



REPUBLIC OF KENYA



Mawingo Construction (2010) Limited v Mombasa Water Products Limited (Environment and Land Case 288 of 2014) [2025] KEELC 7014 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7014 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 288 OF 2014**

**JO OLOLA, J
OCTOBER 16, 2025**

BETWEEN

MAWINGO CONSTRUCTION (2010) LIMITED PLAINTIFF

AND

MOMBASA WATER PRODUCTS LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 26th February 2025, Mawingo Construction (2010) Limited (the Plaintiff/Applicant) prays for the following:
 1. **Spent;**
 2. That a temporary injunction be granted restraining the Defendant /Respondent herein by themselves or their employees, servants, agents, assigns, auctioneers or any other person whomsoever from selling, auctioning or dealing adversely in any way whatsoever with any of the properties attached or further attaching in satisfaction of the Judgment entered on 3rd July, 2024 and/or decree arising from the suit herein pending the hearing and determination of this Application;
 3. That pending the inter-parties hearing and determination of the Application herein, there be a stay of execution of the Judgment, entered on 3rd July, 2024 and/or decree arising from the suit herein;
 4. That the Honourable Court be pleased to order the Defendant/ Respondent either by itself or through its agents Sure Auctioneers to release to the Applicant or its agents a number of goods (listed) and proclaimed but were illegally attached;
 5. That this Honourable Court declare that execution of the Judgment as illegal and therefore null and void; and



6. **That costs of this Application be provided for.**
2. The application is supported by two Affidavits sworn by Clive Erskine, a Director of the Plaintiff and is premised on the grounds inter alia that:
- i. On 28th February, 2025 Sure Auctioneers, on the instructions of the Respondent herein, shall proceed to sell by auction goods seized from the Applicants' premises which included the Applicant's tools of trade as well as other goods not belonging to the Applicant and several goods never proclaimed but illegally attached without leave of the Court;
 - ii. The attachment is unlawful and bad in law as majority of the goods the Respondent's Auctioneers intend to sell were unprocedurally, unlawfully and irregularly obtained/seized and the whole execution process is therefore flawed and untenable in law;
 - iii. That judgment for the Counterclaim was entered on 3rd July 2024 for the Defendant/Respondent herein as against the Plaintiff/Applicant for a colossal sum of Kshs 157,994,749.59;
 - iv. That without taxing the costs in this matter, the Defendant/Respondent proceeded to instruct the Auctioneers who subsequently obtained warrants of attachment dated 19th December, 2024 excluding costs;
 - v. That on 23rd December, 2024 the said Auctioneers went to the Applicant's and proceeded to illegally proclaim its goods;
 - vi. That on 20th January 2025, despite there being a stay of execution in place the Defendant's Auctioneers proceeded to the Plaintiff's premises and proceeded to illegally and unprocedurally attach some items on the proclamation notice of 23rd December 2024 as well as numerous items that were never proclaimed;
 - vii. The Plaintiff thereafter proceeded to file an application seeking leave to Appeal out of time which application is yet to be determined;
 - viii. Taking advantage of the fact that there currently is no interim stay orders, the Respondents have now, through Sure Auctioneers proceeded to gazette sale by auction all the items attached; and
 - ix. It is only fair and in the interest of justice that this application be heard expeditiously and be allowed as prayed.
3. Mombasa Water Products Limited (the Defendant/Respondent) is opposed to the application. In a Replying Affidavit sworn on its behalf by its Director Joseph Gichanga on 21st May 2025, the Respondent avers that upon delivering judgement, this court became functus officio and does not have jurisdiction to grant the orders of injunction. In addition, the Respondent avers that since the Applicant has sought for orders of stay of execution pending appeal in Mombasa Court of Appeal Civil Application No. E009 of 2025, a similar request before this court amounts to an abuse of the court process.
4. The Respondent further avers that it decided to forego the costs and its Advocates wrote a letter requesting for the warrants since it did not wish to file any bill of costs. The Respondent asserts that the decree has been executed partly and the items attached sold and that therefore this application is moot and a mere academic exercise.



5. I have carefully perused and considered the Plaintiff's application as well as the response thereto by the Defendant. I have similarly perused and considered the oral submissions made before me by the Learned Advocates representing the parties herein.
6. By this application before the court, the Plaintiff prays for a temporary order of injunction restraining the Defendant, its agents or auctioneers from selling, auctioning or dealing adversely in any way with any of the properties attached in satisfaction of the judgment delivered herein dated 3rd July 2024. The Plaintiff further urges the court to be pleased to order the Defendant either by itself or through its agents to release the goods said to have been attached without being proclaimed and to declare the execution of the judgement as illegal, null and void.
7. It is the Plaintiff's case that the attachment is unlawful and bad in law as majority of the goods the Auctioneers attached and intend to sell were un-procedurally and unlawfully obtained and that the whole execution process was therefore flawed and untenable.
8. The basis of the contention that the attachment was unlawful is the Plaintiff's assertion that as at the time the same was done, there were orders of stay in place which the Defendant and the Auctioneer ignored while carrying out the attachment. In support of that position, the Plaintiff's Director one Clive Erskine avers at paragraph 4 of the Supporting Affidavit as follows:

“4. That on 20th January 2025, despite there being a stay in force set to lapse on 21st January 2025, the Defendant/Respondent's Agent Sure Auctioneers proceeded to the Plaintiff/Applicant's premises and proceeded to illegally attach some items on the proclamation notice of 23rd December 2024 as well (as) numerous items that were never proclaimed. (annexed and marked “CE-3a” and “CE-3b” respectively are the copy of stay order issued and copy of the Notification – 2025 and pictures of 20th January 2025 and pictures of the manner execution was done).”

9. The said Annexure “CE-3a” said to be the Court Order staying execution herein reads as follows:

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E036 OF 2024
Mawingo Constructions 2010 Ltd. Plaintiff/applicant
Versus
Miller George Gekonde Advocates. .. Defendant/respondent
Order

(in Court Before Hon. Justice J.k. Ng'arng'ar On 14.11.2024)

This matter coming up for Mention in the presence of Ms. Ngozi Advocate for the Plaintiff/
Applicant and No Appearance for the Defendant/Respondent.

It is hereby ordered:



1. That a stay of execution of judgment in ELC 288/2014 Mawinjo (Sic) Constructions 2010 Ltd –Vs- Mombasa Water Products Ltd. dated 3rd July 2024 is hereby granted.
2. That this matter be mentioned on 21st January 2025.
.....”

10. A simple perusal of that order reveals that it was a clear attempt to hoodwink and mislead the court. The order was issued in a separate case before the Commercial and Tax Division of the High Court. While the Plaintiff in that matter was also the same one herein, the Defendant therein was one Miller George Gekonde Advocate and not Mombasa Water Products Limited who are the Decree-holders herein. How an order of stay of execution could be issued in such a matter against the Defendant herein was not explained by the Plaintiff and it is a matter which in my view if the order really exists requires an investigation by the relevant authorities.

11. Be that as it may, it was evident that the Plaintiff was at all times aware that they had not obtained any order of stay of execution either in this matter or in the said matter before the High Court. That much is clear from a perusal of Paragraph 5 and 6 of the Supporting Affidavit where its said Director deposes as follows:

“5. That the Plaintiff/Applicant herein mortified by the said attachment proceeded to file an Application seeking leave to Appeal out of time which Application is yet to be determined.

6. That the Respondent, taking advantage of the fact that there currently is no interim stay orders have now, through their Agents Sure Auctioneers, proceeded to gazette sale by auction all the items attached including those illegally seized. Set to sale by auction on 28th February 2025”

12. As it were an order on injunction such as the one sought by the Plaintiff herein is an equitable remedy. A person seeking an order of injunction must come to court with clean hands. In a matter such as this where the Plaintiff has deliberately and blatantly sought to deceive the court, such orders cannot issue.

13. In any event, the Plaintiff has not explained why it took more than 7 months before coming to court. The judgment herein was delivered on 3rd July 2024 and no explanation has been proffered for the delay. This court has already rendered its decision and the Plaintiff has evinced its intention to appeal. Having delivered its judgment on the very issue of injunction, this court is now functus officio and cannot consider another application for injunction.

14. In the premises, I find no merit in the Motion dated 26th February 2025. The same is dismissed with costs to the Defendant

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 16TH DAY OF OCTOBER, 2025

.....

J.O. OLOLA

JUDGE

In the presence of:

a. Ms. Firdaus Court Assistant.



b. Ms. Abwao Advocate for the Plaintiff/Applicant

c. Ms. Gatimu holding brief for Mwanzia Advocate for the Defendant/Respondent

