



**Kamau & another v JMW (Suing as Next Friend and Mother of EWK - Minor)  
(Civil Appeal E075 of 2021) [2024] KEHC 9899 (KLR) (7 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9899 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E075 OF 2021  
RE ABURILI, J  
AUGUST 7, 2024**

**BETWEEN**

**KATHANGA PETER KAMAU ..... 1<sup>ST</sup> APPELLANT**

**NOAH OTEKO OSUMBA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JMW (SUING AS NEXT FRIEND AND MOTHER OF EWK -  
MINOR) ..... RESPONDENT**

**RULING**

1. This is an appeal arising from the judgment and decree of Hon F. Rashid, Principal Magistrate at Winam Law Courts in Winam SPM CC No. 71 of 2018. The appellants herein were defendants in the running down claim against them by the respondent where consent judgment was entered in favour of the respondent. The appellant filed this appeal challenging the consent judgment. Vide judgment delivered on 29/3/2023, T.A.Odera J dismissed the appeal and upheld the judgment and decree of the lower court. She also awarded costs of the appeal to the respondent. The judgment was to apply to other matters in the series filed Kisumu HHCA E071, E072, E073, E074, E075, E077 and E078 all of 2021.
2. Following that judgment, the respondent filed a bill of costs dated 4<sup>th</sup> may 2023 which costs were assessed at Kshs 90,025 vide a ruling dated 30<sup>th</sup> October, 2023 and an application for execution filed by the respondent's firm of advocates on record for her, dated 5<sup>th</sup> February, 2024, claiming for kshs 96,175.
3. I note that although in the application for execution there is interest added to the assessed costs, there is no order for interests of costs awarded on appeal.
4. That aside, warrants of attachment and sale were issued to Bridge Lakes Auctioneer Services to attach and sell movable properties belonging to the appellants herein.



5. From the Proclamation, three motor vehicles were attached which included Motor vehicle registration number KBS xxxB Station Wagon belonging to the 2<sup>nd</sup> appellant herein. In the said proclamation dated 19/2/2024, the auctioneer claimed for Kshs 861,075 exclusive of the auctioneers fees and he did list all the nine civil appeals to which the orders of T.Odera J applied in her judgment dismissing the appeal.
6. Upon the execution process being set in motion, the applicants herein who are the appellants filed the application dated 26<sup>th</sup> march, 2024 seeking orders stay of sale of the motor vehicle registration number KBS xxxD which had been proclaimed and due for sale on 28/3/2024 by public auction. They also sought leave to summon the auctioneer for cross-examination on the process of service.
7. The applicants' case as per the grounds and affidavit sworn by the 1<sup>st</sup> appellant in support are that they were never served with proclamation, that the lower court case proceeded Exparte among other series files, that an application to set aside the judgment was dismissed giving rise to the appeals which were dismissed and that negotiations were ongoing for settlement but parties failed to agree. That the applicants were not served with any proclamation and warrants of attachment as per the rules as the agent purportedly served was unknown and that the vehicle had been advertised for sale.
8. Opposing the application, Kennedy Oduor advocate swore an affidavit on behalf of the respondent on 8<sup>th</sup> April 2024 and contending in deposition that the case in the lower court was heard and determined on merit with consents entered into; that negotiations for settlement failed and an appeal was lodged on each of the files, which appeals were dismissed with costs which were assessed hence the application for execution after the applicants refused to settle the assessed costs even after being reminded of the same. It was also deposed that the applicants had not said the truth as they were served with proclamation and after attachment, the vehicle was advertised for sale as per the notice in the newspaper annexed and sold and certificate of sale issued as annexed dated 28<sup>th</sup> March, 2024.
9. According to the respondent, the only remedy is a claim being lodged against the auctioneer where there is evidence of illegality on his part.
10. The application was argued orally with Ms. Ogango submitting in reiteration to the grounds and affidavit in support of the application that his clients were never served with the proclamation and warrants of attachment contrary to Rule 12 of the Auctioneers Rules. that the vehicle belonged to the 2<sup>nd</sup> appellant and that they had paid all costs to the respondent's advocates. That the applicants only learnt of the attachment when the advocate was served with proclamation and advertisement notice for 28<sup>th</sup> March, 2024 and that they contacted the client who said he was not aware of the attachment as the vehicle attached belonged to the 2<sup>nd</sup> appellant.
11. It was submitted that the vehicle had not been sold and that if it was sold, then the sale was illegal for lack of service. He urged that the auctioneer produce the vehicle or refund the proceeds of sale.
12. Opposing the application, Mr. Owuor counsel for the respondent submitted that the payments were made on 30<sup>th</sup> April 2024 in exclusion of one file and that a balance of Kshs 95675 was outstanding plus the auctioneers fees, arguing that the application was overtaken by events hence it should be dismissed with costs.
13. In a rejoinder, Ms Ogango submitted that they had fully paid the costs but the auctioneer was yet to file accounts on how the proceeds were applied. That the alleged sale was illegal as no proclamation was served.



## Determination

14. I have considered the application and the opposition thereto. The main issue for determination is whether the application is merited. The facts of the case are fairly simple that costs on appeal were assessed and the appellants did not settle the same thereby necessitating execution for recovery. The only question is whether the procedure for execution was followed as provided for in the law.
15. The applicants depose that they were never served with any proclamation or warrants of attachment and sale of the subject motor vehicle. The respondent through her advocate swore an affidavit asserting that the proclamation annexed were served upon the appellants agent at Emanyulia on 19/2/2024 but the agent refused to sign. The auctioneer never swore any affidavit to confirm that indeed he served the proclamation and warrants of attachment and sale.
16. An Auctioneer is bound by the Auctioneers Rules (LN 120/1977 Corr. No. 84/1997, L.N. 144/2009). In the context of this case Rules 12 and 13 are relevant. They provide as follows:
  12. Movable other than perishable goods and livestock
    - (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) record the court warrant or latter of instruction in the register;
      - (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 for in the court warrant or letter of instruction;
      - (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
      - (e) ensure safe storage of the goods pending their auction;
      - (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;
      - (g) not remove any goods under the proclamation until the expiry of the grace period..."
17. Therefore, aside from the [Civil Procedure Rules 2010](#) which bind the Auctioneers, the auctioneer must follow the process laid down in the Auctioneer's Act and the Rules made thereunder. An essential step in this process is that the judgment debtor must be accorded an opportunity to pay the debt and release his property. The steps are:



- (a) proclamation, giving seven days
  - (b) attachment, giving seven days before sale at a public auction
  - (c) public Auction by notice
18. Each step is distinct and each must take place on separate dates within the timescales set out. I reiterate that the Act and the Rules expressly provide for the judgment debtor to be afforded an opportunity to pay the judgment debt.
19. In this case, the proclamation is dated 19/2/2024. The warrants of attachment and which are left in the court file sale are not dated although signed and sealed by the Deputy Registrar. However, because this file is similar to HCCA E070 of 2021, I have perused the latter file and I observe that a similar proclamation and warrants are in that file and the same are equally not dated.
20. One would therefore not know, by perusing the two court files, the date when the warrants of attachment and sale were issued by the court following an application for execution and the proclamation dated 19<sup>th</sup> February, 2024. The two instruments cannot be issued on the same day. Proclamation is done first then the judgment debtor is given Notice of seven days to redeem the proclaimed property by settling the decree or order and in default, the auctioneer obtains warrants of attachment and proceeds to take possession of the goods which are kept in safe custody and advertised for sale not earlier than seven days of taking possession and not later than 14 days of such taking of possession.
21. Nonetheless, the affidavit sworn by Bernard Oduor Auctioneer in response to a similar application as the one subject of this ruling, the application in HCCA E070 of 2021 annexes copies of warrants of attachment and sale and the same are dated 16<sup>th</sup> February, 2024. The auctioneer in HCCA E070 of 2021 swore an affidavit to the effect that the warrants were issued on 16<sup>th</sup> February, 2024.
22. Additionally, the proclamation dated 19/2/2024 also states that the instructions letter is dated 16/2/2024. The question is, how did the auctioneer attach the motor vehicle KBS xxxD which he later sold on 28<sup>th</sup> March 2024 before proclaiming it? On that basis alone, I am satisfied that the auctioneer never served the appellants/ applicants herein with the proclamation dated 19<sup>th</sup> February, 2024 for motor vehicle registration number KBS xxxD. He did not even swear any affidavit controverting the applicants' assertion that they were never served with any proclamation or warrants of attachment.
23. Section 23 of the [Auctioneers Act](#) provides for duties of auctioneers as follows:
23. Duties of auctioneers
- A licensed auctioneer shall—
- (a) at all times act in a manner befitting an officer of the court and shall ensure that his employees, servants or agents act in like manner;
  - (b) act in accordance with such rules as may be prescribed when repossessing, attaching, storing or selling any property pursuant to the provisions of any written law or contract;
  - (c) maintain such books, accounts, records or other documents as may be prescribed and furnish the same to the Board at such time and in such manner as may be prescribed.
24. The Auctioneer is not expected to attach and sell goods before proclaiming the same and then issuing the Notice of proclamation to the judgment debtor. Even after proclaiming the goods, he must allow



- seven days before taking possession and after taking possession thereof, allow not less than seven days before selling the attached property.
25. In this case, it is clear that even if the proclamation was issued on 19<sup>th</sup> February, which was after the attachment on 16<sup>th</sup> February, the process was irregular because attachment cannot be done before proclamation and between the proclamation and attachment must exist seven days before the proclaimed goods are taken possession of.
  26. The auctioneer does not say when he took possession of the proclaimed motor vehicle subject of this application and ruling. What that means is that the judgment debtors were never issued with the proclamation and or warrants of attachment.
  27. The respondent claims through her advocate that the motor vehicle was sold at Ksh 725,000. Under Rule 18 (4) of the *Auctioneers Rules*, the auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 21, rule 74 of *Civil Procedure Rules* (Cap. 21, Sub. Leg.) There is no evidence on record that the auctioneer has paid the proceeds of sale of the motor vehicle to the decree holder's counsel and in addition, there is no evidence of what the auctioneers charges are, noting that counsel for the respondent admitted in his submissions that indeed the appellants had paid the costs, and therefore the auctioneer is holding the proceeds of the purported sale of the motor vehicle, while the advocate has received the assessed costs with interest.
  28. It is further worth noting that there is no order for interest to accrue on the taxed costs on appeal. However, the respondent in the application for execution included interest which inclusion was erroneous. The interest calculated on the assessed costs is hereby set aside.
  29. Accordingly, I find and hold that the sale of the aforesaid motor vehicle registration number KBS xxxD was irregular and illegal. The proclamation which was never served and which was written after the warrants of attachment and sale were issued are no doubt irregular and illegal. They are all set aside. The certificate of sale dated 28<sup>th</sup> March 2024 is therefore inconsequential. It is hereby set aside.
  30. The effect of the above holding is that the motor vehicle registration number KBS xxxD shall be restituted to the owner thereof as it was irregularly and illegally sold. The auctioneer to comply with this order of restitution of the attached motor vehicle.
  31. The Auctioneer shall pay costs of this application to the applicant. Mention on 26/9/2024 before the Deputy registrar to confirm compliance with the orders herein and the filing of bill of costs.
  32. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF AUGUST, 2024**

**R.E. ABURILI**

**JUDGE**

