muturi Mwangi as 1st defendant.
5. That upon the suit being heard, judgment was entered in favour of the plaintiff against the defendant upon which the plaintiff took out execution proceedings against the defendant, and instructed the appellant herein, Naomi Wanjiku Mwangi t/a Mamalo Auctioneers to execute the decree, then in the sum of Kshs. 1,109,415/= as seen in the warrants of attachment.
6. Upon warrants of attachment and sale being obtained, the Auctioneers proceeded to attach the J/D's vehicles KBV 243A and KCB 893M; that the said motor vehicles were duly sold by public Auction on 31/09/2023 as stated in the notification of sale, to one Samuel Ngure, that on 10/11/2023, the Auctioneers remitted the sale proceeds of Kshs. 469,500/= less their charges, to the 1st Respondent, and the Auctioneers released motor vehicle Registration No. KBV 243A back to the 2nd Respondent herein Bernard Muturi Mwangi. Upon perusal of documents, it emerged that the Accident motor vehicle at the material times was insured by Directline Assurance Company Limited.
7. Thereafter without knowledge and or participation of the Auctioneers, the appellant in this appeal (the Insurance Company), through its Advocates, on the 5/02/2024 together with the Decree Holders Advocate Mr. Kasyoka, crafted and executed a consent order in the absence of the Auctioneers, upon a Notice of Motion dated 5/02/2024. The parties advocates appeared before Hon. A. Nyoike SPM, and recorded the consent that directly had serious ramifications on the appellant herein (the Auctioneers.) who were not party to the consent orders.

(The consent order shall be annexed hereto for ease of reference) as marked "NM5".

8. A perusal of the consent order that the court proceeded to adopt as a court order by and large places numerous obligations upon the Auctioneers yet they were not party to the same.

To mention a few, the Auctioneers were to:-

- a. Return motor vehicle KBV 243A and KCB893M stated to have been irregularly released to the Decree Holder returned to Central Police Station yet it had been returned to its owner, at their own costs.
- b. The motor vehicle sold by public Auction to be returned to the owner, yet it was sold long before the consent order and proceeds paid to the Decree Holder.
- c. OCS Central Police to enforce the consent orders against the Auctioneers, among others.



9. In the case of John Waruinge kamau vs. Phoenix Aviation Limited [2015] eKLR the court considered circumstances in which a consent order can be set aside thus:-

“...are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement hence not been fulfilled. The grounds for setting aside contracts are fraud, mistake or misrepresentation”.

10. A consent entered into is binding on the parties to the consent as held in the case of Kenya Commercial Bank ltd vs Specialized Engineering Company Ltd [1982] KLR.

A party who is not a party to a consent cannot be bound by the terms of the consent and the obligations created therefrom cannot be placed upon the absent party to perform that which it was not party to.

11. As regards the prayers sought by the appellant by the instant application, the applicant reads mischief in the consent order and may, as rightfully stated by the applicant harass and or intimidate them when they were performing lawful duties placed upon them as Auctioneers.

12. It is unfortunate that the trial court could not see the mischief in the consent order crafted and indeed adopted by the said court; because a casual perusal of the same carefully would have raised doubts in the mind of the trial magistrate as the appellant was not party to the consent, and thereby refuse to adopt it.

13. For the above, the court finds the appellants application dated 9/04/2024 to be merited.

Consequently the court proceeds to allow the prayers sought thereof and stay all proceedings in the Milimani COMMSU No. E805 of 2022 pending hearing and determination of the appeal.

In addition, the Applicant/Appellant is granted an order of injunction restraining the respondents by themselves or their agents or servants from harassing, intimidating or causing the arrest or in any other manner whatsoever the appellant pending hearing and determination of the appeal.

This matter shall be listed before the DR. Hon. Wambu for further direction on the appeal.

Orders accordingly.

14. In the matter of costs, the court finds it appropriate to order that costs of the application be borne by the Respondents, to the appellant.

Orders accordingly

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH DAY OF MARCH 2025.

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JANET MULWA.

JUDGE

