



Upperhill Chambers Limited v Vio Tech Limited & another (Miscellaneous Application E162 of 2022) [2025] KEHC 6365 (KLR) (Commercial and Tax) (20 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E162 OF 2022**

JWW MONG'ARE, J

MAY 20, 2025

BETWEEN

UPPERHILL CHAMBERS LIMITED APPLICANT

AND

VIO TECH LIMITED 1ST RESPONDENT

CHINA WU-YI LIMITED 2ND RESPONDENT

RULING

1. By an application dated 3rd December 2024 and made under, inter alia, Articles 40, 50 and 159 of *the Constitution* and sections 1A, 1B, 3A, 44 and 64 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Orders 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (“the Rules”), the 1st Respondent (“Vio”) seeks to stay the execution of the judgment and decree of the court issued on 11th January 2024 and the resultant warrants of attachment and proclamation issued by the Applicant’s (“Upperhill”) auctioneers. Vio centers its application on the grounds set out on its face and the supporting affidavit of its director, SAMSON NJOROGE, sworn on 5th December 2024. The application is opposed by Upperhill through the affidavits of its Facilities Manager, CAROLYNE MALLO, sworn on 13th December 2024 and 11th February 2025. The application was canvassed by way of written and oral submissions by the parties’ respective counsel which I have carefully considered and I will make relevant references to them in my analysis and determination later on.
2. For context, this matter arose out of an arbitral process between the parties that culminated in an award by the arbitral tribunal dated 30th August 2021 where inter alia Upperhill was awarded Kshs.26,457,165.90/= against Vio. Upon application by Upperhill, this award was subsequently adopted as a judgment and order of the court on 11th January 2024. Aggrieved, Vio approached the Court of Appeal and sought certification and leave to appeal against the court’s ruling as well as stay any



further proceedings of the court. The Court of Appeal, in a ruling dated 25th October 2024, dismissed the application (see *Vio Tech Limited v Upperhill Chambers Limited & Another* [2024] KECA 1496 (KLR)). Thereafter, Upperhill sought to execute the decree hence the present application.

Analysis and Determination

3. The gravamen of Vio’s application is that Upperhill has sought to execute the decree prior to taxation of the Bill of Costs and that it did not seek leave to do so contrary to the provisions of section 94 of the *Civil Procedure Act* which provides that:

94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

4. In rebuttal, Upperhill states that the decree it extracted is final and that there is nothing pending between them and Vio in that the arbitral tribunal did not award it costs. Going through the record, I note that Vio raised this issue in opposition to the application for recognition and enforcement when it stated that the arbitral award was partial in that there was no subsequent additional award made to clarify the position of the arbitrator on assessment of costs. The court noted this argument but declined to accept it by holding that the issue of costs as between the parties was settled and that there was no issue pending for determination between the parties. I am therefore in agreement with Upperhill that indeed, there is nothing pending between the parties in respect of the arbitration. Further, in the arbitral award, the arbitral tribunal held that “[Upperhill] will bear its own costs of the reference” and I am further inclined to agree with Upperhill that it was never awarded costs in the arbitration and therefore, the issue of taxation of costs as between Vio and Upperhill cannot arise. Therefore, I find that the decree issued as between Vio and Upperhill is final and that there is nothing pending for determination.
5. Vio has also sought to lift the warrants of attachment and proclamation by stating that the same was unlawful and irregular in that it does not state what has been proclaimed, it does not show a proper condition, it has no estimated value of the proclaimed goods leaving room for abuse, the proclaimed goods are tools of trade of Vio, it shows auctioneer’s charges of Kshs.4,485,636.00/= with no basis whatsoever as even the value of the goods is not stated, the invoice by the Auctioneer predates the actual proclamation, the warrants require the auctioneer to give 15 days’ previous notice after making due proclamation but they have only given 7 and lastly, that the decretal amount is overstated.
6. Upperhill did not give any response to the above defects cited by Vio but going through the said proclamation, I am inclined to agree with Vio’s submission that the same appears to be casually done by the auctioneer and is not in line with Rule 12 of the Auctioneers Rules which calls for specificity of the items being attached, their conditions and their values as follows:

12

- (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
 - a)



- b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory, the auctioneer shall sign a certificate to that effect.
- c) in writing, give to the owner of the goods seven days' notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.

7. Upperhill's auctioneers clearly did not follow the aforementioned Rules to the letter and the Court of Appeal in *LAKELAND MOTORS LIMITED vs HARBHAJAN SINGH SEMBI* [1998] KECA 246 (KLR) stated that courts cannot countenance an execution process that is contrary to the Rules as follows:

There does not appear to be any provision in the *Auctioneers Act*, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule. Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution. Hence, while we decline to order a stay as requested by the applicant under rule 5 (2) (b) of the Rules of this Court as outlined at the commencement of this ruling, we think that on account of the respondent's non-compliance with the law in the execution process of the decree as we have indicated in this ruling and to prevent abuse of the process of this Court, in the exercise of our inherent power under rule 1 (3) of the aforesaid Rules the said execution process must and is hereby set aside.

8. As the proclamation by Upperhill's auctioneers is marred by procedural and substantive irregularities, the execution arising from the same cannot be allowed. If Upperhill seeks to proceed with the execution, then it must advise its auctioneer to file a proper proclamation that is consistent with Rule 12 of the Auctioneer's Rules (see *Joachim Von Stackelberg & another v Sylke Obst* [2021] KEHC 4204 (KLR))

Conclusion and Disposition

9. In the foregoing, I find merit in the application by Vio that the proclamation notice issued by Upperhill's auctioneer is defective and irregular for want of compliance with Rule 12 of the Auctioneers Rules and the same is hereby set aside. A stay of execution is granted for a period of 30 days and until Upperhill's auctioneers issue a proper Proclamation Notice that is consistent with Rule 12 of the Auctioneers Rules. Each party shall bear its own costs of the application. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MAY 2025

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

1. Ms. Nyamu holding brief for Mr. Waigwa for the Applicant.



2. Mr. Ngatia SC for the Respondent.

3. Amos - Court Assistant

