



**Shah v Bid; For You Supplies Limited (Objector) (Commercial Case E118 of 2021)
[2024] KEHC 12322 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E118 OF 2021
MN MWANGI, J
OCTOBER 4, 2024**

BETWEEN

ASHWIN SHAH PLAINTIFF

AND

MUKESH HARAHAND BID DEFENDANT

AND

FOR YOU SUPPLIES LIMITED OBJECTOR

RULING

1. This ruling is in respect to two applications. The first application is the objector's Notice of Motion dated 29th August, 2023 filed pursuant to the provisions of Rules 3(1) & (2) of the High Court Practice & Procedure (Vacation) Rules, Article 159 of *the Constitution* of Kenya, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 43 Rules 1(2) & (3), Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The objector seeks orders for extension of time to file an application seeking leave to appeal, and for leave to appeal from the Court's ruling (differently constituted) delivered on 22nd March, 2023, and for an order for stay of execution pending the intended appeal from the ruling delivered on 22nd March, 2023.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Khushal Bid, the objector's Director. He averred that on 9th March, 2021, the Court issued a conditional order to attach the defendant's property to satisfy a decree of Kshs.147,000,000.00. That following the said order, the plaintiff instructed Arvid Park Auctioneers to proclaim and attach the defendant's property in execution of the order. He stated that through a proclamation dated 20th March, 2021, the plaintiff instead proclaimed the objector's goods valued at Kshs.50,000,000.00 in the process of executing the order. That as a result, the objector filed objection



- proceedings through an application dated 23rd March, 2021, which was dismissed in a ruling delivered on 22nd March, 2023.
3. Mr. Bid averred that being dissatisfied with the said decision, the objector intends to appeal from the said ruling at the Court of Appeal, but since the objector does not have an automatic right to appeal, it ought to have first sought the Court's leave, either orally when the order was made or within fourteen (14) days thereafter. Mr. Bid stated that the objector's previous Counsel neither advised the objector about the need to seek leave to appeal following the ruling on 22nd March, 2023, nor did he inform the objector if such leave was sought orally in Court on the day the ruling was delivered. He emphasized that the failure to seek leave within the required time frame was unintentional and should not be held against the objector. He deposed that in the interest of justice, the orders requested in the application dated 29th August, 2023 should be granted. He contended that the objector has a strong case for appeal, making it just and fair for the goods to be preserved by granting the orders sought.
 4. Neither the defendant nor the plaintiff filed any responses to the application dated 29th August, 2023.
 5. The 2nd application is the objector's Notice of Motion dated 20th September, 2023 filed pursuant to the provisions of Article 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 22 Rule 22 of the Civil Procedure Rules, 2010, Rules 8, 10 & 12 (b) of the Auctioneers Rules, and all other enabling provisions of the law. The objector seeks orders for this Court to declare that the attachment of the objector's goods was flawed for failure to comply with Rule 12(b) of the Auctioneers Rules, an order directing the plaintiff to take fresh inventory of the seized goods in the presence of the objector's representatives, an order for valuation of the seized goods by an independent valuer at the plaintiff's costs, an order directing the plaintiff to account to this Court on the arrangements taken for the safe custody, preservation, repair, maintenance, storage, insurance of the goods seized and the cost thereof, and an order summoning the plaintiff and his agent Julius Onyango T/A Agunja Traders Auctioneers to appear in Court in person to show cause why they should not be held in contempt and disobedience of the ruling and orders of the Court delivered on 22nd March, 2023.
 6. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Khushal Bid, the objector's Director. He stated that by a proclamation dated 23rd August, 2023, the plaintiff proclaimed the objector's goods worth over Kshs.50,000,000.00 in execution of an order issued by the Court on 22nd March, 2023. He contended that the plaintiff did so without serving the objector with the said Proclamation Notice. That on 8th September, 2023, the plaintiff then instructed Agunja Traders Auctioneers to remove the objector's goods from its premises and sell them by public auction within fifteen (15) days of issuing the notification of sale. He claimed that the Auctioneers in violation of Rule 12(b) of the Auctioneers Rules, failed to take a proper inventory of the goods during the attachment.
 7. He averred that as a result, the inventory does not accurately represent the goods that were seized, putting the objector at risk of losing its stock if the orders sought are not granted. He stated that he attempted to have the Auctioneer sign against the proper inventory of goods during the seizure, but he refused to do so. Mr. Bid deposed that on 12th September, 2023, the plaintiff instructed Agunja Traders Auctioneers to advertise the objector's goods for sale, which he argued was in contempt of the Court orders issued on 22nd March, 2023. He also expressed concern that if the goods are sold as per the notification of sale dated 8th September, 2023, the said goods will likely be undervalued since no proper valuation was conducted.
 8. In opposition to the application dated 20th September, 2023, the plaintiff filed a Notice of Preliminary Objection dated 25th September, 2023 raising the following grounds –



- i. The Notice of Motion application dated 20th September, 2023 is res judicata as the objector has previously filed a similar objection application before this Court, being the Notice of Motion application dated 23rd March, 2021 raising substantially the same objection as the present application;
 - ii. The objector's stated previous objection application dated 23rd March, 2021 was heard on its merits and a ruling delivered by this Honourable Court on 23rd March, 2023 dismissing the same with costs to the plaintiff;
 - iii. The present application is filed contrary to Section 7 of the Civil Procedure Act and therefore the Honourable Court lacks jurisdiction to grant the orders prayed for;
 - iv. The Court having pronounced itself on the same application (sic) on 23rd March, 2023 as aforesaid, is now functus officio on the matter and the objector can only move by way of appeal or review and cannot sustain a similar application in the same Court;
 - v. The objector's present application dated 20th September, 2023 is, in the circumstances, bad in law, ill-conceived, vexatious, misplaced and a grave abuse of the Court process;
 - vi. The objector's present application is calculated to obstruct due administration of justice and defeat the ends of justice; and
 - vii. The objector's Notice of Motion application dated 20th September, 2023 should therefore be struck out in limine, with costs to the plaintiff.
9. The plaintiff also filed a replying affidavit sworn on 11th October, 2023 by Ashwin Shah, the plaintiff herein. He claimed that the current objection proceedings are entirely res judicata and should be dismissed as the issues raised were already addressed in the application dated 23rd March, 2021, which was dismissed in the ruling delivered on 22nd March, 2023. He pointed out that in the said ruling, the Court stated that it could not confirm whether the attached goods belonged to the objector or the defendant.
10. The plaintiff contended that the objector has not presented any new evidence in the application dated 20th September, 2023 to provide the certainty that the Court previously found lacking. He averred that the attachment of the defendant's goods was lawful, as it was carried out under valid warrants of attachment issued by the Court. The plaintiff claimed that the objector was not served with a Proclamation Notice before the attachment as the said objector was not involved in the proceedings herein, and it was not mentioned in the warrants of attachment or the ruling that led to their issuance.
11. Mr. Shah maintained that the attached goods belong to the defendant, not the objector, which is the reason why the defendant did not oppose the attachment, and that the defendant expressed willingness to cooperate with the plaintiff in a letter dated 31st July, 2023. He stated that the decision to advertise the goods for sale was in line with the explicit instructions in the warrants of attachment issued by the Court, which directed that the goods be attached and sold. He claimed that the Auctioneer prepared a proper inventory, which was signed by the defendant, agreeing to the list of attached goods. He also noted that the objector was not present during the attachment at the defendant's premises, suggesting that the inventory prepared by the objector is a fabrication intended to mislead the Court. He asserted that the Auctioneer fully complied with Rule 12(b) of the Auctioneers Act by properly preparing a proclamation of sale.
12. Additionally, he argued that it is necessary to sell the attached goods because they are perishable and their condition and value will significantly deteriorate by the time this case is heard and determined.



- He also mentioned that the costs of storing the goods and hiring security are substantial and if the sale is not permitted, the costs of storage will deplete any proceeds from the sale. He maintained that the sale of the goods through an open public auction will yield a fair market value, and if the Court decides to stay the sale, the objector should be made to cover the storage and security costs, as well as the Auctioneer's and legal fees.
13. Directions were given for the applications herein to be canvassed by way of written submissions, which were to be highlighted on 24th April, 2024. The objector's submissions were filed by the law firm of CM Advocates LLP on 17th November, 2023. This Court notes that the plaintiff did not file any written submissions, but his learned Counsel made oral submissions on 24th April, 2024. On the said date, Ms. Kigata, learned Counsel for the defendant indicated that the defendant was not opposed the applications herein.
 14. Mr. Miano, learned Counsel for the objector submitted that the objector lacks an automatic right to appeal from the Court's ruling of 22nd March, 2023. He stated that the objector should have sought leave to appeal, either orally when the ruling was delivered or within fourteen (14) days thereafter. He contended that since the objector is layman, it was not informed of the ruling's implications or the right to appeal against the said ruling, but once it obtained legal representation from its current Advocates on record, it was informed of its right of appeal. Counsel contended that if the orders sought are not granted, the objector will suffer prejudice as the company has been paralyzed and closed due to financial losses following the attachment of its goods. He relied on the Supreme Court case of Kenya Revenue Authority & 2 others v Kenya Bottle Manufacturers & 2 others [2022] KESC3 (KLR), and the case of Almond Resort Limited v Mohamed Mahat Kuno & another [2020] eKLR, and stated that this Court has the discretion to grant the objector leave to appeal out of time from the ruling of 22nd March, 2023.
 15. He asserted that the objector has met the necessary criteria for the orders sought. He pointed out that the application dated 29th August, 2023 is unopposed, as neither the plaintiff nor the defendant filed a response. He also highlighted that despite the Court's ruling to preserve the attached goods pending judgment, the plaintiff and its agents in violation of the Court orders, advertised the goods for sale, as acknowledged in paragraphs 12 and 13 of the plaintiff's replying affidavit.
 16. Mr. Miano cited the case of *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu Civil Appeal No. E030 of 2021*, and stated that the objector has established sufficient grounds for a stay of execution of the ruling delivered on 22nd March, 2023 pending appeal. He asserted that the objector has a valid appeal, as outlined in the draft Memorandum of Appeal, and it is at the risk of execution for a debt owed by the defendant to the plaintiff. He contended that the plaintiff's attachment of the objector's assets hindered the objector's ability to pursue future investments.
 17. Counsel referred to Rule 12B of the Auctioneers Rules and the case of Hughes Limited v Mohammed S. Kassam [2008] eKLR, and submitted that the Auctioneer acting on behalf of the plaintiff failed to comply with the said provisions when attaching the objector's goods. He stated that in particular, the objector was not given a Proclamation Notice, the condition of the proclaimed goods was not verified, and a proper inventory of the goods attached and removed was not taken. He contended that the Auctioneer's inventory does not accurately reflect the goods that were seized. He argued that if this Court does not order a new inventory to be conducted in the presence of the objector, there is a risk of the objector losing its stock.
 18. Mr. Miano relied on the provisions of Rule 10 of the Auctioneers Rules and the case of Levi House Construction & Engineering Limited v ABC Bank Limited & another [2021] eKLR, and submitted that the plaintiff has not provided evidence of how the attached goods, valued at over Kshs.50,000,000/= were appraised, and that the Auctioneer only assigned them an arbitrary value of Kshs.5,000,000/=.



19. He argued that if an order for independent valuation is not granted, there is a risk that the goods will be sold at a significantly lower price, resulting in substantial financial loss to the objector. Counsel cited the provisions of Rules 8 & 12(e) of the *Auctioneers Act* and asserted that the plaintiff should be responsible for arrangements related to the safe custody, preservation, repair, maintenance, storage, and insurance of the seized goods until this suit is determined, as well as covering the storage costs. Counsel explained that is important since the plaintiff and the defendant agreed to attach a third party's goods. Counsel also pointed out that the plaintiff in paragraph 12 of its replying affidavit admitted to having advertised the objector's goods for sale. He argued that the plaintiff and the Auctioneers acting on their behalf are in contempt of Court, as the ruling of 22nd March, 2023 only permitted the preservation of the goods, and not their disposal.
20. Mr. Mutava, learned Counsel for the plaintiff submitted that the objector's objection proceedings are res judicata as an earlier application dated 23rd March, 2021 was heard, determined and dismissed in a ruling delivered on 22nd March, 2023. Counsel urged this Court not to grant the objector an order for leave to appeal. He stated that paragraph 13 of the of the plaintiff's replying affidavit does not admit that there was an attempt to sell the attached goods. He stated that warrants of attachment were issued to the plaintiff and his instructed Auctioneer, who went ahead to advertise them for sale in the usual manner, which was done in error. He contended that in as much as the value of the attached goods is not in issue as the inventory of the said goods was signed by the defendant, the storage of the goods as well as the party who will meet the storage costs is in issue.
21. In a rejoinder, Mr. Miano submitted that the Preliminary Objection filed by the plaintiff was made on 26th September, 2023, but the Court directed the parties herein to address the issues at hand. He referred to annexure No. AS 4 attached to the plaintiff's replying affidavit and contended that it states that the defendant declined to sign the Proclamation Notice. He argued that the value of the attached goods was not agreed on. He once again referred to the contents of paragraph 12 of the plaintiff's replying affidavit and urged this Court to hold that the plaintiff is in contempt of the Court orders issued on 22nd March, 2023.

Analysis And Determination.

22. Upon consideration of the applications filed herein, and the affidavits filed in support thereof, the Notice of Preliminary Objection and the replying affidavit filed by the plaintiff, as well as the written submissions by the objector, and the oral submissions made by Counsel for the plaintiff, the issues that arise for determination are –
 - i. Whether the plaintiff's Preliminary Objection is valid and if it should be sustained;
 - ii. Whether the application dated 20th September, 2023 is res judicata;
 - iii. Whether the application for extension of time is merited;
 - iv. Whether the objector should be granted leave to appeal to the Court of Appeal against the ruling delivered on 22nd March, 2023;
 - v. Whether an order for stay of execution of the ruling dated 22nd March, 2023 should issue;
 - vi. Whether the Auctioneers who attached the subject goods complied with Rule 12(b) of the Auctioneers rules;
 - vii. Whether an order for taking of fresh inventory should issue;
 - viii. Whether an order for a valuation of the seized goods by an independent valuer should issue;



- ix. Whether the plaintiff should account on the arrangements taken for safe custody, preservation, repair maintenance, storage and insurance of the seized goods; and
- x. Whether the plaintiff and the Auctioneers acting on his behalf acted in contempt and in disobedience of Court orders issued in the ruling delivered on 22nd March, 2023.

Whether the plaintiff’s Preliminary Objection is valid and should be sustained.

23. In the case of Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd [1969] E.A 696, at page 700, the Court defined what a Preliminary Objection is, and discussed how it operates the following manner-

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

24. In John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR, the validity of a Preliminary Objection was considered in the following manner -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law...

25. From the foregoing decisions, a Preliminary Objection ought to raise a pure point of law. It should be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

26. Upon perusal of the Preliminary Objection raised by the plaintiff, it is evident that it is based on the fact that the application dated 20th September, 2023 is res judicata, as the objector had allegedly previously filed a similar objection application before the Court, being the Notice of Motion application dated 23rd March, 2021, raising substantially the same objection as the application dated 20th September, 2023. In the case of George Kamau Kimani & 4 others v County Government of Trans Nzoia & another [2014] eKLR, the Court held as follows -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling



in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.” (Emphasis added).

27. In order to aptly determine whether the application dated 20th September, 2023 is res judicata or not, I will have to ascertain facts and interrogate the evidence adduced in the application dated 23rd March, 2021 for me to make a determination. It is my finding that legally, a plea of res judicata cannot be raised as a Preliminary Objection. For the said reason, the Preliminary Objection raised does not qualify as a pure point of law. The Preliminary Objection dated 25th September, 2023 is hereby dismissed with costs to the objector.

Res judicata as raised in the replying affidavit filed by the plaintiff.

28. Although the issue of res judicata cannot be determined as a Preliminary Objection, in this instance, it was also substantively raised in the replying affidavit sworn on 11th October, 2023 by the plaintiff. This Court will therefore proceed and address its mind to the said issue in the context in which it was raised in the said affidavit. The plaintiff contended that the application dated 20th September, 2023 is res judicata the earlier application dated 23rd March, 2021.

29. The doctrine of res judicata is provided for under the provisions of Section 7 of the Civil Procedure Act which states that –

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.

30. In order to succeed in a plea of res judicata, the party raising it must satisfy its five elements which are stipulated in conjunctive as opposed to disjunctive terms. They include –

- i. The suit or issue raised was directly and substantially in issue in the former suit;
- ii. That the former suit was between the same party or parties under whom they or any of them claim;
- iii. That those parties were litigating under the same title;
- iv. That the issue in question was heard and finally determined in the former suit; and
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

31. The doctrine of res judicata ousts the jurisdiction of a Court to try any suit or issue which had been determined in finality by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. It is evident from the record that the objector filed objection proceedings vide an application dated 23rd March, 2021, which application was dismissed in a ruling delivered on 22nd March, 2023.

32. In the application dated 20th September, 2023, the objector is seeking orders for this Court to declare the attachment of the objector’s goods to be flawed for failure to comply with Rule 12(b) of the Auctioneers Rules, an order directing the plaintiff to take fresh inventory of the seized goods in the presence of the objector’s representatives, an order for valuation of the seized goods by an



independent valuer at the plaintiff's costs, an order directing the plaintiff to account to this Court on the arrangements taken for the safe custody, preservation, repair, maintenance, storage, insurance of the goods seized and the cost thereof, and an order summoning the plaintiff and his agent Julius Onyango T/A Agunja Traders Auctioneers to appear in Court in person to show cause why they should not be held in contempt and disobedience of the ruling and orders of the Court delivered on 22nd March, 2023.

33. From the foregoing, it is my finding that the issues which have been raised in the application dated 20th September, 2023 were neither canvassed, heard nor determined in the application dated 23rd March, 2021 which was dismissed by the ruling delivered on 22nd March, 2023. In the application dated 23rd March, 2021, the objector was challenging the attachment of the defendant's property before judgment on the ground that the property the plaintiff intended to attach belongs solely and exclusively to the objector, and that the defendant has no interest in the goods whatsoever. The issues raised and to be canvassed in the application dated 20th September, 2023 are not only substantially different, but they have never been heard and determined between the parties herein, by a Court of competent jurisdiction. The said application is therefore not res judicata.

Whether the application for extension of time is merited.

34. Section 75 of the *Civil Procedure Act* and Order 43 Rule 1 of the Civil Procedure Rules, 2010 provides for orders from which appeals lie as of right. Objection proceedings are provided for under Order 22 Rule 51 of the Civil Procedure Rules, 2010. An order made pursuant to the provisions of Order 22 Rule 51 of the Civil Procedure Rules, 2010 is not appealable as of right, but with leave of the Court as provided for under Section 75(1) of the *Civil Procedure Act* and Order 43 Rule 1(2) of the Civil Procedure Rules, 2010. An application for leave to appeal shall be made as provided for under Order 43 Rule 1(2) of the Civil Procedure Rules, 2010 which states that –

An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

35. From the record, it is evident that no such application was made orally when the Court delivered its ruling on 22nd March, 2023. Neither was an application for leave made and/or filed on or before 4th April, 2023, which would be within fourteen (14) days from 22nd March, 2023, as provided for under Order 43 Rule 1(2) of the Civil Procedure Rules, 2010.
36. Courts however have the power and/or discretion to enlarge time for doing any act or taking any proceedings upon such terms that are just, pursuant to the provisions of Order 50 Rule 6, of the Civil Procedure Rules 2010, which states that –

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”



37. The guiding principles when it comes to extension of time were laid down by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, as hereunder-

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. a party who seeks...extension of time has the burden of laying a basis to the satisfaction of the Court;
 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
38. The objector averred that being aggrieved by the ruling delivered on 22nd March, 2023, it intends to appeal against the said decision to the Court of Appeal but their Counsel on record during the delivery of the said ruling did not advise them of the need to seek leave to appeal against the said ruling.
39. In my considered view, if at all the objector was aggrieved by the Court's ruling delivered on 22nd March, 2023 and intended to lodge an Appeal against it at the Court of Appeal, but did not know that it ought to have first sought leave of Court before doing so, it would at the very least attempted to file a Notice of Appeal within fourteen (14) days from the date of the ruling delivered on 22nd March, 2023 as provided for under Rule 77(2) of the Court of Appeal Rules, filed a Memorandum of Appeal, and it would have written to the High Court Deputy Registrar requesting a certified copy of the ruling, and certified copies of the proceedings to enable it file a Record of Appeal within thirty (30) days. From the record, there is no evidence of any such attempt. To the contrary, the letter addressed to the Deputy Registrar requesting for copies of typed proceedings and the draft Memorandum of Appeal are both dated 29th August, 2023, which is approximately five (5) months after the elapse of the fourteen (14) days within which the objector should have attempted to file a Notice of Appeal.
40. In the premise, I am of the view that appealing against the ruling delivered by the Court on 22nd March, 2023 is an afterthought. The objector all along had knowledge of the delivery of the said ruling but did not at the very least attempt to come back to the Court timeously to seek leave of the Court to Appeal, or even in error file a Notice of Appeal before seeking leave to appeal. The Supreme Court in the *Nick Salat* case (*supra*) held that extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the Court's discretion. The fact that the objector's former Advocates on record did not advise it on the requirement to seek leave of the Court, does not explain why the objector did not attempt to lodge the appeal without leave in the first place.



41. In light of the foregoing, it is my finding that the objector has not demonstrated sufficient cause and/or reasonable cause for the delay in filing the application contemplated under Order 43 Rule 1(2) of the Civil Procedure Rules, 2010, to warrant this Court to exercise its discretion in its favour.
42. In the circumstances, this Court finds that the objector's application for extension of time is not merited.
43. In view of the above finding, this Court shall not consider and/or determine whether or not the objector should be granted leave to appeal to the Court of Appeal against the ruling delivered on 22nd March, 2023, and whether an order for stay of execution of the said ruling should issue pending the hearing and determination of the intended appeal against the ruling delivered on 22nd March, 2023, as that will be an academic exercise. It must however be noted that the ruling of 22nd March, 2023 dismissed the objector's application dated 23rd March, 2021. This means that the said order was a negative order since the parties herein were not ordered to do anything or to refrain from doing anything. The Court of Appeal in the case of *Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 others* [2008] eKLR, addressed its mind on whether an order for stay can be granted against a negative order as hereunder -

“As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.”

44. The Court of Appeal in the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR, in declining to issue an order for stay of execution of a decree held that the following: -

“With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July, 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay.”

45. Even if the objector had been successful in its prayer for leave to appeal out of time, an order for stay of execution of the ruling delivered on 22nd March, 2023 could not have been granted since the order that ensued from the said ruling was a negative order incapable of execution.

Whether the Auctioneer who attached the subject goods complied with Rule 12(b) of the Auctioneer's Rules.

46. Rule 12 (1) (b) of the Auctioneers Rules states that –

Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock –

- a. ...
- b. prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses



to sign such inventory the auctioneer shall sign a certificate to that effect;...
(Emphasis added).

47. The objector contends that prior to the attachment of the subject goods, the Auctioneer instructed by the plaintiff did not serve it with a Proclamation Notice. The plaintiff on the other hand contends that there was no need to serve the objector with a Proclamation Notice as it is not a party to the proceedings in this suit, neither is there an order directing service of the Proclamation Notice upon the objector.
48. It is evident that before, during, and after attachment of the subject goods, the plaintiff and the Auctioneer believed that the subject goods belonged to the defendant, thus the defendant was served with a Proclamation Notice prior to the attachment of the subject goods. Attached to the plaintiff's replying affidavit, are two Proclamation Notices dated 28th August, 2023 listing the proclaimed goods and indicating that the debtor being, the defendant herein declined to sign the Proclamation Notice. Whereas, annexed to the affidavit in support of the application dated 20th September, 2023 is a Proclamation Notice dated 23rd August, 2023 also listing the proclaimed goods and indicating that the debtor, the defendant herein declined to sign the Proclamation Notice.
49. Upon perusal of the Proclamation Notices stated above, I note that under the heading 'condition', the Auctioneer indicated "assorted". In my considered view, the word "assorted" cannot be used to describe a "condition" since it refers to a collection or selection of various different types or kinds of items. "condition" on the other hand refers to the "state" or "quality" of something at a particular time, especially in terms of its appearance, function, or usability. Therefore, by requiring the Auctioneer to indicate the condition of each item proclaimed in a Proclamation Notice, an Auctioneer is expected to indicate whether the items and/or goods proclaimed are inter alia new, used, refurbished, damaged, pristine and/or dilapidated. In this case, all the Proclamation Notices that have been produced before this Court do not indicate the "condition" of the proclaimed items at the time of proclamation.
50. It is however evident that the Proclamation Notices dated 23rd August, 2023 and 28th August, 2023 have all indicated the value of the proclaimed goods. Rule 12(1)(b) of the Auctioneers Rules also requires an Auctioneer to ensure that such inventory containing the proclaimed items and/or goods is signed by the owner of the goods, or an adult person residing or working at the premises where the goods are attached, and where any person refuses to sign such an inventory the Auctioneer shall sign a certificate to that effect. It is evident from a perusal of the Proclamation Notices dated 23rd August, 2023 and 28th August, 2023 that the defendant declined to sign them. The wording of Rule 12(1)(b) of the Auctioneers Rules as reproduced hereinbefore is that the value of specific items and the "condition" of each item, should be set out by the Auctioneer in the Proclamation Notice.
51. In light of the foregoing, this Court finds that the Proclamation Notices dated 23rd August, 2023 and 28th August, 2023 are not fully compliant with the provisions of Rule 12(1)(b) of the Auctioneers Rules which is couched in mandatory terms. The Court of Appeal in the case of *Lakeland Motors Limited v Harbhajan Singh Sembi* [1998]eKLR, held that -

“There does not appear to be any provision in the *Auctioneers Act*, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule [Rule 12 (1) (b) of the Auctioneers Rules]. Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution.”



52. Further, in *Hughes Limited v Mohammed S Kassam & another* (supra) cited by the objector, the Court stated as follows in regard to compliance with Rule 12(1)(b) of the Auctioneers Rules -

The question therefore is whether there was attachment in execution of decree in accordance with the law. There was not. The auctioneers' failure to prepare an itemized inventory of the goods attached indicating the condition of each specific item and the value thereof renders the purported attachment fatally flawed. It is not for nothing that rule 12 (b) exists. It is to ensure that the specific goods attached and their conditions and values are clearly known. This would ensure that there are no unnecessary disputes regarding what may or may not have been attached. It would also ensure that there is transparency in the subsequent sale of such attached goods and the proceeds thereby realized.

53. In the circumstances, I find that the Auctioneer's failure to comply with the provisions of Rule 12(1)(b) of the Auctioneers Rules was a material irregularity, hence the attachment of the subject goods was fatally defective and of no legal consequence.
54. In light of the above finding, it would be of no use to determine whether an order for taking of fresh inventory should issue, whether an order for valuation of the seized goods by an independent valuer should issue, and whether the plaintiff should account on the arrangements taken for safe custody, preservation, repair maintenance, storage, and insurance of the seized goods, as I have found that the goods that were purportedly attached by the plaintiff following the Proclamation Notices dated 23rd August, 2023 and 28th August, 2023 were attached in a process that was fatally attached.

Whether the plaintiff and the Auctioneer acting on his behalf acted in contempt and in disobedience of Court orders issued in the ruling delivered on 22nd March, 2023.

55. The plaintiff at paragraph 12 of its replying affidavit confirms that the subject attached goods were advertised for sale, and asserts that the decision to do so was in conformity with express provisions in the warrants of attachment issued by the Honorable Court that the goods were to be attached and sold. The objector on the other hand contends that by advertising the subject attached goods for sale, the plaintiff and the Auctioneer acting on his behalf acted in contempt and in disobedience of Court orders issued in the ruling delivered on 22nd March, 2023.
56. Earlier on in this ruling, this Court found that the ruling delivered by the Court on 22nd March, 2023 dismissed the objector's application dated 23rd March, 2021, thus the order that ensued from the said ruling was incapable of execution since the parties herein were not ordered to do anything or to refrain from doing anything. Upon perusal of the said ruling, I note that the Court at paragraph 24 stated as follows –

“As I have already noted elsewhere in this ruling, the purpose of the order for attachment of the defendant's assets was not for the disposal of the same to satisfy a decree, but rather to preserve the same as security for any decree that may be eventually passed against the defendant after the full hearing of the case”. (Emphasis added).

57. The Black's Law Dictionary 9th Edition, defines contempt as –

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”



58. I agree with the objector that advertising the attached goods herein for sale was acting in contempt and disobedience of Court orders as, the Court had expressly stated in its ruling delivered on 22nd March, 2023 that the order for attachment of the defendant's assets was for preservation of the same and not for disposal.
59. In the end, this Court finds that the objector's Notice of Motion application dated 29th August, 2023 is not merited, whereas the objector's Notice of Motion application dated 20th September, 2023 is partly successful.
60. As a result, I make the following orders –
- i. The plaintiff's Notice of Preliminary Objection dated 25th September, 2023 and the objector's Notice of Motion application dated 29th August, 2023 are hereby dismissed;
 - ii. This Court hereby declares the attachment of the goods in issue to be flawed for failure to comply with Rule 12(b) of the Auctioneers Rules;
 - iii. Notice to Show Cause shall issue to the plaintiff and to Julius Onyango T/A Agunja Traders Limited to show cause why they should not be punished for being in contempt of the ruling made by the Court on 22nd March, 2023 which expressly stated that the goods attached were not for disposal but were to be preserved to satisfy any decree that may be eventually passed against the defendant after a full hearing of the case; and
 - iv. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Miano for the Objector

Mr. Muhizi holding brief for Mr. Kigata for the defendant

No appearance for the plaintiff

Ms B. Wokabi – Court Assistant.

