



Odiek & another (Suing as personal representatives of the Estate of Fidelis Nyatwongo Odiek) v Otieno & another (Civil Miscellaneous Application E042 of 2024) [2024] KEHC 15516 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL MISCELLANEOUS APPLICATION E042 OF 2024
A. ONG'INJO, J
DECEMBER 4, 2024**

BETWEEN

**LYDIA KERUBO ODIEK 1ST PLAINTIFF
MARGARET KERUBI NOGIRE 2ND PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF FIDELIS
NYATWONGO ODIEK**

AND

**MICA OBEL OTIENO 1ST DEFENDANT
PROF JOHN OLUOCH ATINGA (SUED AS THE LAWFUL ATTORNEY
IN THE MANAGEMENT OF THE ESTATE OF DR POLYCARP PLUOCH
ATING'A) 2ND DEFENDANT**

RULING

1. The Notice of Motion Application dated 8.9.2024 was brought under certificate of urgency pursuant to provisions of Order 51 Rules 1 and 2 of the [Civil Procedure Rules](#), Section 3 and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law seeking that: -
 - i) The firm of Ms. Ahmed Maash & Co Advocates be granted leave to come on record for the Applicant/ Objector
 - ii) That the Court grants an order setting aside the proclamation of attachment dated 8.8.2024 pending hearing and determination
 - iii) That the Court be pleased to issue an order of temporary injunction against the 1st and 2nd Respondents acting either by themselves or through their agents, servants, employees, assigns



or any persons from the disposing, selling or any way attaching the Applicant's pending the hearings and determination of this application.

- iv) That the court be pleased to issue an order of injunction against the 1st and 2nd Respondent acting either by themselves or through their agents, servants, employees, assigns or any other persons from disposing, selling or any other way attaching the Applicants property.
 - v) That the court issues an order that the Respondents returns the attached property of the, Applicant being tractor registration No. KTCB 465M, Tractor Registration No. KTCN 295K, 15 cows pure breed, one calf and 2 feeder ploughs.
 - vi) That the Court be pleased to order stay of proceedings in Migori CMC CC NO. 60 of 2022.
 - vii) That the OCS Migori Police Station be ordered to ensure compliance with the Court order issued by this court.
2. The Application was premised on the supporting affidavit sworn by Prof. John Oluoch Atinga on 8.9.2024 in which he averred among others that he was sued in the Magistrates Court as Executor of the Will of Dr. Polycarp Eric Wamboi Atinga (Deceased).
 3. That on 13.12.2023 judgment was entered against the estate of the deceased in the sum of Kshs. 2,270,552.90. That on 8.8.2024 proclamation was made in execution of the decree issued on 13.12.2023 by Muriri Auctioneers.
 4. That on 7.9.2024 the Auctioneers unlawfully, unprocedurally and irregularly proceeded to his homestead and seized his tractors registration number KTCB 465M and KTCB 295K together with 15 grade cows, one calf and 2 feeder ploughs.
 5. The Applicant averred that the proclamation was unlawful and illegal as the property seized is separate and distinct from the estate of the deceased as they belonged to him.
 6. The Applicant further averred that unless the court grants the orders sought his property risks being disposed by way of Auction at a throw away price.
 7. The Respondents opposed the application.
 8. Mr. Ogony Advocate for the Applicant submitted in court on 17.9.2024 that the Applicant was willing to deposit security pending appeal so that the attached property can be returned to his homestead.
 9. Mr. Ouma Advocate for the Respondent submitted that the Applicant was seeking to review the decision of the magistrate's court. That the Applicant filed objection proceedings in the Magistrate court and later withdraw it on 10.9. 2024.
 10. That another objection was filed on 19.8.2024 and it was served on 10.9.2024 and the same was due for hearing on 7.10.2024.
 11. The Respondent counsel argued that the Applicant did not attach proof of ownership of the attached properties in his Objection proceedings. That there was also an application to set aside the execution proceedings. Mr. Ouma Advocate contended that the Applicant was forum shopping as he filed the application herein knowing well that another application was pending in the Magistrates court. That the application herein seems to be an appeal of lower court orders.
 12. Mr. Ouma Advocate submitted that the cattle attached were sold and receipts of proceeds duly filed; it was submitted that only 11 cows and one tractor were attached. That the other tractor was not motorable and was not attached.



13. Mr. Ouma Advocate claimed that the Applicant had been changing from one Advocate to another in a bid to frustrate the Respondent and avoid settling the decretal amount. That the application should be dismissed.
14. Mr. Ogony Advocate submitted that the main issue in dispute is the disposal of the Applicant's property which is distinct from the estate of the deceased. That the Applicant was the Administrator of the estate of the deceased. Mr. Ogony Advocate said the Proclamations indicated that the tractors were in running condition and the 15 cows were healthy. That the Respondents took the cows from the Applicants home and went ahead to dispose.
15. Mr. Ouma Advocate further said he was going to file Supplementary Affidavit to prove ownership of the tractors and cows attached. He said the process of auction was being undertaken illegally and sought for order of stay in the proceedings in the lower court.
16. An Order was issued to restrain the Auctioneer from proceeding with the auction to allow the Applicant to file Supplementary Affidavit to prove ownership of goods proclaimed and attached. The Applicant was also ordered to deposit bank guarantee equivalent to the decretal sums with the Deputy Registrar within 7 days. The Respondent was granted corresponding leave to respond to the Supplementary Affidavit within 7 days of being served.
17. On 29.10.2024 when the matter came up for mention to confirm compliance with courts directions Mr. Ogony Advocate said that they filed Supplementary Affidavit dated 23.9.2024 and served but they were not able to deposit the bank guarantee of Kshs. 2.5 Million as they were under the impression that cows attached had not been disposed but the Respondent filed return of Sale of cows dated 12.9.2024 showing 10 cows were sold at Kshs. 430,000/=. That in the circumstances part of the decretal sums had been settled and the order to deposit back guarantee should be varied to enable them comply.
18. He said that the Respondents went on with auction when an order restraining them was in force and that the auction was alleging the properties attached belonging to the Applicant. Mr. Ogony Advocate confirmed that the tractors were registered in the name of the deceased whose estate the Applicant was the Administrator but that the Applicant settled the loan as per annexure 6 and that he has direct interest in the said tractors. Mr. Ogony Advocate sought for extension of orders granted on 17.9.2024 to enable them deposit the bank guarantee.
19. Mr. Ouma Advocate on the other hand said that orders issued on 17.9.2024 were served on 23.10.2024. That in their Replying Affidavit they indicated the cows had been sold but that the tractor that was attached had not been sold. He said the Applicant failed to comply with the conditional stay orders given by the court. Mr. Ouma Advocate said the Applicant is seeking final orders when there is no substantive appeal pending in court and yet judgment was delivered in December 2023. Mr. Ouma Advocate prayed that orders made on 17.9.2024 be vacated as the conditions upon which it was granted had not been satisfied.
20. Mr. Ouma Advocate submitted that there were 3 applications pending before the lower court over the same issue and the Applicant had not appealed against the 3 Rulings in the lower court.
21. Directions were taken that application should be heard by way of written submissions.
22. The Applicants submissions dated 7th November, 2024 is to the effect that he is entitled to or have legal arguable interest on the attached goods and that is why he filed the application for injunction.
23. It was submitted that the applications for injunction was to preserve the status quo as provided under Order 40 Rule 1 of the Civil Procedure Rules 2010.



24. The Applicant argued that he had established a prima facie case by the fact that he has bonafide and lawful interest in the [properties the subject of attachment which are distinct from the estate of the deceased. He said the attachment was unlawful, illegal irregular as the execution was set in Motion against the wrong person.
25. As to whether the Applicant will suffer irreparable injury court was submitted that the Auctioneer referred to the cows as cross breed when they were pure breed and sold them at a meagre 430,000/= contrary to Valuation Report by the Ministry of Agriculture Livestock and Fisheries and Blue Economy dated 1.9.2024.
26. It was submitted that the disposal was questionable and that the illegal disposal has occasioned him immeasurable psychological trauma owing to huge financial loss.
27. It was further submitted that should the court find that the attachment was unlawful the Applicant will suffer substantial loss as the Respondents ability to repay attached property is unknown
28. The Applicant further argued that the balance of convenience is in favour of the applicant being granted interim orders sought
29. The Respondent submissions dated 11.11.2024 was to the effect that the application herein is ideally meant to appeal the decision of the lower court. The Respondents in their submissions questioned the purpose of the stay orders where there is no substantive appeal.
30. The Respondent cited the holding in Co-operative Bank of Kenya Ltd =vs= Banking Insurance & Finance Union (K) [2015]EKLK where Kantai J. A. held that an Order for stay of execution must be intended to serve a purpose.
31. That from the pleadings before the court it is evident that there is neither an appeal nor an intended appeal before the court. That the Applicant had since 29.9.2024 not sought for a copy of the ruling, proceedings it when moved the court on an attempt to appeal the court decision.
32. That it is in the Supplementary Affidavit that the Applicant indicate he wanted to file appeal against the decision of the lower court but has since not done so.
33. The Respondent submitted that in the circumstances the order sought cannot be granted as the application is fatally defective, a nonstarter, offends the principle of subjudice and is an abuse of court process for reasons the Applicant seeks blanket stay orders and has a lieu application of a similar nature pending in the Magistrates court. That the application herein is an attempt by Applicant to bite the cherry twice.
34. The Respondent counsel cited the holding in the case of *Business partners International Kenya Limited vs. Otundo & Another and Chege vs. Gachora* to support their position that the application herein offends the sub-judice rule.
35. It was argued that the execution process was lawful.
36. The Application herein has been considered as well as the Replying Affidavit and the respective submissions. The finding of this court is that the claim by the Applicant that the properties attached belong to him can only be canvassed in the trial court. In the circumstances, an order is hereby issued staying disposal of the properties that were attached and not yet disposed off as submitted by the parties herein so that the Application pending in the trial court as to ownership of the attached goods can be determined.



37. The stay orders granted on 17.9.2024 will remain in force until the said application is heard and determined. The Bank Guarante deposited with the Deputy Registrar herein will also remain in court pending hearing and determination of the Application(s) in the trial court.

38. Cost of the application to be in the cause.

DELIVERED DATED AND SIGNED AT MIGORI THIS 4TH DAY OF DECEMBER, 2024.

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A. ONG'INJO

JUDGE

Judgment delivered in the presence of

