



**Karuri & 6 others v Karuga (Civil Appeal E089 of 2023)
[2024] KEHC 12963 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E089 OF 2023
SM MOHOCHI, J
OCTOBER 25, 2024**

BETWEEN

**CHARLES NDUNGU KARURI 1ST APPLICANT
ROSE WANGUI T/A MOTHER OF MERCY SECONDARY
SCHOOL 2ND APPLICANT
SISTER ROSE WANGUI, VHM 3RD APPLICANT
JOHN NJOROGE 4TH APPLICANT
DAVID METHU 5TH APPLICANT
SISTER ESTHER WAIRIMU, LSOSF 6TH APPLICANT
MARGARET NJOKI 7TH APPLICANT**

AND

RUTH WANJIRU KARUGA RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated 12th June 2024, filed pursuant to Sections IA, 1B, 3A, 63e, *Civil Procedure Act*, Order 22 Rules 51, 52, 53, Orders 5 Civil Procedure Rules and all other enabling provisions of the Law, seeking variations of the conditions imposed on the grant of orders of stay against judgment decree which included:
 - i. Spent;
 - ii. Spent



- iii. A declaration do issue that the attachment by the respondent/ decree holder of motor vehicle registration number KDN 573E and KDK 856L was unprocedural, irregular and be permanently barred from interfering with any of the objector's assets.
 - iv. The decree holder/ respondent be directed either by herself, her agents, servants, employees and or assigns be directed to unconditionally release motor vehicle KDN 573E to the objector/ applicant.
 - v. The decree holder/ respondent be directed either by herself, her agents, servants, employees and or assigns be directed to unconditionally release motor vehicle KDK 856L to the objector/ applicant.
 - vi. Costs of this application be provided for.
2. The Application is supported by the Sworn Affidavit of Sister Grace Maria Grace dated 12th June 2024, where she depones that:
- i. That, on 30th May, 2024 the Respondent's Advocates instructed Direct O Auctioneers to attach any of the movable assets of the Appellant in satisfaction of the decree issued by the Lower Court.
 - ii. That, there was no proclamation issued and on the same day the auctioneers attached an ambulance belonging to and registered in the name of Mercy Centre Lare, registration number KDN 573E" hereafter referred to as the ambulance".
 - iii. That, upon attachment no notice was issued by the auctioneers and on further probing it emerged that the ambulance was taken to a storage yard named Cyka Merchants Yard.
 - iv. That, on request of what document showed the ambulance was taken away the auctioneer only provided the storage form issued by the Yard. Exhibited a copy of the motor vehicle acceptance form marked Exhibit 1.
 - v. That, the ambulance that was attached is in the name of Mercy Centre Lare and it is used for emergency services. Presently without an ambulance any emergency processes would be immensely affected leading to more severe consequences if they are not addressed timeously.
 - vi. That, if the ambulance is not released it is also expensive to hire ambulance at any time as and when need arises affecting the operations.
 - vii. That, the logbook issued for the ambulance indicates it belongs to Mercy Centre Lare and not Mother of Mercy Girls Secondary School that was sued in the case arising from the Accident exhibiting a copy of the Logbook marked Exhibit 2.
 - viii. That, there is apprehension that the decree holder may move to sell the ambulance now that it is in the possession of the auctioneers. It has not been disclosed as and when this is to take place however any action by the respondent/ decree holder of disposal of the motor vehicle is not in the interests of the objector. It had been earlier on been advertised for sale by the auctioneers.
 - ix. That she seeks, that an injunction do issue barring any intended sale and or disposal of the ambulance. Further the decree holder, its agents and or its assigns be directed to unconditionally release the ambulance to the applicant.



- x. That the proprietor of the ambulance operates a dispensary and the lack of it affects the movement of patients as and when this may be need arises upon release. The decree holder should be also barred from in any way attaching or interfering with the assets of the objector.
- xi. That, the continued storage of the motor vehicle at a yard is not in the interests of the dispensary which owns it and had some of its hospital emergency services affected irreparably.
- xii. That, on the 12th April, 2024, this court vide a ruling delivered on the same day reviewed the requirements of additional security and decreed that there be payment of Kshs. 7, 212,
- xiii. 286.50. (Annexed hereto copy of the ruling marked exhibit 3).
- xiv. That, on the 8th June, 2024, there was a further payment of Kshs. 1 million to the respondent through her advocates on record. Exhibiting a copy of the RTGS slip marked exhibit 4.
- xv. That, on the 11th June, 2024, a further Kshs 1 million was paid to the respondent once again through her advocates on record. Exhibiting a copy of the RTGS Slip marked exhibit 5.
- xvi. That, on the 8th June, 2024 the respondent through Direct O auctioneers advertised to sell the ambulance and we only got information of this on 8th June, 2024. The auction had been scheduled for 10th June, 2024 at 9 AM exhibiting a copy of the advertisement marked Exhibit 6.
- xvii. That, on the 10th June, 2024 she was at the auction and storage yard the whole day and informed the auctioneer that there had been a payment of Kshs. 1 million and the balance was to be paid hence put off the sale or auction. she showed him the evidence of payment and prior to this she had informed my advocates on record to reach out to the respondent's counsel over the same.
- xviii. That upon payment of the Kshs. 1 million on 11th June, 2024 upon payment of the further amount she proceeded to the yard in the company of a driver to collect the ambulance. she waited for the release as earlier she had communicated to the auctioneers on the two payments made and that, after a long wait she noticed that, there was a commotion ensuing near the yard where the ambulance was stored. she sought to find out and noticed that there were men she had seen earlier when they came to attach the ambulance. she enquired what the issue was all about yet she had come to pick the ambulance.
- xix. That at that point they (one of the men) retorted that they were under instructions to attach Her car (KDK 856L) and any movable assets in the execution of the remainder of the decretal sum. She was shocked by the turn of events and being a catholic nun she did not want any confrontation as the number of men were many and could easily overpower her and she was also in an unfamiliar territory in an interior place.
- xx. That she called the advocates on record for advice and they informed her that stay orders were varied and this court vide a ruling delivered on 12th April, 2024. she tried to explain to the said men who appeared to be acting on instructions from the respondent's advocate, as they kept referring to him in the conversation but they could not reason.
- xxi. That in the midst of these events they attempted to tow her vehicle registration number KDK 856L but seeing that they even had a breakdown vehicle that was on standby she noticed that they would cause damage to it. She instructed her driver to hand over the car keys to them.
- xxii. That it was an unfair, uncouth, barbaric and unprocedural conduct of the respondent's agents/ auctioneers. This is an act that calls for serious reprimand as there cannot be any attachment without following the due process.



- xxiii. That, the motor vehicle is presently registered in the name of Rosemary Wangui Kuria but owned by her as it was yet to be transferred into her name. The events that happened were uncalled for and should be condemned for being in violation of the law and that no proclamation was made and that she has now have to do without a motor vehicle and seeks an order for the release of the same.
3. The Court had directed that the Application be heard by way of written submissions and the Applicants filed their Written submissions dated 18th July 2024 and the Respondent filed their Written submissions dated 10th July 2024.

Applicants Written Submissions

4. The Applicants in their written submission contend that, their case was that there was attachment of motor vehicles registration numbers KDK 856L and KDN 573E.
5. That the Respondent does not deny he is in possession of the said vehicles and the replying affidavit is a testament to this. The Respondent's argument is that the motor vehicles were attached arising from non-payment of the decretal sum as ordered by the court.
6. That, the Appellant in the further affidavit has deponed that they have since settled the decretal sum and the evidence of the payments including the last payment as contained in the further affidavit. The Appellants affirm that the decretal sum has been settled in full as ordered by the court.
7. That, the Appellants have deposed that the Respondent as at the time of attachment of the motor vehicles acted irregularly. As can be noted the court is urged to take into account the following:
- a. The warrant of sale is dated 20th March, 2024 and was returnable on or before 20th May, 2024.
 - b. The warrants of attachment were dated 20th March, 2024 and to be executed on or before 20th May, 2024.
 - c. The proclamation took place on 20th March, 2024. However, attachment was on the 30th May, 2024 for motor vehicle KDK 856L and on 10th June, 2024 for motor vehicle KDN 573E.
 - d. There was/had been no extension of the warrants of attachment which expired on 20th May, 2024. (emphasis).
 - e. The proclamation having been done on 27th March, 2024, a stay was issued on 12th April, 2024. It would have required the respondent to extract and or seek fresh warrants before proceeding with execution processes.
8. The Applicants addresses the propriety of the process leading to attachment that, there was no compliance with the court order issued on 12th April, 2024. She does not dispute that the decretal sum has been settled in full as at now. The Appellants may have been susceptible to attachment for non-compliance as at 12th May, 2024 when the period issued in the order of this court on 12th April, 2024 was to lapse.
9. That the procedure would have been the Respondent reapplies for reissue of the warrants of attachment and sale. This was not to be as the respondent through her auctioneers proceeded to advertise for sale by auction motor vehicle registration number KDK 856L. The motor vehicle was advertised for sale on 10th June, 2024.
10. That the pertinent question that emerges is whether the auctioneers were duly authorized and procedurally correct in attachment and advertisement for auction of the motor vehicle.



11. The Applicants submit that it was unprocedural for the attachment that took place on 30th May, 2024 and the consequential advertisement for sale was not legally sanctioned. It is quite clear that the attachment of motor vehicle KDN 573E took place on 11th June, 2024. This is confirmed by Exhibit 1 which is the motor vehicle acceptance form. This as earlier submitted, was past the period the warrants were in force. No deposition has been pleaded or extension sought and or granted before attachment.
12. That, as for motor vehicle KDK 856L on 11th June, 2024. While there had been communication by the auctioneers on collection of motor vehicle KDN 573E. The auctioneers who orchestrated the illegality have not deponed to these issues despite having been the primary parties who were involved. The Respondent does not depone to the events relating to the attachment and the illegalities thereto since she does not state that she was present when the attachment took place. Further she does not indicate when the attachment took place however admits that there was proclamation and attachment. She refutes the objection to the attachment and the intended sale of the motor vehicle belonging to the third parties. There was need for the auctioneers to depose when they attached the motor vehicle.
13. That a cursory look at the proclamation filed by them indicates that only page 1 was stamped by Mercy Center Lare on behalf of the Appellants. As for page 2 it is unstamped. The pertinent issue raised in the further affidavit is whether page 2 was provided to the Appellants at the time of proclamation. The proclamation on page 1 equally indicates that RTS which could mean Refused to Sign however there is a signature whereas on the proclamation denoting page 2 it has no signature only writing RTS under the section indicated as signed. This casts doubt of the proclamation denoted as page 2. It would have been expected of the respondent to present the warrants that gave rise to the instructions to the auctioneers as at 30th May, 2024 and as at 11th June, 2024. If she places reliance on those marked RWK 3 and RWK 4 in her replying affidavit then it would appear that the attachment process was unprocedural.
14. That the Appellants submit that the warrant of attachment and sale have specific return dates and the auctioneers could not rely or act on the ones issued on 20th March, 2024 without extension being sought.
15. That the burden lay on the Respondent to demonstrate that the warrants were valid as at the time of attachment by the auctioneers. Order 22 Rule 21 of the Civil Procedure Rules obligate the auctioneers to return the warrants upon the lapse of the period with an endorsement whether they were executed or not and in the event of failure to execute reasons be denoted. Firstly, the auctioneers did not return the warrants as at 20th May, 2024. They therefore could not have sought for extension, in any case none was evidenced. It therefore remains and as deponed by the Respondent in the replying affidavit that the auctioneers were relying on the warrants issued on 20th May, 2024.
16. That Rule 12(4)(b) of the Auctioneer’s Rules 1997 provides: -
 - (4) 4) Where orders obtained by a judgement debtor staying execution and served on an auctioneer are subsequently vacated, the auctioneer shall—
 - (b) where the warrants of attachment and sale have expired, apply for extension of the warrants for a period not exceeding forty-five days, within which he shall finalize execution; Reiterated in the case of Karuri Stores Pharmaceutical Ltd & Another v Acacia Medical Centre Ltd[2021] eKLR
17. That, Section 23 of the [Auctioneers Act](#),1996 provides for Duties of auctioneers:

“ A licensed auctioneer shall-



- (1) 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;
- (2) 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;”

18. Reference is made to the case of *Japta v Schoeman & Others; Van Rooyen v Stolz & Others* [2004] ZACC 25;2005(2) SA 140(CC) Court held that:

“If the procedure prescribed by the court is not complied with, a sale in execution cannot be authorized.”

19. That the warrants were also erroneous since as at 12th April, 2024 this court had reviewed the amount payable from Kshs. 15,554,373 to Kshs. 7,212,286.50 vide the ruling delivered that day. The auctioneers ought to have applied for fresh and correct warrants of attachment. They could and cannot act or attach based on the warrants issued on 20th March, 2024. The Respondent was aware of the review and has even gone ahead to annex that ruling in her replying affidavit. The warrants of attachment are once again procedurally flawed.

20. That, the Applicants has in the proclamation filed and her replying affidavit deposed that the motor vehicles proclaimed belonged to the Appellants. Notably no evidence has been presented on any efforts to find out who owed the motor vehicles in question particularly KDN 573E and KDK 856L. The auctioneer ought to have undertaken a search before advertising them for sale and or attachment. This would be part of the due diligence processes. As to the judgement being awarded against the defendant jointly and severally. We refer the court to the judgement delivered on 26th April, 2023 and the attendant decree contained in the replying affidavit as RWK 1 does not disclose that the judgement was to be executed in a jointly and severally manner. This means the argument made by the Respondent in her replying affidavit is legally moot. There has been no correction or amendment of the decree to reflect this argument advanced by the respondent.

21. That Order 22 rule 51(1) of the Civil Procedure Rules provides as follows:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”

22. In the case of *Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR the court held as follows:

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. He as the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree.”



23. Reference is made to the case of Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others [1993] eKLR the court held:

“The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is (1) that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or

(2) that the objector holds that property on his own account. satisfied.

24. Further Reference is made to the case of Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co Ltd. Where Odunga J (as he then was) held that:

“Although the law is that in the objection proceedings, the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the objector has interest legal or equitable in the attached property, it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership see CHATABHAI M. PATEL & ANOTHER HCCC NO. 544 OF 1957 (Lewis) on 8/12/58 HCU (1958) 743.”

25. That the Respondent has deposed that the Appellant’s deponent (Sister Grace Muema) did not avail proof of ownership. The deponent stated that she had acquired the vehicle (KDK 856L) from the 2nd Appellant and was yet to have it transferred to her. This deposition was never challenged by the Respondent save for claims that this was not proved. The deposition of purchase suffices since no evidence to the contrary was produced by the respondent aside from mere denials.

26. That this court issued the order for stay of execution and in turn it is arising from the non-compliance in time that the Respondent purported to illegally and un-procedurally attach the motor vehicles. the application has been filed before this court being the forum which the conditional stay orders were issued. The Applicants maintain that, the application is properly before this court.

27. In the end the Applicants urges the court guided by the authorities set out hereunder on the processes by the auctioneers in the attachment process that the application be allowed and the motor vehicles KDN 573E and KDK 856L be released unconditionally to the Appellants. The attachment was flawed and the court cannot sanitize it.

Respondent’s Submission

28. In her sworn Affidavit dated 25th June 2024 and written submissions dated 10th July 2024, the Respondent opposes the Application submitting that, the court orders of 12th April 2024 have neither been reviewed nor appealed, and thus, by failing to meet the conditions set out in the ruling granted on 12th April 2024, the stay orders lapsed and the Appellants opened up themselves for attachment in execution of the decree, and they cannot proceed to come back to this court with an objection application premised on the provisions of Order 22 rules 51, 52 and 53 of the Civil Procedure Rules to obtain stay of execution.

29. That, this court had already pronounced itself on the conditions of stay of execution in the rulings of 9th February 2024 and the subsequent review in the ruling delivered on 12th April 2024, and thus submit that, it cannot be dragged to adjudicate on matters arising in the execution of the decree as it does not have jurisdiction to do so.



30. That this court can now only proceed to hear and determine the appeal before it.
31. That, Section 34 of the *Civil Procedure Act* is instructive that:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
32. That, the questions arising from the execution of the decree in Nakuru CMCC No. 1041 of 2018 such as whether the proclamation and attachment was properly done or whether or not motor vehicle registration numbers KDN 573 E and KDK 856 L belong to the objector or appellants and or whether they are liable for attachment and sale are questions that should be determined by the court that issued the decree and not this court.
33. That, furthermore, Section 30 as read with Section 31 of the Civil Procedure Rules provides that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. and the court which passed the decree may on its own motion send the decree for execution to any court of inferior but competent jurisdiction, and those provisions further buttress our submission that this court being a Superior Court to the Nakuru Chief Magistrate's Court, which issued the decree cannot therefore receive the decree for execution nor entertain any object proceedings therefrom.
34. The Respondent therefore ultimately submit that, the Appellants application dated 12th June 2024 lacks merit and should therefore be dismissed with costs to the Respondent.

Analysis and Determination

35. I have considered both applications, the grounds thereof, the affidavits and annexures. I have also considered the submissions together with case law cited by both counsel for parties. The issues for determination are whether the purported execution giving rise to the attachment of was undertaken in contravention of an existing Order of Stay against execution? And whether the Applicants have made out a case warranting grant of the Orders sought.
36. It is trite law that, execution process is always domiciled in the court issuing the decree and that Order 22, rule 22 provides for when court may stay execution:
 22.
 - (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
 - (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.



- (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

37. Of significance is that Order 22 Rule 2 provides for powers for restitution to the court that issued the decree.

38. Order 22 rule 51(1) of the Civil Procedure Rules provides as follows:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”

39. This is an Appellate Court and any pronouncements made including Stay Orders against execution of judgment decree made was in furtherance of getting the Appeal ready for hearing. This Appellate Court is not seized of the Execution of the judgment/decree subject to the Appeal.

40. I note that the Applicants have been flippant in complying with the conditional orders of stay and that in fact the said orders automatically lapsed on the court orders of 12th April 2024 have neither been reviewed nor appealed, and thus, by failing to meet the conditions set out in the ruling granted on 12th April 2024 the automatic extinction of the same paved way for a commencement process.

41. The Condition to pay the Respondent 50% of the decretal sum was in satisfaction of the principal of security for costs as a basis of instituting and maintaining the Appeal. This Order was not an Execution Order.

42. The Relief being sought herein are equitable relief and this court sadly observes the attempt by the Applicants to drag the Appellate Court into an execution dispute.

43. The Applicant may seek the intervention of the execution court. Being as it may the Appellant is urged to focus on the Appeal by causing the filing of the Record of Appeal for admission, directions, hearing and determination.

44. The Applicant have not demonstrated that they have moved the court that issued the Decree in execution.

45. This court not being the execution court is unable to venture into the execution realm as invited by the Applicants.

46. This court is unable to find any merit in the Application dated June 12, 2024 and the same is accordingly dismissed.

47. The Costs of this Application shall be awarded to the Respondent.

It is so Ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 25TH DAY OF OCTOBER, 2024.

S. MOHOCHI

JUDGE

