



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 14 OF 2017

NJIRU BENSON MURAGE.....APPELLANT/APPLICANT

V E R S U S

PETER NJUE ZACHARIA (Suing as the Legal Representative of the

Estate of JUSTIN MUKUNDI NJUE).....1ST RESPONDENT

GIANT AUCTIONEERS.....2ND RESPONDENT

R U L I N G

1. The application dated 19/10/2017 seeks for orders for release of motor vehicle registration number KAN 215 S and 641 Z pending hearing inter parties. It also seeks for orders that the Officer Commanding Embu Police Station enforces the orders.
2. The grounds in support of the application are that this court had already issued a conditional stay of execution at the time the vehicles were attached and that the respondent had been served with the order. The respondent had then deliberately and blatantly disobeyed the court order. The attachment was therefore a nullity *ab initio* and ought to be set aside.
3. The counsel for the respondent Morris M. Karigi in his replying affidavit sworn on 13/11/2017 avers that the orders issued by this court on 18/09/2017 were not complied with by the respondent within 21 days as directed by this court.
4. The respondent further states that on 28/10/2017 the respondent's counsel requested for additional documents for opening a joint account. This was after this application had been filed. The applicant has not come to court with clean hands and should not be given the orders sought.
5. The respondent further stated that there was delay in taking directions for hearing of the application. From the record, it shows that Hon. Justice Limo of Chuka High Court had issued temporary stay orders on 7/06/2017 in favour of the applicant. The application was to heard inter parties on 10/07/2017 but the court file was taken to Chuka High Court by error. The stay orders were still in force.
6. The file was followed up in Chuka Court and returned to Embu. The applicant argued that the respondents were in contempt of court orders at the time the attachment was done on 14/07/2017 because the interim orders issued by Justice Limo were still in force.
7. There is a further affidavit sworn by the auctioneer Lawrence Mugambi on 14/11/2017. He deposes that he received warrants of attachment for a money decree in this case on 27/04/2017. He then proceeded with attachment of the vehicles on 14/07/2017 after confirming that the stay orders given had lapsed.
8. The file was then taken to Chuka Law Courts on 29/06/2017 for inter parties hearing. The applicant's counsel was duly informed of this position.
9. It is further deposed that the orders issued by Limo J. were never extended and were therefore not in force at the time of attachment. The auctioneer seeks to have his fees of Kshs.467,300/= settled by the applicant.
10. The issues that arise from this application are as follows:-
 - (a) Whether the 2nd respondent was wrongly joined in as a party.
 - (b) Whether the orders issued by Limo, J. on 15/06/2017 were in force when the attachment was carried out.

(c) Whether the attachment and sale was lawful and whether the auctioneer's fees is payable and by who.

(d) Whether the orders issued on 18/06/2017 and 24/07/2017 should be confirmed.

11. The applicant joined the 2nd respondent Giant Auctioneers as the 2nd respondent in this application. The respondent argued that it was wrong to join the 2nd respondent. The fee arose from the attachment which is the subject of this application. It was not necessary to make a formal application for leave to join the 2nd respondent.

12. The applicant filed a certificate of urgency dated 7/07/2017 seeking orders for stay of execution pending hearing of this appeal. Interim orders for stay were granted by the Presiding Judge Chuka High Court pending hearing of the application inter parties before Embu Presiding Judge who was on leave at the time of filing the application. The application was to be heard on 10/07/2017. Due to some oversight, the Chuka High Court registry did not forward the file to Embu for hearing and neither did the Embu High Court registry follow up the file.

13. On 10/07/2017 the application was not cause listed because the file was still in Chuka High Court. It was later called for and returned to the Embu High Court registry.

14. The respondent's counsel seems to have taken advantage of the confusion and wrote an undated letter to the auctioneer instructing him to proceed with the attachment since the interim orders had lapsed. This letter was received by the auctioneer on 11/07/2017 as shown by the official stamp on it. It is curious why the respondent's advocates' letter was not dated.

15. It appears that it was written on the same day the application was to be heard so as to reach the auctioneer the same day if not the following day. The question is whether someone had a hand in taking the file to Chuka High Court when the presiding judge in Embu was on duty at Embu. The file indicated clearly that the matter was to be heard before Embu High Court on 10/07/2017.

16. The orders given by Judge Limo at Chuka read as follows:-

Interim orders for stay of execution is granted pending inter parties..." hearing of this application dated 15/06/2017.

It was directed that "Deputy Registrar Embu High Court fixes a hearing date of the application before the presiding Judge Embu when she (judge) resumes duty from leave".

It was also directed that the respondent's advocate be served.

17. On 20/06/2017 the respondent filed an application dated 23/06/2017 seeking to set aside the interim orders for stay given by Judge Limo. The Judge declined to grant the orders and directed that the two applications dated 15/06/2017 and 23/06/2017 be heard by the Presiding Judge in Embu on 10/07/2017.

18. The hearing date of the applications of 10/07/2017 never came to be due to the file not being at Embu on the said date. This court was moved by the applicant on 18/07/2017 seeking to restrain the respondent/ auctioneer from selling the applicant's vehicle which had already been attached on 14/07/2017 following the instructions of the respondent's counsel.

19. This court notes that the Presiding Judge Chuka had issued orders for stay on 16/06/2017 pending hearing of a related application dated 15/06/2017. Bearing that in mind, I directed that *status quo* on the attachment be maintained pending disposal of all the pending applications.

20. It is important to note that the respondent's counsel did not comply with these orders of maintaining *status quo*. As an officer of the court, the counsel had an obligation after being served with a copy to withdraw the instructions he had given the auctioneer on 10th or 11/07/2017 in his undated letter. The auctioneer went ahead to attach and sell the property of the applicant and raised a bill of KShs.467,320/= which he now demands payment.

21. As for the orders of Judge Limo, it was clearly indicated that they were to remain in force pending hearing inter parties of the pending applications. It is trite law that interim orders will last for 14 days. The party in whose favour the order was issued has an obligation to apply for extension of the orders.

22. In the case before me, the file was not available for hearing of the applications inter parties on 10/07/2017 for extension of the orders. With this knowledge, the respondent's counsel who is an officer of the court ought to have appreciated the unique circumstances prevailing and held his guns for a few more days for the court file to be called for from Chuka and give the applicant's counsel time to apply for extension of the orders to which application he was entitled to oppose.

23. The law or rules are not cast on stone and the court has a duty to consider the facts of each case so as to serve the interests of justice in respect of the parties. In this case, the counsel for the respondent was not in order to instruct the auctioneer to proceed with the attachment on the same day that the file was not available for the applicant's counsel to apply for extension of the orders.

24. The wording of the interim orders that it was valid until the hearing of the two applications inter parties was sufficient for the counsel to move the court on the validity or otherwise of the orders if he had any doubt before giving instructions to the auctioneer to attach the applicant's property.

25. On 18/07/2017 this court directed that the parties maintain status quo on the execution pending disposal of the pending applications. By

that time, there were three applications pending before the court including this one.

26. The constitution gives every party a right of being heard which must be accorded by the court. I find the orders of Limo, J. remained valid until the court was moved to set them aside or to extend the same. The issue of automatic lapse of the orders did not arise.

27. An order to maintain status quo is an order of the court that must be obeyed like any other. The respondent's counsel was served with the order but failed/neglected to move the auctioneer to put the sale of the attached property on hold.

28. The affidavit of Lawrence Mugambi, of Giant Auctioneers, states he attached the property on 14/07/2017. He placed an advert in the daily newspapers on 2/10/2017. The sale was scheduled for 1/11/2017 at 10.00 a.m. the affidavit of the 2nd respondent states that one of the vehicles of the applicant was sold by public auction.

29. The act of the auctioneer was in contempt of the orders issued by this court on 18/07/2017. The auctioneer said he attached the property on 14/07/2017. He advertised it for sale on 24/10/2017 during the subsistence of the court's orders to maintain status quo.

30. The respondent having been served with the order ought to have stopped any further action by the auctioneer. The auctioneer had the history of the matter and ought to have exercised due diligence before being moved by an undated letter of the respondent's counsel.

31. It is my considered view that the attachment, the advertisement and sale of the applicant's property was illegal for it was in contempt of court orders.

32. On 18/09/2017 this court delivered a ruling on the application dated 7/06/2017 and gave conditional orders for stay pending a hearing and determination of the appeal. These orders for stay remain valid until the appeal is heard and determined. The counsel in his brief replying affidavit said that the conditions given by the court were not complied with. He did not elaborate on this subject in his affidavit or in his submission to facilitate the court in determining any issue of non compliance.

33. Even assuming that there was a problem in compliance, the counsel ought to have raised it in the right forum and move the court to vacate the orders for stay. As the record shows, the orders for stay pending appeal are still valid to date. The auctioneer advertised the applicant's property for sale during the existence of the orders for stay pending appeal. It appears that the respondent was determined to sell the applicant's property despite the existence of several court orders to the contrary.

34. It is my considered view that the advertisement and sale of the applicant's vehicle registration number KAP 641 Z or any other property unlawfully attached was unlawful. The respondent and the auctioneer were in blatant and deliberate disregard of the court orders. The conduct of the respondent's counsel in this matter leaves a lot to be desired.

35. I find that the application dated 19/10/2018 is merited and is allowed on the following terms:-

(a) That the orders of this court dated 18/06/2017 and 24/07/2017 are hereby confirmed.

(b) That the auctioneer's fees be taxed by the Deputy Registrar and be paid by instructing client the 1st respondent and his counsel Morris Mugendi Karigi in equal parts.

(c) That the respondent and his counsel to meet the costs of this application in equal parts.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Marete holding brief for Mr. Njoroge for Applicant

Ms. Murithi for Mugendi for Respondent