



Mbigi Njuguna & Co. Advocates v Town Clerk, City Council of Nairobi; Chege & another (Interested Parties) (Miscellaneous Case 308 of 2006) [2024] KEHC 178 (KLR) (Civ) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 178 (KLR)

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

CIVIL

MISCELLANEOUS CASE 308 OF 2006

AA VISRAM, J

JANUARY 24, 2024

BETWEEN

MBIGI NJUGUNA & CO. ADVOCATES APPLICANT

AND

THE TOWN CLERK, CITY COUNCIL OF NAIROBI RESPONDENT

AND

FRANCIS KAIRU CHEGE INTERESTED PARTY

STANLEY T. MUGACHA T/A GALAXY AUCTIONEERS INTERESTED PARTY

RULING

1. This ruling relates to the Applicant's Notice of Motion dated 2nd November, 2021, seeking the following orders: -
 - i. That the Applicant in this suit Mbigi Njuguna & Co. Advocates be ordered to refund to the 2nd Interested Party – Galaxy Auctioneers the sum of Kshs.215,000/= together with the interest accrued paid to them by the said 2nd Interested Party on the 14th January 2010.
 - ii. That the costs of this Application be provided for.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Stanley T. Mugacha, the 2nd Interested Party herein, sworn on 2nd November, 2021.
3. The Applicant averred that he was directed to execute attachment warrants issued in this case on 17th December, 2010, against the Respondent while acting on behalf of the Applicant. Following the



execution, he sold the motor vehicle KAW 737Z owned by the 1st Interested Party, Francis Kairu Chege, for Kshs. 750,000/=.

4. The deponent further averred that out of that sum, he paid Kshs. 215,000/= to the Applicant on 4th February, 2011, and after the Respondent filed an application on 8th March, 2011, the Hon. Lady Justice Rawal issued a ruling on 22nd November, 2011, setting aside the execution process.
5. The Applicant then filed an application seeking orders from the court to determine what would happen to the vehicle. Sergon, J. issued a ruling on 15th January, 2020, revoking the attachment and sale of the vehicle in question; and ordered a refund to the 1st Interested Party of any amount paid for the purchase of the vehicle in question.
6. The 2nd Interested Party by way of the present application contends that the sum paid to the advocates was part of the proceeds of sale and ought to be refunded to him based on the court order as stated above.
7. The Respondent filed a Replying Affidavit sworn by Mr. Dominic Njuguna Mbigi on 11th May, 2023. He deposed that the attachment was not unlawful, and that Rawal, J (as she then was) had declined to declare the same as such. He stated that Her Ladyship's finding was that the decretal sum had been fully settled, and that there was, in fact, an over payment in the amount of Kshs. 244, 627/=.
8. He further deposed that Her Ladyship had pointed out that there was an order of the High Court given on 18th October, 2010, which had held: -

“Sequestration of such of the Respondent’s council movable property as will be enough to satisfy the decree and interest accrued in this case and the same be disposed of the public auction to satisfy the said sum”

9. He contended that the Decree Holder has since filed an appeal which to date has not been determined, arising out of the numerous applications between the parties, and because of a stay of execution pending the appeal is in place.
10. He deposed that the ruling by Sergon, J. stating that the attachment was unlawful was incorrect because Justice Rawal had already ruled that the same was lawful.
11. The Respondent cited the decision of the High Court in *Republic v Ministry of Industry Trade and Cooperatives & another ;Rocham Enterprises Limited (Ex-parte)* (2021) eKLR, where the court stated as follows: -

“It is trite that Court orders are binding on the party against whom they are addressed and until set aside remain valid, and are to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced in complying with the said orders. Furthermore, once a Court order is made in a suit the same is valid unless set aside on review or on appeal.”

Analysis and Determination

12. I have considered the grounds in support and in opposition to the application as well as the rival submissions of the parties.
13. It is evident to me that there may be some contradiction over the issue of whether or not the auction was unlawful, arising from the two different rulings made by Rawal, J. (as she then was) and Sergon, J. However, irrespective of whether or not the sale was lawful, there is a positive order made by Sergon, J



on 15th January, 2020, ordering the 2nd Interested Party to “forthwith refund to the 1st Interested Party, if any, the amount he paid for the purchase of the motor vehicle registration no KAW 737Z.”

14. The issue here, which has not come out clearly, appears to be that the 2nd Interested Party does not have the money to refund because the same was paid to the advocates’ law firm as part of the proceeds of sale. The 2nd Interested Party appears to be seeking orders for a refund to itself rather than for the purpose of compliance with the previous court order.
15. To my mind, the above issue has already been resolved by the ruling dated 15th January, 2020, the refund belongs to the 1st Interested Party and ought to be complied with unless the same has been overturned or stayed. The issue of legality of the auction may still be resolved by a higher court, on appeal, in due course, and appropriate orders may be made in the future. In the meantime, a refund in terms of the ruling dated 15th January, 2020, ought to issue immediately.
16. I am satisfied that the 2nd Interested Party paid the advocates’ law firm the sum of Kshs. 215,000/= out of the proceeds of sale (Kshs. 750,000/=) on 4th February, 2011. A receipt marked as Exhibit STM8 is attached and I find the same to be sufficient proof of the payment. The Respondent has not disputed receiving this amount, but has stated that the issue of a refund ought to be determined on appeal and in relation to the question of whether or not the auction was legal. I disagree. That is a separate issue. It may still be determined in the future. In the meantime, the order for refund must be complied with.
17. Accordingly, I am satisfied that the sum of Kshs. 215,000/= ought to be refunded to the 2nd Interested Party for the purpose of onward payment to the 1st Interested Party only and in compliance with the ruling issued by my brother Sergon, J. Alternatively, the refund may be made directly to the 1st Interested Party to avoid incurring additional delay and transfer fees. In any event, the payment shall be made within the next 30 days from the date of the ruling of this Honourable Court.
18. Based on the reasons set out above, I find that the application dated 2nd November, 2021, is allowed on the specific terms stated above. Each party shall bear its own costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF JANUARY 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....**For the Applicant**

.....**For the Respondent**

.....**For the 1st Interested Party**

.....**For the 2nd Interested Party**

