



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Miscellaneous 248 of 2009**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 65**

**BETWEEN**

**DAVID NJUGUNA KIBE .....APPLICANT**

**AND**

**GLADYS WANJIKU GICHUHI.....1<sup>ST</sup> RESPONDENT**

**AND**

**CHIEF MAGISTRATE THIKA LAW COURT**

**IN THE MATTER OF CMCC NO. 815/2005 THIKA .....2<sup>ND</sup> RESPONDENT**

**BETWEEN**

**GLADYS WANJIKU GICHUHI (SUING AS**

**LEGAL REPRESENTATIVE OF THE**

**ESTATE OF STEPHEN KARANJA  
(DECEASED).....PLAINTIFF**

**- VS -**

**JOSEPH GAKUO MUTUAL AND**

**DAVID NJUGUNA  
KIBE .....DEFENDANTS**

**JUDGEMENT**

The Applicant herein, David Njuguna Kibe, has moved this court by way of an amended originating notice of motion under Section 65 (2) of the Constitution of Kenya and the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. The Respondents are named as Gladys Wanjiku Gichuhi and the Chief Magistrates Court, Thika Law Courts. The Applicant has raised three questions:-

(A) Whether an auctioneer can lawfully and legally execute a decree of a court in respect of which the Auctioneer has no jurisdiction.

(B) Whether the auctioneer *Elijah Mputhia Irura trading as Warleen (K) Ltd.* acting for and on behalf of the 1<sup>st</sup> Respondent is wrongfully and illegally detaining the Applicants Motor Vehicle KBA 556 V having had no jurisdiction to execute a decree from Thika Law Courts and in particular CMCC 815/05, **Gladys Wanjiku - Vs - Joseph Gakuo Mutua and David Njuguna Kibe** or should he release the vehicle forthwith.

(C) Whether the court executing a decree has jurisdiction to hear and determine all questions between parties to the suit in which the decree was passed.

The motion is supported by grounds found in the body of the application and the supporting affidavit of the Applicant dated 7.05.2009. The 1<sup>st</sup> Respondent opposed the motion and filed submissions on 10.07.2009 and a list of authorities. Elijah Mputhia who trades as Warleen Traders (K) Ltd. filed a replying affidavit in opposition.

The Applicant's case is as follows:- the Applicant's motor vehicle KBA 556 V was attached on 16.02.2009 by Elijah Mputhia who trades as Warleen Traders(K) Ltd. in execution of a decree in **CMCC 815/05 Thika, Gladys Wanjiku Gichuhi Vs - Joseph Gakuo Mutua and David Njuguna Kibe** A notification was left with the driver (DMK 1) and the Applicant filed an application dated 19.03.2009 and notice of preliminary objection dated 1.04.2009 (DMK 2). When the matter came up for hearing before the court, the court declined to hear the objection to the attachment on grounds that that court had no jurisdiction to hear him in view of the order made in HCC 168/09 in the matter of **Standard Insurance Co. Ltd** (under statutory management) and in particular Order 4 (DKK 3). That to date the application is still pending before the subordinate court and the Auctioneer had no jurisdiction to attach the vehicle since his jurisdiction is limited to Nairobi, Kiambu and Kajiado District. The Applicant seeks this court to declare that the attachment is unlawful. That his vehicle which caused the accident KAB 914 B was insured by Standard Assurance under statutory management and that the execution done during the moratorium should be set aside.

Mr. Getange counsel for the 1<sup>st</sup> Respondent opposed the motion and urged that if the Applicant was not heard by the court, he has a remedy in an appeal to the High Court, under Order 41 Civil Procedure Rules or that he should have come by way of Judicial Review.

As regards the auctioneer, counsel urged that the conduct of the Auctioneer can not be an issue for determination by this court as Section 3 of the Auctioneers Act establishes a Board whose functions under Section 2 is to oversee the discipline of Auctioneers. That it is not the duty of this court to supervise auctioneers. That if he was aggrieved by the actions of the Auctioneer Section 26 allows the aggrieved party to move the court for damages, and that the Auctioneer had nothing to do with the right to be heard in the lower court. Counsel relied on the case of **NATIONWIDE FINANCE CO. LTD. – VS – MECK INDUSTRIES LTD. HCC 3231/1985** where J. Osiemo observed that a party aggrieved by an auctioneer's actions should move the court for damages.

Ms. Kabaria, counsel for the 2<sup>nd</sup> Respondent did not file any reply but supported the submissions made by counsel for the 1<sup>st</sup> Respondent.

Having considered the pleadings and submissions by all counsel, I wish to note right from the onset that the 1<sup>st</sup> Respondent was a party to the proceedings in CMCC 815/05. One of the allegations made by the Applicant is that the court has refused to hear him on his application dated 19.03.2009 seeking to set aside the judgment in CMCC 815/05. This application is brought under Section 65 (2) of the Constitution which is the supervisory jurisdiction of this High court over subordinate courts or tribunals. The 1<sup>st</sup> Respondent is an individual and has really no control over the proceedings in the lower court. Orders can not issue against her in this application and I find that she is wrongfully enjoined as a Respondent. She can only be an interested party such in such an application. The 1<sup>st</sup> Respondent can not be the subject of

supervision by this court since she is a private individual not a public body.

The other anomaly I note in this application is that the Applicant seeks prayers against the Auctioneer Elijah Mputhia Irura who trades as Warleen Auctioneers (K) Ltd. Even before I consider whether or not there would have been any merit in the application, I note that the said Auctioneer is not a party to these proceedings yet orders are sought against him. The court can not grant orders against a person who is not party to the proceedings and prayer B would not issue in any event.

The Applicant's complaint is that the lower court has declined to hear his application and hence violated his right to a fair hearing. That being the issue, then the Applicant has moved the court under the wrong provisions of law. He should have invoked the court's enforcement jurisdiction under Section 84 of the Constitution to enforce his rights under Section 77 of the Constitution after specifically pleading how his rights to a fair hearing had been breached. The pleadings as presented to court are muddled up and not clear as to exactly what the Applicant wants this court to do. Infact what the Applicant has done is frame issues for determination. See prayer A, B and C but not specifically pleaded. Infact there are no specific prayers sought.

The Applicant was before the lower court. The matter had reached execution stage. He had been party to the proceedings before judgment was granted. He then sought to set aside judgment but the court declined to hear him for reasons that the High Court had granted a stay of all proceedings subsisting against Standard Assurance (K) Ltd. (under statutory management) because of a moratorium which had been declared by the statutory manager. If the Applicant was dissatisfied with the court's decision, he had a right to appeal to the High Court. No explanation has been given why that option of appeal was not considered. The Applicant has not demonstrated what this court should supervise in the first place. There is a remedy provided under the Civil Procedure Act Rules, that is an appeal and there should be good reason for the Applicant to skip that procedure and opt for the constitutional jurisdiction. The Appellate court is given wide powers under Section 78 of the Civil Procedure Act to determine a case finally, remand a case, frame issues and refer them for trial, take additional evidence or order a new trial. Since the appellate court is given such wide powers to deal with cases on appeal, parties should invoke the constitutional jurisdiction only in exceptional cases where constitutional issues arise.

In Re application by **BANADUR (1986) L.R.C. CONST. 297** at page 298, the court should:-

***“The constitution is not a general substitute for the normal procedure for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that law and not under the constitution.”***

The same principle was applied in the privy council case of **HARIKISSON – VS – AG.G. (1979) 3 W.L.R. 63** and also adopted by J. Nyamu in **GEORGE WAITHAKA GITURU – VS – THE A.G. MISC. APL. 578/08** where the Applicant did not pursue an appeal but instead invoked the constitutional jurisdiction and the court declined to grant any order. The orders sought would not be available to the Applicant in any event.

The Auctioneer was rightly not enjoined hereto because he can only be dealt with under the Auctioneers Act, 1996. Section 2 (1) of the Act establishes a Board known as the Auctioneers Licensing Board and its functions are set out at Section 4. They are to exercise general supervision and control over the business and practice of auctioneers, under Section 4 (2), the Board licenses, regulates the business and practice of auctioneers, supervises and disciplines licensed auctioneers. It means that if an auctioneer acts in contravention of the Act, then a complaint should be lodged with the Board and the Board will then consider the said case.

In the instant case, it seems that the Warleen Auctioneers did not have jurisdiction to execute a decree in Thika Court. However, it is not disputed that there was a lawful decree in place. Such execution would not therefore be unlawful and the irregular acts of the auctioneer can be dealt with through the procedure set out in the Act. That is, by the Applicant making a complaint to the Board or if the Applicant has suffered any special or general damages, then he can prefer civil proceedings against the auctioneer. The

acts of the auctioneer can not call for this court being moved under the constitutional provisions. The question as to whether execution can proceed during the existence of the moratorium declared on Standard Assurance the insurer's of the Applicant that is a matter for the civil courts.

For all the above reasons, I find no merit in the applicants originating notice of motion and the same is dismissed with costs.

**Read and delivered in Nairobi this 6<sup>th</sup> day of October 2009.**

**R.P.V. WENDOH**

**JUDGE**

**Present:-**

Ms. Chige for the Applicant

Mr. Getange for the Respondent

Muturi – Court Clerk