



**Mburu & another v Kengere & 3 others (Civil Appeal
E008 of 2025) [2025] KEHC 10076 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E008 OF 2025
FN MUCHEMI, J
JULY 10, 2025**

BETWEEN

FRANCIS KINYANJUI MBURU 1ST APPELLANT

JOHN MBURU NJUGUNA 2ND APPELLANT

AND

HERMAN AGWENYI KENGERE 1ST RESPONDENT

JEREMIAH MOSENDU T/A ICON AUCTIONEERS 2ND RESPONDENT

JANE MUNIU T/A ICON AUCTIONEERS 3RD RESPONDENT

MOTOR SCOPE AUTO GARAGE 4TH RESPONDENT

RULING

Brief Facts

1. The application dated 27th January 2025 and Amended on 27th February 2025 seeks for orders of the sale of motor vehicle registration number KBT 477S for recovery of the sum of Kshs. 174,016/- being auctioneer's charges yet to be taxed despite the trial court orders of 16th December 2024 directing the 2nd and 3rd respondent to have the said charges taxed pending hearing and determination of this appeal. The appellants further seek to have the said motor vehicle unconditionally released to them as the 2nd and 3rd respondents have refused to file their bill of costs for taxation as directed by the trial court on 16th December 2024. Additionally, the appellants seek for orders that with the full satisfaction of the claim of Kshs. 213,319/-, there is no decree on which to execute. As such, the continued holding of the motor vehicle registration number KBT 477S coupled with threats to dispose the same so as to recover the sum of Kshs. 174,016/- is unjustified.
2. In opposition to the application, the 1st respondent filed a Replying Affidavit dated 14th March 2025 and the 2nd & 3rd respondents filed a Replying Affidavit dated 6th February 2025.



Appellants' Case

3. The appellants state that the 1st respondent and themselves, on 14th November 2024 entered into a full consent on stay of execution and the full settlement of the entire decretal amount of Kshs. 213,319/- which was subsequently paid to the 1st respondent's advocates between 14th November 2024 and 19th November 2024. The consent further provided for payment of auctioneers charges as strictly as provided for by the Fourth Schedule Part II at Kshs. 17,371/-. Despite the agreed sum, the 1st respondent demanded an additional Kshs. 156,645/- in un-explained additional charges of opening file, investigations, proclamation, inventory, transport, labour, application for police assistance, transport to Ngong, additional labour, security for police assistance, towing charges, advertisement, insurance and miscellaneous expenses which charges the trial court did not agree with. For this reason, the court, on 16th December 2024 ordered the 2nd and 3rd respondent to file their bill of costs for taxation/assessment.
4. The appellants argue that the 2nd and 3rd respondents have completely failed to file their bill of costs for assessment but have instead persistently threatened to dispose the motor vehicle registration number KBT 477S so as to recover their untaxed costs which amount to extortion, blackmail and is marred with impunity and illegalities.
5. The appellants state that with the full satisfaction of the trial court's decree of Kshs. 213,319/- there is no decree left to execute on.

The 1st Respondent's Case.

6. The 1st respondent states that the application seeks orders that are dispositive of the appeal and orders that overturn the impugned ruling. The 1st respondent further states that the orders sought in the application can only issue upon substantive hearing of the principal appeal on merits.
7. The 1st respondent states that the present court has been irregularly moved to set aside the orders of the trial court and substitute the ruling thereof with the orders initially sought in the application that was substantially dismissed and orders sought in the appeal herein. The 1st respondent states that the principal orders, that motor vehicle registration number KBT 477S be released was the very same order sought as order No.4 of the application dated 21/11/2024. The appeal herein emanates from the learned adjudicator's ruling of 16/12/2024 in regard to the same application. The court in its ruling dated 16/12/2024 did proscribe the respondents from disposing the subject motor vehicle as per the terms of the consent.
8. The 1st respondent argues that whereas the appellants complain that the auctioneers have failed to tax their costs they themselves are at liberty to move the auctioneers board or the magistrate's court to tax the costs but have failed to do so.

The 2nd & 3rd Respondents' Case

9. The 2nd and 3rd respondents state that the instant application is improperly before the court as it invites the court to consider issues of fact thereby offending the provisions of Section 38 of the *Small Claims Court Act* which limits appeals from decisions to only matters of law. It is further argued that the application is premature and bad in law as the appellants have invited the court to make final orders at an interim stage without determining itself on the merits of the substantive appeal.



10. The 2nd and 3rd respondents state that the affidavit herein is similar to the application dated 21st November 2024 before the trial court, which issues were canvassed by the parties resulting in the ruling delivered on 16th December 2024.
11. The 2nd and 3rd respondents state that they did not refuse to tax their costs but parties were engaged in negotiations in good faith with the aim of amicable settlement of the auctioneers costs and related charges but negotiations were defeated primarily due to the appellants' refusal to settle auctioneers' costs and related expenses insisting on payment of a paltry Kshs. 17,371/-.
12. The 2nd and 3rd respondents aver that they prepared and filed their Bill of Costs dated 27th January 2025 vide Thika Miscellaneous Application No. E008 of 2025 Jeremiah K. Muchendu t/a Icon Auctioneers vs Francis Kinyanjui Mburu and John Mburu Njuguna which is coming up for taxation on 3rd March 2025.
13. The 2nd and 3rd respondents aver that there have been no attempts of disposing the motor vehicle and there is no intention to dispose of the same as such would amount to contempt of court following the ruling of the court below dated 16th December 2024. Further, the appellants seeking the unconditional release of the motor vehicle at the interim stage would amount to overturning the decision of the trial court at an interim stage without determining the merits of the appeal.
14. The appellants filed an undated Supplementary Affidavit and state that the appeal before the court is on issues of law and in particular the legality of the respondents' refusal to file a bill of costs so as to recover the sum of Kshs. 174,016/- in auctioneers charges which have not been taxed despite the trial court orders of 16th December 2024.
15. The appellants state that the respondents filed their bill of costs two weeks after they served them with the instant appeal thus there has been a delay of 8 weeks.
16. The appellants aver that the respondents have not sold the suit motor vehicle following the ruling of this court however after the ruling of the lower court they moved the suit vehicle from the 4th respondent and they do not know where it is. Their efforts to know of the vehicle's whereabouts from the 4th respondent have proved futile as they have been instructed not to inform them by the 2nd respondent.
17. The appellants state that they have always been ready and willing to pay the respondents the sum of Kshs. 17,371/- and deposit any reasonable sum in court so as to secure the release of the suit motor vehicle.
18. The appellants state that the auctioneers fees has been increased to Kshs. 225,817/- which is more than the decretal amount of Kshs. 213,319/-.
19. Parties disposed of the application by way of written submissions.

The Appellants' Submissions

20. The appellants refer to the case of Nairobi Petition No. 38 of 2017 Dismas Wambola vs Cabinet Secretary Treasury & 5 Others [2017] eKLR and submits that the preliminary objection is not sustainable as the application raises questions of fact which would require adducing and interrogation of evidence upon its hearing.
21. The appellants submit that the appeal before the court is on issues of law and in particular the legality of the respondents refusal to file a bill of costs and continue with execution by detaining their motor vehicle coupled with threats to dispose of the same. The appellants argue that the main appeal is



largely on the claim for loss of user whereas the instant application is on stay of execution and the unconditional release of their motor vehicle following the respondents' refusal to file a bill of costs.

22. The appellants rely on Order 42 Rule 6 of the Civil Procedure Rules and the cases of Patrick Kalava Kulamba & Another vs Philip Kamosu & Roda Ndanu Philip (Suing as the legal representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR and Nairobi Civil Appeal 427 of 2015 Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutubwa [2016] eKLR and submit that a party can file an application for stay of execution in the present court whether such application shall have been granted or refused by the court appealed from.
23. The appellants submit that the decretal amount of Kshs. 213,319/- was paid in full hence their vehicle is being held to leverage them to pay auctioneers charges of Kshs. 174,016/- which with the filing of the auctioneers' bill of costs have since increased to Kshs. 225,817.44/- which is more than the decretal amount. The appellants thus submit that the auctioneers should not be allowed to keep their motor vehicle which is worth Kshs. 1 million and which they use for personal and commercial purposes.
24. Relying on the case of Siaya Civil Appeal E003 of 2022 Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga [2022] eKLR, the appellants submit that they stand to suffer substantial loss of over Kshs. 503,050/- as well as costs and interest if stay of execution is not granted. Further, the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The appellants further submit that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank.
25. On the issue of whether the application has been filed without undue delay, the ruling of the lower court was delivered on 16th December 2024, the memorandum of appeal was filed on 15th January 2025 and the instant application filed on 27th January 2025 about 42 days after the ruling was delivered. Thus, the delay was not inordinate.
26. the appellants rely on the case of Machakos Civil Appeal E034 of 2024 Matata & Another vs Rono & Another [2024] KEHC 2799 and submit that they are willing to make direct payment of the respondents' fees as strictly provided for in the Fourth Schedule Part II.

The 2nd & 3rd Respondents' Submissions

27. The 2nd and 3rd respondents submit that the appellants are inviting this court to issue final declaratory orders and arrive at a finding that the continued holding of the appellants' motor vehicle despite the trial court's orders of 16th December 2024 amounts to extortion, blackmail and is marred with impunity and illegalities on the part of all the respondents.
28. The 2nd and 3rd respondents rely on Section 38 of the [Small Claims Court Act](#) and the case of Amunga vs Muisu (Civil Appeal E725 of 2022) [2024] KEHC 2504 (KLR) (Civ) (8 March 2024) (Judgment) and submit that the appellants have guised their appeal in the instant application introducing issues of fact and law.
29. The 2nd and 3rd respondents submit that the nature of the orders in the impugned ruling are negative orders which are incapable of execution. The appellants are not appealing the consent judgment entered into between the parties and thus there is nothing arising out of the ruling of the trial court to stay. To support their contentions, the 2nd and 3rd respondents rely on the case of Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme vs Millimo, Muthomi & Co. Advocates & 2 Others (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR) (18 February 2022) (Ruling).



30. The 2nd and 3rd respondents submit that the appellants have not met the threshold for the grant of orders of stay of execution pending appeal pursuant to Order 42 Rule 6(2) of the Civil Procedure Rules. The appellants have not shown any substantial loss likely to be suffered as there is no threat of execution noting that the holding of the attached motor vehicle is pursuant to a consent judgment where parties agreed that the release of the motor vehicle would be subject to the full payment of auctioneer fees and storage costs. Thus disposing the suit motor vehicle would be in contravention of the terms of the consent judgment and the ruling dated 16th December 2024.
31. The 2nd and 3rd respondents submit that in the event the court grants the orders of stay of execution, the appellant ought to furnish adequate security to cover the auctioneer costs, and storage fees.
32. The 2nd and 3rd respondents submit that the order seeking for the unconditional release of the suit motor vehicle to the appellants is not an interlocutory relief but a final order which would have the effect of rendering the entire appeal an academic exercise and there will be no dispute remaining for resolution. To support their contentions, the 2nd and 3rd respondents rely on the case of Scania Credit Solutions (Pty) Limited vs Hodan Wholesale Limited (Commercial Civil Case 583 of 2021) [2021] KEHC 11 (KLR) (Commercial and Tax) (8 September 2021) (Ruling) and submit that there are no special circumstances that have been led that would warrant granting of the final orders of unconditional release of the motor vehicle before payment of the auctioneers' fees and storage costs.
33. The main issue for determination is whether the application has merit.

The Law

Whether the application has merit.

34. The appellants filed an application dated 21st November 2024 seeking orders similar to the ones in the present application. The trial court rendered its ruling on 16th December 2024 and held that motor vehicle registration number KBT 477S be released to the appellants herein upon payment of storage fees from the date of attachment to 19th November 2024 and payment of auctioneers fees after taxation of their bill of costs. Being aggrieved by the decision of the lower court, the appellants lodged an appeal on 15th January 2025 vide their memorandum of appeal. On perusal of the appeal, it is evident that it emanates from the ruling dated 16th December 2024 for the application dated 21st November 2024 which application is similar to the application before this court. Thus, it would be premature for the court to consider the present application which is the subject of the appeal at this juncture.
35. It is therefore, my considered view that determining this application would render the appeal moot.
36. Consequently, the orders sought in the application dated 27th January 2025 and Amended on 27th February 2025 are hereby declined.
37. The parties herein are advised to fast-track the hearing of the appeal without further delay.
38. The costs of this application shall abide in the appeal.
39. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE

