



**Wekwanya v Wamalwa Simiyu & Company Advocates & another (Miscellaneous Application 109 of 2018) [2025] KEHC 4699 (KLR) (9 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4699 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION 109 OF 2018**

**REA OUGO, J**

**APRIL 9, 2025**

**BETWEEN**

**MARTIN KHAEMBA WEKWANYA ..... APPLICANT**

**AND**

**WAMALWA SIMIYU & COMPANY ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**TIMPECH AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before the court is dated 14/10/2024, brought under Article 40 of the Constitution, section 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 3, 4 & 10, Order 45 Rule 9 and 7 of the Civil Procedure Rules. The applicant seeks the following orders:
  - a. Spent
  - b. That leave be granted to the applicant to change the counsel on record.
  - c. That pending the hearing and determination of the this application interparties, this honourable court be pleased to issue an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents by themselves, their officers, servants, agents or anyone acting on the respondent's behalf from auctioning the property of the applicant.
  - d. That pending the hearing and determination of the application the court be pleased to set aside execution process as there is no decree on record making execution illegal.
  - e. That pending the hearing of the suit inter-parties, the court be pleased to issue an order compelling the 1<sup>st</sup> respondent from harassing the applicant.
  - f. That costs be borne by the respondent.



2. The applicant filed an affidavit in support of the application. It was averred that he was not served with any court documents that led to the decree and was condemned unheard. The 1<sup>st</sup> respondent has now instructed auctioneers to execute the certificate of costs, yet he had paid over Kshs 100,000/- through a different firm of auctioneer. The 2<sup>nd</sup> respondents auctioned his property, amounting to Kshs 200,000/-, yet no decree was obtained. He seeks that the court intervene and issue appropriate orders so that he does not suffer irreparable harm and damages.
3. The 1<sup>st</sup> respondent in response avers that the application before the court is an outright abuse of the court process. He contends that the applicant filed an application dated 7/02/2023 seeking the order compelling the 1<sup>st</sup> respondent to stop harassing him, similar to that sought herein. The said application of 7/02/2023 was heard and dismissed. It was the 1<sup>st</sup> respondent's case that the decree was issued on 31/01/2023; therefore the allegation that there is no decree is baseless.
4. The application was argued in court by Mr. Sichangi, Counsel for the applicant and Mr. Wamalwa for the 1<sup>st</sup> respondent.
5. At the outset, I note that there was no substantive prayer that was sought in the application. Mr. Sichangi in his submissions, argued that they were seeking prayers (c) and (d) of the notice of motion. All the prayers by the applicant were to be made "pending hearing and determination of the application" to mean that they were not tenable. The court in *Foundation Ministry Church-Kitui & another v Mailu & 3 others* (Civil Case E002 of 2022) [2022] KEHC 397 (KLR) (6 May 2022) (Ruling) when addressing a similar issue held as follows:

"The substantive prayers (4,5,6, 7 and 8) as sought in this application are not tenable because they are anchored on the pendency of this application which means that they cease immediately this application is determined. This is because the said prayers are couched or premised on the determination of "the hearing and determination of this application" and not either the application dated 20.04.2022 or the main suit. The omission by the applicants in my considered view renders the said prayers (4,5,6,7 & 8) defective and incompetent...

7. It is quite apparent that the applicant may have been taken by surprise by the defendants' action and out of haste drafted this application without noticing that is anchored on air literally because the way it is framed or couched its lifespan ends immediately I pronounce myself on this application which in itself defeats the purpose of approaching this court in the first place."
6. The upshot of this ruling is that the application dated 14/10/2024 is incompetent and the same is struck out with costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 9<sup>TH</sup> DAY OF APRIL 2025**

**R.E. OUGO**

**JUDGE**

In the presence of:

Applicant - Absent

Mr. S. Wamalwa -For the 1<sup>st</sup> Respondent

Wilkister -C/A

