



REPUBLIC OF KENYA



KENYA LAW
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**Adhiambo v Agunda & 3 others (Election Petition 6 of 2018)
[2023] KEHC 23554 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
ELECTION PETITION 6 OF 2018
RPV WENDOH, J
OCTOBER 12, 2023**

BETWEEN

ODHIAMBO BEATRICE ADHIAMBO APPELLANT

AND

MICHAEL ONDONG AGUNDA 1ST RESPONDENT

JOASH MWAURA OJUNE 2ND RESPONDENT

WILLIAM ODOVO CHACHA 3RD RESPONDENT

I.E.B.C 4TH RESPONDENT

RULING

1. The application for consideration is the one dated 13/5/2022, filed by Michael Ondong Agunda, (the applicant). For purposes of this ruling, Odhiambo Beatrice Adhiambo is the respondent while Michael Ondong Agunda is the applicant. The applicant is seeking the following orders:-
 1. That this court be pleased to review and/or set aside orders issued herein on the 25/4/2022;
 2. That upon granting prayer (1) above, the court be pleased to fix the appellant/respondent's Notice of Motion dated 12/1/2022 for hearing on merit;
 3. That costs be in the cause.
2. The application is based on the grounds on its face and the affidavit of the applicant sworn and dated on 13/5/2022. It was deposed that this matter was determined in favour of the respondent with costs; that the applicant is the sole registered owner and proprietor of L.R. Suna East/Area B KWA/993 and 1700; that the respondent obtained ex-parte orders of attachment and sale pursuant to this court's orders issued on 25/4/2022 in the applicant's absence; that on 25/4/2022, the applicant's Counsel



mistakenly sat in the Deputy Registrar's Court not knowing that this matter was being mentioned before this court.

3. The applicant contends that when his Counsel realized the mistake, he moved to this court only to be told that this matter had been dealt with and the orders issued ex-parte; that in this court's judgement, the costs were to be paid jointly and severally; that the respondent has since moved to court to obtain orders to attach and sell the two land parcels to realize the taxed costs of Kshs. 2, 131, 175/= while the taxed costs were to be paid by the respondents jointly and severally but not by the 1st respondent alone. The applicant asked this court to allow its application and enable it to respond to the respondent's Notice of Motion dated 12/1/2022; that if the application is not allowed, and the respondent proceeds to sell the two parcels of land, it would be unfair and unconstitutional since the taxed costs were to be paid jointly and severally.
4. The application was not opposed. The respondent did not file a replying affidavit but chose to respond to the application through written submissions dated 11/5/2023. The applicant filed his written submissions dated 22/10/2022. I have duly considered the arguments of both parties.
5. The applicant contended that he was not heard on 25/4/2022 prior to the orders being issued. The events leading to the proceedings of 25/4/2022, was an application dated 12/1/2022 filed by Odhiambo Beatrice Adhiambo (the respondent). The respondent sought prohibition orders prohibiting the sale of L.R. Suna East/Area B KWA/993 and 1700 (suit parcels of land) by the applicant pending the execution process. This court granted the said orders in the interim and directed that further directions would be taken on 16/2/2022. On the said date, Mr Oywer holding brief for Mr. Awino informed the court that Mr. Awino had not been served and the court directed that he be served and upon service, he files a response. The court gave further directions on filing of submissions. The application dated 12/1/2022 was slated for a mention on 25/4/2022 in the presence of Counsel for the applicant.
6. On 25/4/2022, Mr. Adawo appeared in court holding brief for Mr. Bosire Gichana for the respondent. Mr. Awino for the applicant did not appear in court. Mr. Adawo informed the court that the application did not need a response because orders had already been given. Mr. Adawo informed this court that they were seeking conservatory orders pending execution which orders were granted on 26/1/2022 and they require to proceed with the execution before the Deputy Registrar. On that basis, this court directed that the file be placed before the Deputy Registrar for execution.
7. Having further perused this court file, the undisputed evidence is that the taxation proceedings and the outcome thereof were completed and the costs assessed at Kshs. 2,131,175/=. A Certificate of Costs was issued on 3/9/2019. The taxation proceedings have not been challenged by any party. Counsel for the respondent proceeded to apply for execution of the decree on 20/1/2022. Hence, the application dated 26/1/2022 simply sought to preserve the subject matter of the intended execution. The applicant failed to file a response to date, despite being given the opportunity to do so.
8. The applicant now contends that on the said date, his Counsel was before the Deputy Registrar where this matter was last handled. The firm of Thomas Muniko & Co. Advocates came on board as an additional Counsel for the applicant and not in place of the firm of Odondi Awino. Therefore, this means that the applicant is being represented by two firms of Advocates.
9. When the respondent's application dated 21/1/2022 came up for directions on 16/2/2022, Mr. Awino Counsel for the applicant had instructed another Counsel to hold his brief. As I have observed hereinabove, this court gave the date of 25/4/2022 for further directions before it and not before the Deputy Registrar. There is no plausible reason as to why Counsel for the applicant decided to appear before the Deputy Registrar. Mr. Muniko did not come on record in place of Mr. Awino but they



are both on record for the applicant. The expectation is that both Counsel should be in consonance with the latest position of this matter. The fact that one of the Counsel for the applicant was in the precincts of the court premises, it goes to show that the applicant was aware of this matter. If by the time Counsel came to court and found the matter had already been called, as deposed by the applicant, he should have asked the court to recall the file and also negotiate with Counsel for the respondent for the matter to be heard on merit. Besides, the notice of appointment of the new advocates was filed on 22/4/2022. A prudent Counsel should have taken time to establish the last orders of the court after taking instructions.

10. This court has taken the liberty to call for the cause list for 25/4/2022. The cause list clearly shows that this matter was listed before this court. The online e-filing judiciary system under the tab “Public Information Kiosk” gives the history of this matter that the mention date of 25/4/2022 was set in this court. It is therefore this court’s finding that the orders issued on 25/4/2022 were proper and I decline to review and/or set aside the said orders.
11. The instant application is also premised on the fact that the appellant’s two parcels of land are about to be sold in order to satisfy the costs awarded to the respondent. The applicant contended that the judgement of this court was jointly and severally against himself, the 2nd, 3rd and 4th respondents but it is only him the respondent intends to execute against.
12. The concept of joint and several liability is defined in *Black’s Law Dictionary* 10th Edition as follows:-

“liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties”
13. As to who is liable to settle the decree, in the case of *Republic vs PS in Charge of Internal Security ex parte Joshua Paul* (2013) eKLR. It was held inter alia: -

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”
14. In *Kenya Airways Limited vs Mwaniki Gichobi & Another* H.C. (Milimani Commercial Courts) Civil Case No. 423 of 2002 (UR) it was stated thus;

“...The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree...”
15. Consequently, a party is at liberty to execute and obtain the entire decretal sum against any one of the defendants or against each one of the defendants. The defendant against whom execution proceeded is entitled to a reimbursement from the co-defendants. The assertion by the applicant that he is not the only one liable is not supported in law since the judgement was entered jointly and severally.



16. Looking at the circumstances of this case, whichever way, the assessed costs must be settled. If the named judgement debtors opt not to pay the decree holder, an execution is imminent and must take place. Even if this court was to set aside the proceedings of 25/4/2022, it would be a waste of judicial time since the argument of the applicant would be centred on the liability of his co - judgement debtors to settle the taxed costs. This court will not reach a different finding on the liability of settlement of the taxed costs.
17. The upshot is that the application dated 13/5/2022 is unmerited and it is hereby dismissed with costs to the appellant/respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 12TH DAY OF OCTOBER 2023

R. WENDOH

JUDGE

