



Angima v Kirera t/a Ongegu & Associates Advocates & another (Miscellaneous Application 438 of 2020) [2025] KEHC 13524 (KLR) (Civ) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 438 OF 2020

JN MULWA, J

SEPTEMBER 25, 2025

BETWEEN

CAREN BOCHERE ANGIMA PLAINTIFF

AND

**BOSIRE DANIEL KIRERA T/A ONGEGU & ASSOCIATES
ADVOCATES 1ST DEFENDANT**

FREDRICK KIMANI KIMEMIA 2ND DEFENDANT

RULING

(On Motion Dated 20/03/2023)

Background

1. By an Originating Summons (OS) dated 22/10/2020 taken out by the Plaintiffs against the 1st and 2nd Defendants, the Plaintiffs sought orders that the 1st Defendant Bosire Daniel Kirera t/a Ongeru & Associates Advocates to render an account on how the purchase price of Kshs. 8,000,000/= of property Ruiru/Kiu Block 3/1785 was applied or employed from 19/10/2015 and 7/12/2015.
2. The Plaintiff further sought orders that the 1st Defendant do deposit Kshs. 8,000,000/= (being the actual purchase price) in court pending hearing and determination of the matter via court order dated 2/03/2021.
3. The court further ordered the 1st Defendant to pay interest on the purchase price since 2015 for delivery of documents it holds on behalf of the plaintiff to which they are entitled.
4. In response to the originating summons, the 1st Defendant swore and filed a replying affidavit dated 26/11/2020; in respect to both the Originating Summons and on application dated 22/10/2020.



5. On 2/03/2021 judgment in the OS was passed against the 1st defendant in the sum of Kshs. 8,000,000/= by the Hon. Justice S. J. Chitebwe J in favour of the Plaintiffs. A decree was drawn and issued in the sum of Kshs. 14,126,460.

The Plaintiffs then took out execution proceedings against the judgment debtor, the (1st defendant) and instructed auctioneers to proclaim and attach several movable properties of the 1st defendant including several vehicles.

6. By a motion dated 20/03/2023 the 2nd Defendant approached the court seeking temporary injunctive orders as well as interim stay of execution orders pending hearing and determination of the application. Upon consideration, on 17/12/2020, the Hon. Chitebwe J, made and issued temporary orders directing the 1st Defendant (JD) to deposit the entire sum of Kshs. 8,000,000/= as security in court within 30 days and in the alternative the 1st defendant to furnish the court with a security in form of property or bank guarantee.
7. The 1st Defendant did not comply with the orders of court, so on 2/03/2021 when the matter was placed before the judge (Chitebwe J) other orders were issued that as the 1st defendant had failed to comply with the conditional stay orders of injunction, warrants of execution for the decretal sum be issued in favour of the plaintiff's against the 1st Defendant for the sum of Kshs. 8,000,000/- with interest at court rates.
8. By a further motion dated 27/11/2020, the 2nd Defendant sought orders to stay further proceedings in the suit against himself; and that his name be struck out from the case and costs be awarded to him.

On 30/09/2021, Justice Chitebwe J rendered (in his ruling), while dismissing the motion, that the 2nd defendant by a memorandum of understanding dated 9/03/2016 and a Tripartite Agreement dated 8/01/2019 which included the 2nd defendant, he did not deny that he was party to the agreements, and therefore a beneficiary of the money subject of the originating summons.

9. The court further held that it was satisfied that the 2nd Defendant agreed to pay the money, and therefore was a necessary party to the proceedings as the two defendants agreed to pay Kshs. 10,000,000/= to the plaintiffs, hence made a finding that the 2nd defendant had been properly joined in the proceedings and dismissed the application on 30/09/2021 with costs.
10. On 6/12/2021 a decree was drawn upon the judgment of the court in the sum of Kshs. 8,000,000/= with interest to be computed at court rates. It was however silent on whom it was to be executed against. On 21/09/2022, warrants of attachment were issued by the court (DR) against both the 1st and 2nd Defendants.
11. Upon the warrants being issued the 2nd Defendant moved the court by motion dated 20/03/2023 wherein the applicant, the 2nd defendant sought temporary orders of injunction and stay of execution against the Plaintiffs from attaching, selling and or in any manner dealing with the 2nd Defendants motor vehicles or any other of its property pending determination of the application.

The above prognosis in my view was necessary to aid the court to understand the journey in this suit to the present.



Application Dated 20/03/2023

12. The Applicant Fredrick Kimani Kimemia (2nd Defendant) pursuant to provisions of Order 40 Rules 1, 2, & 4 of the CPR and Sections 1A, 1B and 3A of the CPA seeks:-
1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. That the court do issue a declaration that the proclamation of the Applicants motor vehicles on 15/07/2022 by MS chador Auctioneers was wrongful null and void.
 6. That the court do issue an order to permanently stop the Auctioneers or the Judgment Creditor from in any manner proceedings with any adverse action in respect of the applicants motor vehicles ruling members KCG 299G, KCA 868 D and KCK 058 S
13. The Applicant swore the supporting affidavit on 20/03/2023 to buttress its grounds of the motion found at the face of the motion, that he was enjoined wrongly as the 2nd Defendant in the suit, that on 17/12/2020, the court ordered the 1st Defendant to deposit security in court n the sum of Kshs. 8,000,000/= which he failed to comply; that as a result warrants of attachment in execution of the decree was issued against the 1st Defendant, not against himself as 2nd Defendant.
14. Further, the Applicant posits that without prior notice from the plaintiffs, his vehicles were proclaimed, specifically numbers no KBM 512 V FVZ Isuzu lorry which he previously owned alongside the earlier vehicles stated above which are his properties which proclamation he deems to have been erroneous.
- Additionally, he avers that the warrants of attachment were procured through false misrepresentation for including him as a judgment debtor, there having been no decree against him as the 2nd defendant and providing the court orders issued on 2/03/2021 FKK-2; FKK-3a, b, & C being the attachment notice, and warrants of sale of sale in execution of the decree dated 21/09/2022.
15. For the above, the Applicant has urged the court to allow his application in the interest of justice.
16. The Respondents/Plaintiffs opposed the motion by the Replying Affidavit sworn on 19/04/2023 by the 1st Plaintiff. Citing a ruling of the court issued on 30/09/2021 stating that the court held the 2nd defendant was jointly liable with the 1st defendant upon hearing several applications filed by the parties and the originating summons (suit).
17. The Plaintiff's relied on Order 1 Rule (4) of the CPR for the proposition that the court may give judgment without amendment against such one or more of the defendants as may be found liable according to their respective liabilities and further citing the parties agreements by way of MOUs, upon which the court held the two Defendants as beneficiaries of the subject monies and hence jointly and severally liable to settle the decree annexed as CB-4 is the agreement dated 8/01/2019 wherein both agreed to pay the plaintiffs Kshs. 10,000,000/=



18. Additionally, and in view of the foregoing, the Respondents/Plaintiffs urge the court to find that the execution of the decree by the Auctioneers was lawful and the application by the 2nd Defendant was an afterthought with an intention to deprive them of their fruits of justice and the proclamation dated 15/07/2022 as well as the notification of sale dated 29/09/2022 were lawful.
19. It is noted that the execution proceedings against the judgment debtors/Defendants was halted by court through the Deputy Registrar of this court on 13/07/2023 to await ruling of the motion under review by the court.

Both parties filed their respective submissions to further buttress their respective cases.

2nd Defendant's/Applicant's Submissions

20. In its submissions dated 5/06/2023, the Applicant relies on Order 22 Rule 51(i) of the CPR to object to the attachment and sale of his vehicles/property on grounds that the issued by the court by an order of 2/03/2021 was against the 1st Defendant only and therefore there being no decree against him, no execution proceedings ought to have been levied against him.

He placed reliance on the case of Precast portal Structures V. Kenya Pencil Company Limited [1993] eKLR wherein the court held that the burden of proof is on the objector to prove his right to have the attached property released.

Also cited is the case of Arun C. Sharma v. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 4 Others [2014] eKLR on the same proposition, but adding that it is the objector who has to prove his legal or equitable interest in the attached property.

21. It is also submitted that the plaintiffs in their originating summons never sought any reliefs from the 2nd defendant, and therefore no basis to include him in the warrants of attachment which was not only irregular but outrightly illegal, and urged for the application to be allowed as prayed.

Plaintiffs/Respondents Submissions

22. Their submissions are dated 15/05/2023 in which they urge the court to decline to grant orders sought by the 2nd Defendant and particularly temporary injunction citing Order 40(1)(a) and (b) of the Civil Procedure Rules for failure to meet the conditions as set out in the Giella V Casman Brown Case [1973]EA 358; Kenleb Cons Ltd v. New Gatitu Service Station Ltd & Another [1990] eKLR.
23. The Plaintiffs submit that the Court granted all parties opportunity to file necessary documents before hearing of the motion whose ruling was delivered on 17/12/2020. They submitted that the plaintiffs urge that the court heard all the applications filed by the Plaintiffs and the 1st and 2nd Defendants as well as the originating summons on a merit and decision on the originating summons delivered on 30/09/2021; without having amended the pleadings stating that it was not necessary as stated under Order 1 Rule 4(b) CPR.

24. The plaintiffs further submit that under Order 47 Rules 17, 18 and 19 CPR, the court has discretion to determine how to proceed on a matter commenced by an originating summons as was in the case.

Additionally, the Plaintiffs submit that there having been a judgment which the 2nd defendant failed to comply with, the Orders it seeks ought not to be granted citing the case of Paul Gitonga Wanjau V. Gathuthia Tea Factory Co. Ltd & 2 Others [2016] eKLR.

Issues for Determination



- a. Whether there is in place a lawful judgment and decree, upon which execution ought to issue against the 2nd Defendant. If the answer is in the affirmative;
- b. Whether the 2nd defendant has met the threshold of grant of the declarations and permanent injunction against execution of the decree
- c. Who bears costs of the application

Analysis and Determination

25. The court has perused the totality of proceedings from inception of the suit upto the filing of the application dated 20/03/2023.

It is necessary here to state that the court orders prior to 20/03/2023 have never been set aside, varied, reviewed or appealed against.

26. There is no dispute that the 2nd Defendant was enjoined to this originating summons by a court order issued on 30/09/2021 as a Defendant.

A perusal of the proceedings show no documents filed either by the 2nd Defendant by way of a replying affidavit to the Originating summons or by an admission of the plaintiffs' claims.

27. It is also noted that the originating summons were not amended to include the 2nd Defendant therein as a party, citing Order 1 Rule 4(b) CPR wherein it is provided:-

The court may give judgment without amendment against such one or more of the defendants as may be found to be liable according to that respective liabilities.

28. The Orders of 2/03/2021 are as follows:-

1. That the 1st defendant having failed to comply with court order to deposit the sum of Kshs. 8,000,000/= in court or provide any other security, it is hereby ordered that warrants of execution for the sum of Kshs. 8,000,000/= be and are hereby issued in favour of the Plaintiffs against the 1st Respondent.
2. That interest on the sum of Kshs. 8,000,000/= be computed at court rates
3. That mention be on 20/04/2021.(Emphasis added)

29. Upon the above orders, warrants of attachment of movable property were taken out in the sum of Kshs. 14,7-1,328 and indicated "to be executed against Bosire Daniel Kibera t/a Ongegu & Associates Advocates (1st Defendant, and Fredrick Kimani Kimemia (2nd Defendant) the said warrants were issued and allocate to Ms. Chador Auctioneers. Upon the above the Applicants/2nd Defendants vehicles were proclaimed upon motor vehicle copies of records being provided that the subject vehicles belonged to the 2nd Defendant

30. The judgment/Order upon which the execution process was made is dated 2/03/2021 – (Chitebwe J).

It reads as follows:-

IT IS HEREBY DECREED THAT:

1. Judgment is entered for the plaintiffs in the sum of Kshs. 8,000,000/= with interest from October, 2015



2. The Plaintiffs to have the costs.

31. While interrogating the parties rival cases, and particularly the 2nd defendants depositions, question arises as to whether the court's ruling dated 2/03/2021 could be termed as a judgment and if so, whether it could be executed against the 2nd Defendant.

It is evident that the orders of the court dated 2/03/2021 were against the 1st defendant alone (reproduced at paragraph 28 above). There cannot be two interpretations of the same as they are plain and clear.

The decree following thereafter also is plain and clear; that "Judgment is entered for the Plaintiffs in the sum of Kshs. 8,000,000/= with interest from October, 2015"

It is also plain and clear that the said judgment does not state against whom it was entered, there being two defendants in the suit.

32. So that when the warrants of attachment and sale were issued by the court via the Deputy Registrar against both Defendants, that did not in my considered view, pinpoint to which of the two defendants, or jointly or severally and therefore not a true reflection of the court's order on judgment, as it was silent on that very vital aspect.

Despite their having been some sort of pronouncement by the court in the 2nd Defendant and 1st Defendants liability, such pronouncement was not recorded as a judgment capable of being executed.

33. A careful examination of the events leading to impugned warrants of attachment, the court would not be faulted to be inclined to find that the default to deposit security in court as ordered on 2/03/2021 precipitated the execution process. The court (Chitebwe J) in plain and expressly stated that the execution was to be directed against the 1st Defendant.

34. In my opinion, there was and there is no basis at the interlocutory stage of the proceedings to have execution of the decree against the 2nd Defendant. I also hold the view that the warrants of attachment and sale would have properly been issued against the 1st Defendant as I have stated above.

35. In the ruling delivered on 30/09/2021, while the court declined to stay proceedings in the suit, and also declined striking out the 2nd defendant from the suit upon being satisfied that he (2nd defendant) was a necessary party and properly joined thereto, the court took issue with particularly the 1st defendant's failure to pay the debt in the instalments granted, and further added that the two defendants undertook to pay Kshs. 10 million.

36. Further reading of the ruling shows that the learned judge did not find on a balance of probabilities that the 2nd defendant benefited from the purchase price, but was satisfied that the 2nd Defendant was properly joined in the proceedings. At the last paragraph of page 9 the judge made a finding that it is the 1st Defendant who made proposals of payment in instalments but had failed to; that he is the one who benefited from the sale proceeds... that he had all the time to settle the debt but has failed to do so and proceeded to dismiss the two applications by the Defendants with costs.

37. The court orders aforesaid are saliently silent upon whom execution was to issue. To execute against any or both should have been clearly stated in the various ruling of the court. The Plaintiffs are not and could not be at liberty to execute against either of the defendants as the rulings were not "jointly and or severally" they were simply silent.



Without further interrogation, I find that the 2nd Defendants application dated 20/03/2023 not to have been an afterthought, but one with issues that must be resolved during the hearing of the suit on its merits.

38. Additionally, the court finds that this matter having been instituted by way of originating summons, it is yet ready for hearing as no clear or proper directions under Order 52 Rule 4 CPR were taken on the mode of hearing of the originating summons.

39. The end result is that the court is persuaded to allow the 2nd Defendant's application dated 20/03/2025 by granting prayers No. 5 only.

Each party shall bear own costs on the application.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2025

.....

JANET MULWA.

JUDGE

