



Gecaga (Suing on her behalf and as a next of friend of Dr. Bethuel Mareka Gecaga) v Gateway Insurance Co Ltd & 3 others (Civil Suit 86 of 2018) [2023] KEHC 4039 (KLR) (Commercial and Tax) (5 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 86 OF 2018**

A MABEYA, J

MAY 5, 2023

BETWEEN

MARGARET GACIGI GECAGA (SUING ON HER BEHALF AND AS A NEXT OF FRIEND OF DR. BETHUEL MAREKA GECAGA) PLAINTIFF

AND

GATEWAY INSURANCE CO LTD 1ST DEFENDANT

UDI MAREKA GECAGA 2ND DEFENDANT

QUINVEST LTD 3RD DEFENDANT

ISAAC MIANO NG'ETHE T/A PRINCIPAL AUCTIONEERS . 4TH DEFENDANT

RULING

1. The applicant filed the Motion dated October 24, 2022 which was premised under Order 22 rules 22, Order 1 of the *Civil Procedure Rules* and sections 1A, 1B & 3A, 63 of the *Civil Procedure Act*.
2. The application sought orders for stay of execution of the decree dated February 15, 2021 pending the full disclosure of the sale proceeds of the goods attached on February 7, 2022.
3. The application was supported by the affidavit sworn by Margaret Gacigi Gecaga. The grounds were that the 2nd and 3rd respondent's agents had attached her household goods and two motor vehicles, Reg No KAP (BMW) and KAP 571V. That the said goods were enough to settle the decretal amount. However, on October 19, 2022, the auctioneers again proclaimed her goods for the balance of Kshs 363,338.07. It was the plaintiff's case that the auctioneers were not justified in proclaiming more goods as they had not tabled the proceeds of the previous attachment and they had not provided valuation



reports showing the value of the vehicles. That the plaintiff was sick and not in a position to settle the said costs as the initial execution of February 7, 2022 had left her in a deplorable state.

4. In response, the 2nd and 3rd respondents filed an affidavit dated November 7, 2022 sworn by Udi Mareka Gecaga. He stated that the warrants of attachment and sale were issued on January 25, 2022 to the auctioneers who thereafter proclaimed the plaintiff's assets at her home. He contended that the motor vehicle KAD 946H BMW belonged to the 3rd defendant and it was therefore released to the 3rd defendant after accruing storage charges of Kshs 43,616/-.
5. That during the auction that took place on June 11, 2022, the amount that was realized from the sale was Kshs 622,800/-. That the auctioneer forwarded a cheque of Kshs 321,876/- after deduction of the auctioneer's charges from the auction and the same did not cover the costs awarded by the court.
6. I have considered the application, the response and the oral submissions in court. The main issue is whether stay of execution should be issued pending the full exposure and tabulation of the sale proceeds of the goods attached on February 7, 2022.
7. According to the plaintiff, the second auction ought not to proceed before the proceeds of the previous sale has been tabled and a valuation report availed showing the value of the motor vehicles and amount realized from the sale. The plaintiff faulted the auctioneers for failing to respond to correspondence and selling the goods at unrealistic prices.
8. The response was that one of the motor vehicles belonged to the 3rd respondent and therefore was not sold at the auction. That the auction did not realize the full amount awarded by the court in terms of costs and thus the reason for the second attachment.
9. The auctioneer filed another affidavit dated November 8, 2022 sworn by Isaac Mano Ng'ethe. He aligned himself with the averments of Udi Mareka and confirmed that the information therein was true.
10. From the foregoing, it is not in dispute that the court awarded the 2nd and 3rd defendant the party costs amounting to Kshs 655,670/- against the plaintiff. The plaintiff's failure to settle the amount necessitated the defendants to have her goods attached for sale.
11. I have examined the evidence attached to the affidavit dated November 7, 2022 and in the letter dated June 14, 2022. The auctioneers confirmed that from the auction, they recovered a sum of Kshs 622,800/- and after deducting their costs and/or charges of Kshs 300,923.50, the amount forwarded to the respondents was Kshs 321,876/-.
12. Rule 7 of the *Auctioneer Rules* provides that the auctioneers fees is to be borne by the debtor. In this case, the auctioneer deducted the auction charges on attachment and sale and the balance was forwarded to the defendants. I have looked at the catalogue for the sale of the goods at the auction as against the proclamation notice. My view is that the items were not sold at an undervalue.
13. My take is that the auctioneer availed the required evidence on the sale of the proclaimed goods. With respect to the motor vehicle KAD 946H, the 3rd defendant produced a logbook which confirmed ownership of the vehicle to him. The same could not be subject to the auction. There was no challenge to the auctioneer's charges to warrant taxation.
14. In the premises, I find that the plaintiff has not made out a case for stay of execution. I find no merit in the application and the same is dismissed with costs.
15. It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A MABEYA, FCIArb

JUDGE

