



REPUBLIC OF KENYA



**Ngutu v Beta Bakers Co Ltd & another (Civil Appeal E003 of 2019)
[2023] KEHC 22409 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E003 OF 2019
FR OLEL, J
SEPTEMBER 21, 2023**

BETWEEN

AMOS KIMEU NGUTU APPELLANT

AND

BETA BAKERS CO LTD 1ST RESPONDENT

BAKERS CORNER CO LTD 2ND RESPONDENT

RULING

Introduction

1. The application before this court is the notice of motion application dated August 16, 2022 brought pursuant to provisions of section 1A, 1B, & 3A of the [Civil Procedure Act](#), order 22 rule (6), order 21 rule (7), order 12 rule 7, order 51 rule 1 of the of the [Civil Procedure Rules](#), rule 12 of the [Auctioneers Rules](#) and all other enabling provision of law. Prayers 1,2, 3 and 4 of the said application are basically spent and the main prayer sought are prayers (5), (6) and (7) which sought for prayers that ;
 - a. That the honorable court be pleased to nullify, quash and/or set aside the illegal decree, warrants of attachment and sale extracted from Kithimani PMCC No. 129 of 2018 Amos Kimeu Ngutu v Beta Bakers Company Limited & Anofor having been extracted in proceedings that were subsumed by the instant matter and for inclusion of awards no granted in the judgment delivered herein on the November 18, 2019.
 - b. That the honorable court be pleased to order that the auctioneers costs be borne by either the auctioneer for non-compliance with the [Auctioneers Rules](#) or the appellant and/or the appellants advocates.



- c. That the honourable court be pleased to award the applicants loss of use and loss of profit for the days the appellants agents, Hariki Auctioneers continues to hold the applicants motor vehicle registration number KDD 109F consequent to the illegal decree, warrants un- procedural attachment which award should be borne by the appellant.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of Beatrice Muriithi & Abraham Musyoki Kimeu both dated August 16, 2022. The applicants did state that this appeal was allowed on November 8, 2021, and the decision of the trial magistrate dismissing the primary suit was set aside and judgment entered in favour of the respondent in the sum of Kshs 100,000/= as general damages and Kshs 5,550/= as special damages. The said judgment would accrue interest at court rates from the date of judgment in the trial court until date of payment in full.
3. The appellants avers that the respondent has illegally and un-procedurally extracted warrants before the trial court being Kithimani PMCC No 129 of 2018 Amos kimeu Ngutu v Beta Bakers company ltd & ano and further stated that the said warrants incorporate components of awards not granted by the appellate court especially with respect to costs of the primary suit which were no granted. It was the appellant's contention that the decree ought to have emanated from the court generating it and thus the decree extracted from the primary suit at Kithimani was illegal and ought to be quashed and nullified for having been extracted in proceedings already subsumed by the high court proceedings.
4. It was the applicants further contention that the respondent agent Hariki Auctioneers did on August 17, 2022 attach the applicants motor vehicle registration number KDD 109F through a process which was illegal as the attachment was made contrary to provisions of rule 12 (c) of the Auctioneer Rules, which provided that a debtor ought to be accorded seven (7) days to redeem the debt, therefore placing the entire integrity and sanctity of court proceedings at stake. The second supporting affidavit of Abraham Musyoki kimeu the applicant's managing director was also made specifically supporting the contention that no proclamation notice was issued by the auctioneers before the attachment was undertaken.
5. The respondent did oppose this application by his replying affidavit and the replying affidavit of Martin Kiriko Kinga (the license's auctioneer) both dated September 26, 2022. The applicant stated that the execution process was valid and all provisions of law were complied with. The applicants were fully aware of the decree and had failed to settle it six months later and were before the court with unclean hands in equity
6. The applicants had been informed of the judgment on November 10, 2021 and by email correspondence they requested the respondents counsel to give an undertaking not to execute for a period of 30 days to allow for settlement of the decree. The respondent counsel did indeed give his professional undertaking on January 26, 2022 not to execute for the said period. The applicant thereafter went to slumber thereby forcing their hand, and his advocate did request for warrants of execution in July 2022. The applicants had not appealed as against the decree or filed for review against the high court judgment and thus they were perfectly in order to enforce the same to enable him enjoy the fruits of his judgment.
7. The other deponent Martin Kiriko Kinga (the auctioneer) averred that the execution process was lawful and procedurally undertaken. They had served the applicant with a proclamation notice, which was duly signed by the applicant's agent and therefore they could not be faulted for subsequently attaching the said motor vehicle. There was no good reason advanced for seeking to reverse the execution process and the said application ought to be dismissed with costs.



Submissions

8. The applicant did not file any submissions, but the respondent did file his submission on April 17, 2023, though wrongly titled as applicant submissions. The respondent did state that the applicant had moved to court with unclean hands in equity and had moved court too late in the day after deliberately failing to pay the decretal sum despite being given time and thus were undeserving of the orders sought.
9. The respondent further stated that the auctioneers had complied with all relevant provisions of the *Auctioneers Act*, including issuance of the proclamation. The auctioneer's averment as stated in his affidavit filed was not rebutted in any way and that limb of the application thus could not succeed. The applicant was using every trick in the book to delay payment of a judgment which was three years old (entered on November 8, 2021) and unnecessarily misusing court process to delay just conclusion of this matter. He prayed that this application be dismissed with costs.

Analysis & Determination

10. I have carefully considered the application, supporting affidavit, the respondent's replying affidavit, written submissions filed and discern that the two issues which arise for determination is whether the court in its discretion should nullify, quash and set aside the decree and warrants of attachment and sale issued by the trial court, and secondly who should pay auctioneers costs/whether the respondent should be condemned to pay the applicant loss of user and loss of profit for the days motor vehicle KDD 109F was in custody of the auctioneers

A. Whether the warrants of attachment and sale issued by the trial court should be recalled nullified and set aside

11. The applicant's contention that, the respondent erred in extracting a decree from the trial court at Kithimani and enforcing the same is fallacious. It is common law under order 22 of the *Civil Procedure Rules* a decree is enforced by the trial court. The appellate court did set aside the judgment of the trial court decree, dismissing the primary suit and proceeded to award the respondent a sum KShs 105, 550/= . This in effect meant that the decree of Kithimani PMCC No 129 of 2018 Amos kimeu Ngutu v Beta bakers company limited & ano changed to the awarded figure and was only executable in the said court.
12. The applicant also did contend that the said decree should be set aside suo moto as the appellate court did not award the respondent costs of the primary suit and therefore it was unlawful for the said respondent to demand the same. The judgment of the appellate court was very clear that no costs were awarded for the appeal for the simple reason that the respondents pleadings were wanting and it did contribute to the initial dismissal of the primary suit. The said judgment did not disallow the costs of the primary suit and it cannot be interpreted negatively or implied that the respondent was not awarded costs of the said suit.
13. It is common law that costs follow the event. The respondent was successful and had a decree issued in his favour after successfully appealing against the initial dismissal of the primary suit. Section 27 of the *Civil procedure Act* does expressly provide that "costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order." There is no reason advance to deny the respondents their costs after successful completion of litigation in their favour.
14. Further on the said issue, the respondents counsel did send to the applicant counsel their letter dated November 10, 2021 notifying them of the appellate court judgment and also tabulated their costs therein for the applicant's counsel approval. The applicant counsel asked the respondents counsel to hold his horses for thirty (30) days as they negotiated settlement. They never objected to the said costs



and unfortunately failed to settle the decree until July 2022, when the respondent applied for warrants of attachment. The applicant had the opportunity to challenge the said bill of costs but opted to keep quiet and the same was rightly taxed by the executive. The complaint over the same is thus unmerited and is made in bad faith.

(B) who should pay auctioneers costs and whether the respondent should be condemned to pay the applicant loss of user and loss of profit for the days Motor vehicle KDD 109F was in custody of the Auctioneers

15. The applicant alleged that the execution levied was un-procedural for the reason that the auctioneer failed to comply with provisions of section 12 (c) of the *Auctioneers Act* by failing to proclaim the applicant's goods and give the mandatory seven (7) days' notice to redeem the debt. The auctioneer Martin Kimeu Ngutu did swear an affidavit affirming that he indeed proclaimed and attached the said proclamation which was served upon the applicant agent. The applicant did not rebut this contention and by virtue of section 108 of the *Evidence Act* the evidential burden remained on them and they were bound to fail if no further evidence was adduced to support their contention. See *Evans Nyakwana v Cleophas Rwana Ongaro* [2015] eKLR.
16. Further I do note that by an order of this court dated August 23, 2022, at the interlocutory stage, the court did order for the release of motor vehicle registration number KDD 109F on condition that the applicant pays the respondent counsel Kshs 50,000/= being part of the decretal sum and also pay the auctioneers fee before release of the said motor vehicle. The orders thus sought have thus been overtaken by events and are superfluous. In any event, the applicant also failed to prove that the decree was extracted illegally and/or that the auctioneer had failed to comply with provisions of the law relating to attachment, there would be no basis to direct the respondent to bear the auctioneers costs
17. The final issue for determination is whether the applicant should be awarded damages for loss of user and loss of profit for the days the said motor vehicle registration number KDD 109F was detained by the auctioneer. This claim too fails as the claim is in the nature of special damages. The applicant if he so wished should have filed a new suit to specifically plead the same and lead the evidence of loss incurred.

Disposition

18. Taking all relevant factors into consideration I do find that;
 - a. The notice of motion application dated August 18, 2022 lacks merit and the same is dismissed with costs to the respondents.
 - b. The costs of this application are assessed at Kshs 30,000/= all inclusive.
 - c. The applicant is directed to settle the unpaid decretal sum (inclusive of costs) plus interest and costs of this application within the next 30 days failure of which the respondent's will be at liberty to execute.
19. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 21ST DAY OF SEPTEMBER, 2023.



In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

