



**Okutoyi t/a Armok Auctioneers v Independent Electoral and Boundaries Commission; John (Client) (Miscellaneous Case 2 of 2024) [2024] KEELRC 2121 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2121 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS CASE 2 OF 2024**

**JW KELI, J**

**JULY 25, 2024**

**(FORMERLY HIGH COURT CIVIL MISCELLANEOUS APPLICATION NO. E027 OF 2024)**

**BETWEEN**

**ARNOLD OMBONYA OKUTOYI T/A ARMOK  
AUCTIONEERS ..... AUCTIONEER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... RESPONDENT**

**AND**

**WANYAMA MURABWA JOHN ..... CLIENT**

**RULING**

1. The ruling is on the application by way of a Notice of Motion by the Applicant /Auctioneer dated April 9, 2024 and filed on 11<sup>th</sup> April 2024 initially filed in the High Court at Bungoma and later transferred to this Court, brought under the provisions of Sections 1A, 1B, 3A of the Civil Procedure Act, Rule 7A, B, C, and Rule 55(1)(2)(3) of the Auctioneer Rules, 1997 and the Auctioneers (Practice) Rules 2009 and Order 51 of the Civil Procedure Act; seeking the orders: -
  - a. The Honourable Court be pleased to direct the respondent to meet /pay Auctioneers Charges and expenses arising from the execution of the warrants of attachment and sale of moveable property in execution of decree dated 14/02/2024 in Bungoma ELRCC 11/2019
  - b. The Auctioneers Bill of cost attached herewith be deemed as properly filed and the same be taxed by a taxing master and the assessed costs be deemed as a decree of this Honourable Court and the same be paid by the Respondent after assessment.
  - c. The cost of this application be the cost in the cause.



2. The Notice of Motion application was premised on the grounds on the face of the application and the grounds in the supporting affidavit sworn by the Applicant on 9<sup>th</sup> April 2024 as follows: -
  - a. That the applicant is an authorized Auctioneer holder of a Class “B” license (AOO-1).
  - b. That on 23/02/2024 he received warrants of attachment and sale(A00-2) from the instructing client in Bungoma ELRCC No. 11 of 2019 to execute against the Respondent.
  - c. That he proceeded on 15<sup>th</sup> February 2024 to serve the proclamation notice (AOO-3) on the Respondent at their Bungoma Office which is 61 km from the applicant’s office using his Motor Vehicle Registration Number KAN594G-Toyota RAV4 (Rating 1990 cc) as evidenced by a copy of logbook (AOO-4).
  - d. That the Current Automobile Association Mileage for Vehicles rating between 1500 CC to 2000 CC is Kshs. 73.20 per Kilometer.
  - e. That an auctioneer is entitled to be paid full costs upon proclamation as per the law.
  - f. That the Respondent upon service with the proclamation Notice moved to court and obtained stay orders dated 7<sup>th</sup> March 2024, which were served upon him on 8<sup>th</sup> March 2024(A00-5).
  - g. The Respondent has refused to negotiate and pay the auctioneer fees despite him writing an email (A00-6).
  - h. That it is not objected that he served a proclamation form and duly executed the warrants of attachment and sale issued by the court and thus entitled to be paid his costs and expenses incurred during execution.
  - i. That the Respondent has refused to negotiate on the auctioneer charges in bad faith and intends to deny him or derail him from benefiting from the hard effort in executing the warrants of the court.
  - j. That the auctioneer’s bill of costs is drawn to scale (AOO-7) and it is in the best interest of justice that the orders sought in the application be allowed so that he can realize the benefit of his hard labour. That unless the orders sought are granted, he will suffer irreparable damage and loss.
  - k. That the application is made timely and in good faith.
3. The application was unopposed.

### **Written Submissions**

4. The Court directed that the application be canvassed through written submissions. The parties complied. The Applicant’s written submissions dated 10<sup>th</sup> July 2024 were filed by Muri Mbugua & Associates Advocates. The Respondent’s written submissions dated 12<sup>th</sup> July 2024 were filed by Donex Juma Advocates on an even date.

### **Determination**

#### **Issues for determination.**

5. The Applicant addressed the following issues in his written submissions: -



- a. Whether the Auctioneer/Applicant received warrant of attachment and sale from instructing party in Bungoma ELRC/11/2019 to levy execution against the Respondent.
  - b. Whether the Auctioneer/Applicant is entitled to his fees as per the Auctioneer Rules 1997 and the warrants of attachment dated 14/02/2024.
6. The Respondent did not address a specific issue but asserted that the application is incompetent and ought to be dismissed as the Applicant did not comply with the strict provision of section 21 of the [Government Proceedings Act](#) on execution against state organs.
7. The Court having perused the application and the written submissions by both parties was of the considered opinion that the issue placed before the court by the parties for determination of the application was: - Whether the application merited?  
Whether the application merited?

### **Applicant's submissions**

8. The Applicant was an auctioneer who received execution instructions from the Judgment Holder and obtained warrants of attachment and sale of movable properties vide Court orders dated 14<sup>th</sup> February 2022 in Bungoma ELRC 11/2019, to execute against the Respondent for the sum of Kshs.2,028,836.43.
9. The Applicant submits that he duly served the warrants of attachment and sale of moveable properties on 15<sup>th</sup> February 2022 which were received by Milka Mukhebi at the Respondent's Bungoma office who advised him to serve electronically at the email info@iebc.or.ke (Annexure 3 in affidavit of 9<sup>th</sup> April 2024).
10. The Applicant contends that he duly served the proclamation notice upon the Respondent and he thus executed instructions given to him. He submitted that it was only after the proclamation that the Respondent who is a debtor, filed a Notice of Motion to stay execution which was granted conditional on the depositing of the decretal sum in 30 days from then.
11. The Applicant contends that Rules 7(a)(b), (c), and 53(3) of the [Auctioneers Rules, 1997](#), are clear on assessment and how to settle auctioneer costs when such instances of conflict and dispute arise.
12. The Applicant submits that by dint of Rule 53 of the [Auctioneer Rules](#), in case of a dispute, the auctioneer should file a bill of assessment before any Magistrate or the Auctioneer Licensing Board. He filed his bill of assessment before the Magistrate Court and he asserts that the Court has the jurisdiction by dint of Rule 53(3) to determine his application.
13. The Applicant asserts that he is entitled to his fees once goods are proclaimed under Rule 12b and it does not matter at what point the execution is terminated. He states that he was entitled to charge commission under Rule 11 paragraph 4 and relies on the decision in [National Industrial Credit Bank Ltd v SK Ndegwa Auctioneer](#) (2005) eKLR.

### **Respondent's submissions**

14. The Respondent submits that it is a state organ established under Article 88(1) of the [Constitution](#) and therefore Government within the meaning of Section 21 of the [Government Proceedings Act](#).
15. The Respondent submits that under Article 260 of the [Constitution](#), a state organ includes a Commission, office, agency, or other body established under the [Constitution](#).



16. Relying on the Supreme Court’s Advisory *in the matter of the National Land Commission* (2015) e KLR, Advisory Opinion No. 2 of 2014, the Court held that state organs are part of the government and one of their mandates is to protect the sovereignty of the people. The same position was upheld in Civil Appeal No. E290 of 2023 (Nairobi) *Five Star Agencies Limited v National Land Commission and Another*.
17. The Respondent asserts that based on the fact that it is a government, the Applicant was to exercise strict compliance with section 21 of the *Government Proceedings Act* on the procedural necessities provided by the law in execution against it.
18. The Respondent submits that by virtue of Order 29 Rule 2 (c) of the *Civil Procedure Rules*, 2010, no order against the government may be made under Order 23(Attachment of Debts).
19. The Respondent submits that the only remedy available to such an Applicant in execution is to institute judicial review proceedings and seek an order of mandamus to compel the government to settle a decree in question relying on the decision of Civil Appeal No. E290 OF B2023 (Nairobi) *Five Star Agencies Limited v National Land Commission and Another* (2024) eKLR.
20. The Respondent submits that where there is a clear procedure for redress of a particular grievance, that procedure must be strictly followed relying on the decision *in Speaker of the National Assembly v James Njenga Karume* (Civil Application No. 92 of 1992) (Nai 40 of 92) (U.R.).
21. The respondent asserts that to allow the application would be to allow the Applicant to enjoy the fruits of an unlawful process and asks the court to dismiss the application with costs for being foundationally incompetent.

## Decision

22. The Respondent asserted that it is a state organ. The Applicant did not respond to this assertion.
23. The Court of Appeal in *Five Star Agencies Limited & another v National Land Commission & 2 others* (Civil Appeal E290 & 328 of 2023 (Consolidated)) [2024] KECA 439 (KLR) (12 April 2024) (Judgment) relied on by the respondent observed that: -

“As regards the first issue, the central issue that the trial court had to determine was whether or not the NLC is analogous to the government and therefore not subject to execution in the manner provided for under Order 23 rule 1 of the Civil Procedure Rules 2010. The court analyzed various provisions of the law and judicial decisions and arrived at the conclusion that the NLC is a State organ and although independent, it is infused with governmental character. This finding of the trial court is not a contested issue in the consolidated appeals. We need not therefore belabour the findings of the trial court on the issue.

83. Having therefore established that the NLC is a State organ and therefore for all purposes part of government, what mode of execution should be adopted against it? The procedure adopted by Five Star is as laid down under Order 23 rule 1 of the Civil Procedure Rules 2010. Order 23 rule 1 provides the normal rules applicable to normal execution proceedings. However, Order 29 Rule (2) (c) of the Civil Procedure Rules 2010 stipulates that: “(2) No order against the Government may be made under—a....; b....; c. Order 23 (Attachment of debts);” [Emphasis added]



84. Our interpretation of the provisions of Order 23 rule 1 as read with Order 29 Rule (2) (c) of the Civil Procedure Rules 2010 is that execution under the Civil Procedure Rules (including garnishee proceedings) is barred in so far as the Government is concerned.....”The Respondent is an independent Commission, just like the National Land Commission, and as held by the Court of Appeal above part of the Government.
24. Section 21 (4) of the [Government Proceedings Act](#) prohibits execution against the Government. It provides that: -
- “Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.”
25. Section 21 of [GPA](#) is drafted in mandatory terms by the use of the word “SHALL” so that where the law provides a clear procedure for executing a particular act (including execution of decrees and orders), this procedure should as a general rule, be followed. A party cannot ignore it.
26. Justice Odunga in [Republic v Permanent Secretary Office of the President Ministry of Internal Security & another Ex-Parte Nassir Mwandishi \[2014\]](#) eKLR, observed that no government agency has money that is readily available for release unless it has been factored in the agency’s expenditure. Only funds that have been approved in the agency’s budget can be lawfully paid out and the agency must be shielded from a run-in on its assets through attachments, otherwise, the government runs the risk of being overrun by attachments with the consequence that it will be completely incapacitated to deliver on its core mandate of providing services to the public. I would say the same of the instant execution.
27. The Applicant did not address the issue of the [Government Proceedings Act](#) but relied on the Auctioneer rules to state that he is entitled to his costs. As discussed above, there was every reason for the procedure set out in section 21 of the [Government Proceedings Act](#) to be followed, and in its absence, the execution by the Applicant was unlawful in going against the statutory provisions of the said Act.
28. In [Stephen Mwallyo Mbondo v County Government of Kilifi \[2021\]](#) eKLR, Justice B. O. M. Manani held that: -
- “49. .... This position is made clear in [National Bank of Kenya Ltd v Joly Family Stores & another \[2005\]](#) eKLR, when the court said as follows: -
- ‘Contrary to the finding of the trial Court, auctioneers, while executing decrees of the courts, are indeed agents of the Court. It is the courts which give them authority to execute, for example by the different modes of warrants and the same court can order them to stop an execution process.’.....” The warrants of attachment and sale of moveable properties issued on 14<sup>th</sup> February 2024 having been obtained and issued in an unlawful execution process are set aside for being unlawful.

#### **Whether the Applicant is entitled to costs.**

29. The Court returns that the warrants of attachment and Sale of Movable properties have been set aside for being unlawful. The Respondent is thus not liable for the costs obtained from an illegality.



30. The application is dismissed with no order to costs as the Respondent has yet to settle the judgment debt.

31. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**J.W. KELI**

**JUDGE**

In The Presence Of: -

Court Assistant: Macheso

Applicant: - Absent

Respondent: Manyonge h/b Juma

