



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPL. NO. 308 OF 2006**

**MBIGI NJUGUNA & CO. ADVOCATES.....APPLICANT**

**-VERSUS-**

**THE TOWN CLERK, CITY COUNCIL OF NAIROBI.....RESPONDENT**

**FRANCIS KAIRU CHEGE..... 1<sup>ST</sup> INTERESTED PARTY**

**STANLEY MUGACHA t/a Galaxy Auctioneers...2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1) Stanley T. Mugacha t/a Galaxy Auctioneers, the 2<sup>nd</sup> Interested party herein, took out the motion dated 13<sup>th</sup> September 2012 and sought for the following orders.

***i) THAT a determination be made on the fate of Motor Vehicle registration Number KAW 737Z- Nissan Lorry which was sold to one Francis Kairu Chege at a public Auction held by the interested party on the 11<sup>th</sup> February 2011 but which the Respondent herein forcefully took away from Leakeys Storage Yard on the 12<sup>th</sup> February 2011.***

***ii) THAT this court do make such order as it may deem appropriate, just and necessary to secure the interests of all persons concerned pursuant to section 34 of the Civil Procedure Act.***

***iii) THAT the costs of these proceedings be provided for.***

2) The motion is supported by the affidavit of Stanley Mugacha. When served with the motion, the Respondent filed the replying affidavit of Karisa Iha to resist the application. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written submissions. The main issue which this court has been asked to determine is the question as to what should happen to motor vehicle reg. no KAW 737 Z, Nissan Lorry which had been attached and sold to Francis Kairu chege, the 1<sup>st</sup> Interested party herein and later forcefully taken back by the Respondent.

4) It is the submission of the 2<sup>nd</sup> Interested party that the aforesaid motor vehicle ought to be released to Francis Kairu Chege, the 1<sup>st</sup> Interested party as a bonafide purchaser.

5) The Respondent has opposed the 2<sup>nd</sup> Interested party's proposal. The Respondent submitted that the suitable remedy available is for the 2<sup>nd</sup> Interested party to refund the money of the alleged buyer namely the 1<sup>st</sup> Interested party since the actions of the attachment were set aside by this court vide the ruling of Lady Justice Rawal (as she then was), made on 2/11/2011.

6) The Respondent further argued that Mbigi Njuguna & Co. Advocates should be ordered to pay the costs of the 2<sup>nd</sup> Interested party since it ordered for execution while it knew that the debt had fully been settled.

7) The question as to whether or not this application is properly before this court was answered by this court vide its ruling of 5<sup>th</sup> July 2019. This court found that the motion was not resjudicata pursuant to the provision of section 34 of the Civil Procedure Act which provides as follows.

***“34 (l) All questions arising between the parties to the suit in which a decree was passed or their representatives and relating to***

*the execution of the decree or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.*

**2) The court may subject to any objection as to limitation or jurisdiction treat a proceeding under this section as a suit or suit as a proceeding and may if necessary order payment of any additional court fees.”**

**8)** It is not in dispute that in the ruling delivered by Justice Rawal on 2<sup>nd</sup> November 2011 found that the attachment by the 2<sup>nd</sup> Interested party was unlawful since the decree had been fully settled.

**9)** The learned judge further set aside all the consequential actions taken by the 2<sup>nd</sup> Interested party. It is the submission of the Respondent that the aforesaid ruling set aside the 2<sup>nd</sup> Interested party’s action of conducting an auction. This court in its ruling of 5<sup>th</sup> July 2019 clearly stated that the ruling of Justice Rawal did not address itself on the issue touching on the attachment of the motor vehicle.

**10)** It is not disputed that motor vehicle registration no KAW 737z Nissan Lorry was attached and sold to Francis Kairu Chege in an auction held on 11<sup>th</sup> February 2011. The Respondent does not dispute that on 12<sup>th</sup> February 2011, it forcefully took away the aforesaid motor vehicle from Leakey’s storage yard. The aforesaid motor vehicle was under attachment and stored in Leakey’s yard. The ruling of Justice Rawal which was delivered on 2/11/2011 expressly set aside all the consequential actions taken in execution of the decree. However, by the time the orders were issued the motor vehicle in question had already been attached.

**11)** However, the Respondent has raised two fundamental points of law which merit this Court’s attention. First, it is argued that under section 21 (4) of the Government proceedings Act, the Government is exempted from execution. Secondly, it is argued that the decretal sum had been fully settled at the time of execution.

**12)** With respect, I agree with the submissions of the Respondent that the court is prevented from making an order of attachment of debts as against the Government. It was therefore unlawful for the 2<sup>nd</sup> Interested party to carry out an attachment against the Respondent which the law does not permit. On the basis of the above ground, this court declines to issue an order requiring the Respondent to return the attached motor vehicle.

**13)** In exercise of this court; inherent power which the 2<sup>nd</sup> Interested party has cited under section 3A of the Civil Procedure Act, the attachment and sale are hereby set aside. The 2<sup>nd</sup> Interested party should forthwith refund to the 1<sup>st</sup> Interested party if any the amount he paid for the purchase of motor vehicle registration no KAW 737Z. In the circumstances of this case a fair order on costs in order which I hereby do that each party meets its own costs.

**Dated, signed and delivered at Nairobi this 15<sup>th</sup> of January, 2020.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent

..... for the Interested Party