



REPUBLIC OF KENYA



**Mwaniki t/a Anfield Auctioneers & another v Itawa (Civil Appeal
E081 of 2025) [2025] KEHC 8587 (KLR) (Civ) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8587 (KLR)

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

CIVIL

CIVIL APPEAL E081 OF 2025

JN MULWA, J

JUNE 19, 2025

BETWEEN

MARTIN N MWANIKI T/A ANFIELD AUCTIONEERS 1ST APPELLANT

PROGRESSIVE CREDIT LIMITED 2ND APPELLANT

AND

ZABLON MATHENGE ITAWA RESPONDENT

RULING

1. Before the Court is a Motion dated 30th January 2025 brought by the Appellants under Order 42 Rule 6, & Order 51 Rule 1 of the Civil Procedure Rules, 2010, Under Article 159 (2) (d) of *the Constitution* of Kenya, 2010, Sections 3A & 63E of the *Civil Procedure Act* seeking orders that this Honourable Court be pleased to grant an order of stay of execution of the ruling and order of the Hon. Becky Cheloti Mulemia delivered 28th January, 2025 in Milimani Misc. Application. No. E2595 of 2024 (Martin N. Mwaniki t/a Anfield Auctioneers & Anor Vs Zablun Mathenge Itawa) pending the hearing and determination of this application and the appeal as well as an order of stay of execution of the said ruling pending hearing and determination of the appeal.
2. The application is premised on the grounds on the face of the application and Supporting Affidavit of Martin N. Mwaniki the 1st applicant dated 30th January 2025.
3. There is no response to the Motion save for a Memorandum of Appearance dated 4th February 2025 filed by the firm of M/S Mwirigi, Nzomo & Co. Advocate Of P. O. Box xxxx-60200 Meru, Rewa House, 3rd Floor.



Applicant's Case.

4. Learned Counsel, Ms. Ondabu for the applicant submitted that there is a pending case in Meru CMCC cited as MCELC NO. E024 OF 2022 in which the 1st Applicant auctioneer was instructed to attach the Respondents' vehicles at Nairobi and security for the auctioneer granted security in the Miscellaneous Application, upon which the two vehicles were attached and taken to a yard.
5. Counsel further stated that the Respondent applied to set aside the orders that were already executed which the court granted on 28/1/2025 and issued orders for repossession of the vehicles from the auctioneers pursuant to a mortgage.
6. It is the Applicant's argument that a court cannot set aside orders that have been executed and prayed that the said orders be stayed as they were obtained illegally.

Respondent's Case.

7. Learned Counsel Mwirigi for the Respondent submitted that the motion had been overtaken by events as orders had been executed and vehicles repossessed, and that the stated case at Meru CMCs was pending when the Preliminary Objection was filed, was heard and dismissed, was appealed against and the appeal dismissed. Counsel stated that the matter came up on 13/3/2025 in the Meru court and that the import of the orders given were set aside, and that the same are negative orders that cannot be acted upon.
8. The Respondent argued that the Appellant had not satisfied conditions under Order 42 of the Civil Procedure Rules and that execution had already taken place and therefore the instant application is moot.

Analysis and Determination.

9. Having considered the instant application, and the reply by the Respondent, the main issue that falls for determination is:-

Whether a miscellaneous application is the proper manner of initiating a suit seeking substantive and final orders.

10. Order 3 Rule 1 of the Civil Procedure 2010 prescribes the form and manner of institution of a suit.

In *Rockland Kenya Ltd –vs- Commissioner General of KRA & Another* (2020) eKLR, the court held that substantive orders cannot be issued in miscellaneous applications. The Court equally cited with approval the decision in *Whitmore Investment Limited –vs- County Government of Kirinyaga & 3 Others* (2016) eKLR where Limo J had stated that;

“.....where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy, raised in the application, it should have moved this court properly in the manner provided by the law.”



11. In the case of Scope Telematics International Sales Ltd -vs- Stoic Company Ltd & Another [2017] eKLR, the Court of Appeal held that:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, overlooking a statutory imperative and the above authorities, the learned judge cannot be said to have exercised his discretion property. There can be no other interpretation of rule 2. The application should have been anchored as a suit. It was not about what prejudice the appellant or and 2nd Respondent would suffer or what purpose the suit would have served. The discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was totally incurably defective.”

12. From the authorities cited above, it follows that the manner of initiating a suit is not a mere technicality; it is actually the basis of jurisdiction. A court can therefore raise it suo moto without being moved by any party.
13. The Applicant seeks grant of an order of stay of execution of the ruling and order of the Hon. Becky Cheloti Mulemia delivered on 28th January 2025 in Milimani Misc. Application No. E2595 of 2024 Martin N. Mwaniki t/a Anfield Auctioneers & Anor –vs- Zablon Mathenge Itewa.
14. The parties to the instant application have a pending matter in MERU CMCC NO. ELC NO. E024 of 2022. The auctioneers sought orders which were issued on the 20th December 2024 but failed to disclose to the court that there was a substantive suit pending in the said court.
- Ms. Ondabu argued that the auctioneer was instructed to attach vehicles at Nairobi, the main reason why the auctioneer was granted security in the motion in miscellaneous application.
15. There is no evidence on record of the court order commanding the auctioneer to attach the vehicles in the substantive suit in Meru and that the auctioneer misled the Court in Miscellaneous Application No. E2595 of 2024 by not disclosing the existence of a case in Meru, CMCC Court.
16. It is callous of an auctioneer, an officer of the court by virtue of his duties to obtain relief on an ex-parte statement without making full disclosure of all the material facts to aid the Court arrive at a conclusive and just decision. The argument that the Respondent ought to file a substantive suit does not stand as the applicant benefited from a misrepresentation of material facts wholly borne by them.
17. A party instituting the same and similar actions between the same parties in different courts even though on different grounds amounts to an abuse of the process of court and only serves to embarrass the Courts.
18. On the matter of stay of execution of the orders of the trial court dated 28/1/2025, the court. Considering the material facts presented before it, finds no compliance by the Applicants, of provisions and conditions set out under Order 42 Rule 6 of the Civil Procedure Rules. In fact, none has been complied with.
19. Based on the foregoing, the Applicants Notice of Motion dated 30th January, 2025 is dismissed with costs to the Respondent.
20. The appeal shall be placed before the Deputy Registrar of the Civil Appellate Division for directions on 15/07/2025.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2025.



.....

JANET MULWA.

JUDGE

