



Muchemi & 2 others v Wachira & another; Wairuiko (Objector) (Miscellaneous Application 506 of 2016) [2023] KEHC 3109 (KLR) (Commercial and Tax) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION 506 OF 2016

A MABEYA, J

APRIL 14, 2023

IN THE MATTER OF ARBITRATION

BETWEEN

NDIRITU MICHAEL MUCHEMI 1ST CLAIMANT

JULIUS IRUNGU NGIGI 2ND CLAIMANT

WANGOMBE HUMPHREY 3RD CLAIMANT

AND

ASHBELL MACHARIA WACHIRA 1ST RESPONDENT

GITHUI PETER MURIITHI 2ND RESPONDENT

AND

JUDY WANJIRU WAIRUIKO OBJECTOR

RULING

1. Before court is the objector's notice of motion dated August 15, 2022. The same is brought under article 40 of the *Constitution*, sections 1A, 1B of the *Civil Procedure Act* and order 22 rules 51, 52 and 53 of the *Civil Procedure Rules*.
2. The objector sought the raising of the attachment and for the immediate release of motor vehicle registration number KCM 020G (hereinafter "the suit vehicle") by Messrs Cash Gate Auctioneers to her.



3. The grounds for the application included that the claimants' agents Messrs Cash Gate Auctioneers descended upon the 1st respondent's premises and attached the suit vehicle in execution of the decree issued herein. That the objector is a joint owner of the suit vehicle with the 1st respondent.
4. The objector pleaded that she is not a party to the present proceedings and thus should not be subjected to the execution proceedings in this matter. That the auctioneers were in the process of selling by public auction the said vehicle in execution thereof and that her constitutional rights as proprietor of the said vehicle would be infringed upon should the auctioneers proceed with the sale.
5. In opposition, the claimants filed a preliminary objection dated September 8, 2022 and a replying affidavit sworn on September 8, 2022 by the 1st claimant on behalf of the other claimants.
6. I will consider the merits of the objection first before looking at the other responses to the application as it may dispose of the entire matter.
7. In the objection, the claimants opposed the application on the grounds that the 1st respondent had tried to set aside the warrants on the same grounds adduced by the objector herein and the same was litigated and decided by Muigai J on January 25, 2022.
8. That the matter was therefore *res judicata* as had been held by Mshila J in her ruling of August 12, 2022 in Misc E077/2022. That there was no compliance with order 22 of the [Civil Procedure Rules](#) and the application had been brought with inordinate delay, the proclamation and attachment having been done on May 13, 2021.
9. The issue for determination is whether the application is *res judicata*.
 10. Section 7 of the [Civil Procedure Act](#) provides: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
11. In her ruling of December 10, 2021, Muigai J held: -

“Notice of motion dated May 17, 2021 for release or stay of sale of motor vehicle is granted subject to payments settled as per the final award and subsequent court orders.”
12. The subject matter of the ruling was the notice of motion dated May 17, 2021 by the 1st respondent. In that application, the 1st respondent had sought the release of the said vehicle. In dismissing the said application, Muigai J directed that the said vehicle be sold.
13. Pursuant thereto, the objector filed Misc E077 of 2022 before this court. The same was heard and determined by Mshila J who made the following findings in her ruling of August 12, 2022: -
 - i) Preliminary objection has merit and is hereby upheld.
 - ii) This court finds the applicant's objection proceedings to be an abuse of due process.
 - iii) The application is found to have elements of *res judicata* and found to be improperly before this court and it is hereby struck out.



iv) The applicant/objector shall bear the costs of this application.”

14. The subject matter of that above ruling was an application by the objector seeking *inter-alia*, the release of the said vehicle and for a declaration that the attachment in execution of the decree in the present suit was illegal.
15. Having analysed the two rulings, it is crystal clear that the issues in the present application have already been heard and determined by two competent courts. The objector and the 1st respondent, who moved the courts in the two matters, are merely forum shopping in an attempt to obtain a favourable decision.
16. I therefore find that the present application violates section 7 of the *Civil Procedure Act*, is frivolous and a waste of the judicial time.
17. Accordingly, I uphold the claimants’ preliminary objection and strike out the application dated August 15, 2022 with costs to the claimants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

A. MABEYA, FCIArb

JUDGE

