



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 27 of 2008

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL
ELECTIONS ACT (CHAPTER 7, LAWS OF KENYA)**

**AND IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS
REGULATIONS AND THE NATIONAL ASSEMBLY (ELECTION PETITION) RULES
AND**

**IN THE MATTER OF THE ELECTION OFFENCES ACT , CHAPTER 66 OF THE LAWS OF
KENYA**

AND IN THE MATTER OF ELECTION FOR LANGATA CONSTITUENCY.

STANLEY LIVINDO.....PETITIONER / JUDGEMENT DEBTOR

-VERSUS-

RAILA AMOLO ODINGA.....1ST RESPONDENT

JOSEPHINE MWENGI.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

IDAH KAGENDO KARAUNI.....OBJECTOR

RULING

The Objector/Applicant has filed a notice of motion dated 20th March, 2013 Under Order 22 Rule 51 of the Civil Procedure Rules and Other Provisions of the Law seeking the following orders:-

1. Spent
2. THAT there be a stay of execution of the warrants of attachment and warrant of sale of the Objector's movable properties in execution of the decree for costs in favour of the Respondents Decree Holders issued to Valley Auctioneers pending the hearing and determination of this application inter parties.
3. THAT the Respondents/Decree holders acting through their agents Valley Auctioneers or any other auctioneers be restrained from proclaiming , attaching, repossessing and/ or selling by private treaty or public auction the Objector's properties on or within Title number NAIROBI/BLOCK 118/291 at

Kahului, Nairobi in execution of the decree for costs herein in favour of the Respondents Decree holders.

4. THAT costs of this application be met by the Respondents/ Decree Holders.

The application is based on the following grounds.

- 1) The objector is not a party to the suit between the Petitioner and the Respondents .
- 2) The properties in respect of which Valley Auctioneers have obtained warrants of attachments and warrants of sale in execution of decree in favour of the Respondents/Decree Holders belong to the Objector and not the Judgment Debtor.
- 3) The Judgment debtor has no legal interests in the property proclaimed and or attached for sale in execution of the decree.
- 4) The objector has now been served at her premises at Title Number Nairobi/ Block 118/291 Kamulu with an order directing the Officer in Charge of Ruai police station to supervise and provide security to Valley Auctioneers to enter into the Petitioner/ Judgment Debtor's premises allegedly at Kipawa in Kamulu and the Objector believe that the said auctioneers are mistaken in their believe that Title Number Nairobi / Block 118/291 belong to the Judgment Debtor.
- 5) The Objector as the absolute legal owner of the property proclaimed for attachment will suffer irreparable loss and damage if the intended execution is allowed to proceed.

The objector filed a supporting affidavit reiterating facts similar to what is stated in the grounds which I need not to repeat.

The respondent filed grounds of objections as follows;-

1. The application is incompetent and misconceived as it is not made under the provisions of the order and rules that it is purported to have been made and the same should be struck out from record.
2. The application is not made in accordance with the provisions of order 22 rule 51 of the Civil Procedure Rules, 2010.
3. The requisite procedure was not followed and the application dated 20/3/12 has no room under rule 51 under which it is purported to have been filed.
4. The application is not made under rules 52 and 54 of order 22 aforesaid.
5. All the mandatory steps, requirements of steps to be taken in obtaining a stay of execution have been skipped by the objector, who came straight to court for her application to be heard without following the correct procedure as required by Law, and thus failed to give mandatory notices required by Law to be given.
6. The application dated 20/3/12 is misplaced and is not known under the provisions of Order 22 Rules 51 to 54 inclusive leaving the Court with no option but to dismiss the application with costs, so that execution can proceed without interference to recover the decree-holder's money.
7. The law for a stay of execution under order 22 rules 51 to 54 was not followed and inviting the Court to order a stay of execution under an application not provided for and/or known in Law is not in the interests of justice and would not meet the standard of "Over-riding objectives" of the Court and the law to do justice without reliance on "undue technicalities" so as to do justice where property legal procedural steps have been taken and brought under the provisions of law.
8. The application has been brought to Court illegally and without any backing of the law the same is

incompetent and misconceived, frivolous and vexatious and is not brought under any known provisions of the law and should be struck out from record.

9. Procedural rules are there to be obeyed and/or observed so as to make civil proceedings easier to handle without leaving any litigant out whom the law requires to be heard and served under the law and the application should be struck out from record and dismissed with costs to the respondent on the higher scale

Parties filed written submissions which I have read and considered together with their oral submissions made in Court. In their submissions they reiterate what is stated in their affidavits and grounds. The first issue that I will deal with is whether the application is incompetent as submitted by the respondent. The objector filed a notice of objection on the 20th of March 2012 through the firm of J M Mugo and Company, simultaneously she also filed a notice of stay of execution under order 22 rule 52 and a notice of motion under Order 22 Rule 51 of the Civil Procedure Rules which is the application under consideration, all these were filed under certificate of urgency. The procedure of objection proceedings are set out under Order 22 rule 51, 52, 53 and 54. The applicant complied with rule 51 (1) the applicant gave notice in writing to the Court. Under this rule the applicant was to serve all the parties and the decree holder with the notice. Under rule 51 (2) the notice shall be accompanied by an application supported by an affidavit and shall set out in brief the nature of the claim which the objector makes to the property attached. The applicant complied. The notice of objection and an application were to be served within 7 days from the date of filing on all parties. Under rule 52 upon receipt of the notice and application the Court was to make an order of stay of execution for not more than 14 days and call upon the attaching creditor by notice in writing to intimate to the Court and all parties in writing within 7 days whether he was going to proceed with the attachment and execution wholly or in part.

Mr. Sato for the applicant submitted that they filed the notice and application and that it was served within 7 days. They served on the 21/3/2012 and filed an affidavit of service on the 22/3/2012 and therefore the objector fulfilled the objection under the rules. He argued that the application is properly before the Court and the respondent's arguments submissions that the matter should be struck off holds no water and that the respondent is relying on technicalities.

Mr. Gaturu in opposing the application argued that the notice of motion filed on the 20/3/2012 was the only one served on their firm on the 21/3/2012. That they appeared before Justice Waweru on the 22/3/2012 and he was granted leave to file his grounds of objection which he filed within 14 days on the 14/4/2012. They were ordered to file written submission and he did so on the 27/4/2012 but the objectors filed their on the 7/6/2012, the same was not served on him. Mr. Gaturu submitted that he was not served within 7 days as provided by the law but was served on the 28/5/2012. He received the notice under protest as it was almost 3 months and hence there was no compliance with the procedure in order 22 rules 51, 52 and 53. Having not been given the notice he could not comply with the provisions of rule 54. He submitted that these are not undue technicalities but requirements of the law that need to be complied with fully and therefore their application is misplaced and not known under the provisions of order 22 rule 51, 52, 53 and 54 and therefore the application should be dismissed.

In reply Mr. Sato submitted that it was the Court that was to call upon the attaching creditor to show cause or state whether they wanted to proceed with the attachment. He urged the Court to examine the merit and substance of objector's application and that in the interest of justice the objector's property should not be sold off. He referred the Court to Order 22 rule 84 and also to its powers under section 3A to prevent injustice.

From the submissions made by the respondent it is apparent that only the notice of objection was served on them. The notice was not accompanied by an application. This application as per counsel was served way after the 7 days. It is also obvious that the Court did not give the requisite notice as provided under rule 52. These are procedures that were not complied with. Article 159 (2) of the constitution provides that in exercising judicial authority the Courts and Tribunal shall be guided by the following principles and at article 159 (2)(d) it stated that *Justice should be administered without due regard to take procedural technicalities*. With this in mind I am of the view that it is not worthy to strike out the

objector's application even though the objector did not follow the laid down procedure in law. In my view striking out the objection proceedings will cause a delay in the process that has taken place for what is of importance now is whether the execution should proceed. Going to the merits of the application the objector has exhibited a certificate of lease for Attachment/Distress/Repossession Movable Property form from Valley Auctioneers showing a schedule of proclaimed goods. She has also attached certificate of lease for Nairobi/Block 118/291 in her name issued on the 16/10/2003 plus copies of receipts of goods purchased from Tile and Carpet Centre of goods purchased by her. In her supporting affidavit she claims that she has no connection with the proceedings. She was served with the attachment notice at her premises in execution to the Court warrant. That she explained to the auctioneer that the goods did not belong to the judgment debtor and that the judgment debtor had no legal right in any of the proclaimed properties. That the auctioneers served her with the Court order directing the police at Ruai to enter the premises and carry away the goods. She says that she is the absolute legal owner of the goods proclaimed and she stand to suffer loss and damage if her premises is forcibly entered and her properties taken away for sale by auctioneers. These facts were not challenged by the respondent. The respondent only filed grounds of opposition which dealt with the competence of the application. I am persuaded that the goods attached belong to the respondent and that there is need to stop the auctioneer from attaching, repossessing and selling by private treaty or public auction the objector's properties on or within Title number Nairobi/Block 118/291 at Kamulu, Nairobi in execution of the decree for costs herein in favour of the respondents/Decree holder. Accordingly prayer 3 of the application dated 20/3/2012 is granted. Costs shall however be in the cause.

Orders accordingly.

Dated, signed and delivered this 12 day of April 2013.

R. OUGO
JUDGE

.....Objector/Applicant

.....Decree holders /Respondents

.....Court Clerk