Kisoya v Maingi; Blegif Consult Auctioneers (Interested Party) (Civil Case 198 of 2019) [2025] KEMC 104 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEMC 104 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE 198 OF 2019

YA SHIKANDA, SPM

MAY 13, 2025

BETWEEN

COSMUS MUIA KISOYA ..... PLAINTIFF

AND

CELINA KARABAI MAINGI ..... DEFENDANT

AND

BLEGIF CONSULT AUCTIONEERS ..... INTERESTED PARTY

RULING

1. Before me is an application dated 26/2/2025 brought by Celina Karabai Maingi (hereinafter referred to as the applicant) under a certificate of urgency. The application was initially filed on 26/2/2025 but the applicant refiled it on the same day and on 4/3/2025. The main prayers that are yet to be determined are:

    1. The Firm of Okwera Oteko & Company Advocates be granted leave to come on record for the Defendant;

    2. Blegif Consult Auctioneers be placed on record as an Interested Party;

    3. The Interested Party do unconditionally release the Defendant's motor vehicle reg. no. KCT 149 Band KCH 227 N together with all cargo and/or goods detained when they seized the vehicles;

    4. The warrants of attachment, warrants of sale and all consequential orders arising from the Judgment, be set aside;

    5. The costs of this application be in the cause.

2. The application is supported by an affidavit sworn by the defendant/applicant and is premised on the following general grounds:

    a. That on 24/02/2025 at 6.30 PM, without prior service of a proclamation notice, the Plaintiff's Auctioneers (the Interested Party) seized the Defendant's motor vehicles reg. no. KCT 149 Band KCH 227 N and threatened to sell the same by public auction if the judgment debt of KShs. 2,802,428/= is not settled;

    b. That only after follow up by the Defendant's son after seizure of the Defendant's motor vehicles, did the Plaintiffs Auctioneer disclose the warrants of attachment and warrants of sale but to date have never served the mandatory 7-day's proclamation notice upon the Defendant hence the attachment and/or seizure of the Defendant's motor vehicles is irredeemably illegal;

    c. That the Defendant made enquiries and learnt Judgment dated 27/02/2023 was delivered in favour of the Plaintiff for a sum of Ksh. 4,403,050/=, and a subsequent Decree dated 07/01/2025 was issued for the sum of KShs. 5,799,928/= comprising the principal award, interest and costs of the suit;

    d. That the Defendant has never been served with notice of entry of judgment yet a Decree in the matter has already been issued and warrants of attachment and sale extracted in violation of civil procedure rules;

    e. That the Defendant's motor vehicles are her sole tool of trade and/or means of livelihood which is used in transporting customer goods for profit, therefore the threatened sale shall irreparably damage her and render her a pauper;

    f. That the Defendant's vehicles were seized while transporting customer goods which the Plaintiffs Auctioneers have adamantly refused to release, therefore the said seizure has exceeded the legal prescriptions and violated third party property rights;

    g. That if the application is not disposed of urgently and interim relief granted, the Plaintiff shall proceed with illegal execution and the Defendant shall suffer irreparable damage and prejudice;

    h. That it is in the interest of justice that execution herein be stayed and the warrants of attachment and warrants of sale be set aside;

    i. That the balance of convenience is in favour of issuing the orders sought herein and will promote strict obedience to legal provisions and rules;

    j. That the application is made in good faith without undue delay;

    k. That it is fair and just for the Court to grant the orders sought herein;

    l. That this Honourable Court has unfettered discretion to allow this application in the interests of justice.

3. In the affidavit in support of the application the defendant/applicant reiterated the grounds on the face of the application and attached documents.

The Plaintiff's Response

4. The plaintiff opposed the application by filing two Replying affidavits. There is a Replying affidavit sworn by the plaintiff and another sworn by the Auctioneer. The plaintiff deposed that the application was an afterthought, vexatious and an abuse of the court process. That the applicant was duly served with a proclamation notice and that the interested party followed due procedure. The plaintiff stated

that the applicant was duly represented and that her advocates were present when the judgment was delivered. That the execution process is lawful since the decree is yet to be settled in full and the applicant has not given any reasons for failing to settle the decretal sum. The plaintiff deposed that he was prejudiced by the application since he continues to suffer from the amputation of his left leg and that the applicant has not demonstrated what prejudice she would suffer if the decretal amount is settled. The plaintiff urged the court to dismiss the application.

5. The replying affidavit by the interested party was sworn by one Benard Oyugi Okech. Apart from stating that he was a licenced Auctioneer, the deponent did not disclose his relationship with the interested party. He deposed that the interested party received instructions from the plaintiff's Advocates to execute the decree herein. That subsequently, warrants of attachment and sale were issued. The interested party stated that a proclamation notice was duly served upon the defendant. A copy of the notice was attached to the replying affidavit. That upon expiry of the 7 days' notice, motor vehicle registration number KCT 149 B was advertised for sale by public auction and on 5/3/2025 the same was sold by public auction. The interested party argued that motor vehicle KCT 149 B did not have any cargo at the time of attachment. The interested party averred that they did not attach motor vehicle registration number KCH 227 N.

Main Issues for Determination

6. From the record, it would appear that the prayer to allow the firm of Okwera Oteko & Associates Advocates to come on record for the judgment debtor/applicant is unopposed. The same applies to the prayer to join the Auctioneer as an interested party. The prayers are hereby allowed. In my opinion, the main issues for determination are as follows:

    i. Whether the warrants of attachment and sale issued herein should be set aside;

    ii. Whether the interested party should be ordered to release the motor vehicle(s) to the applicant unconditionally.

    iii. Who should bear the costs of this application?

The Defendant/applicant's Submissions

7. In the written submissions filed on behalf of the judgment debtor, it was submitted that the mandatory 7-day proclamation notice was not served and even the warrants of attachment and warrants of sale were only disclosed to the Applicant upon follow up by her son with the Auctioneers after the fact of seizure of her vehicle. That a proclamation as known in law did not occur but instead it was an unlawful seizure of the Applicant's vehicle which constitutes a violation of the rule of law and cannot be sanctioned by this Court. The applicant submitted that the interested party did not respond to the application but the record indicates that counsel for the plaintiff was instructed by the interested party and the latter filed a replying affidavit. Perhaps counsel for the defendant was not served with the documents.

8. The applicant submitted on the mistaken premise that the interested party had not responded to the application and contended that her averments were unopposed. The applicant contended that the process leading up to seizure of the Applicant's vehicle was irredeemably defective and must be set aside. That to hold otherwise would waste precious public resources and directly contradict the exercise of judicial authority which is limited under Article 159(2)(a) of the *Constitution* to do justice to all parties and under Article 10(2)(a) of the *Constitution* to observance of the rule of law which includes statutory prescriptions that create and limit rights.

9. The applicant contended that the attachment and seizure of her vehicle was outright violation of the legal procedures designed to protect the Applicant from injustice. That Article 40(1) & (2) (a) of the *Constitution* of Kenya 2010, grants every citizen the right to own property and enjoins the State to avoid enactment of laws that arbitrarily deprives a person of their property. The *Civil Procedure Act* (Cap 21) and *Civil Procedure Rules 2010* provide the process that must be followed where a Judgment is being executed or enforced, while the *Auctioneers Act* 1996 and rules thereunder prescribe how auctioneers may interact with the execution process for warrants of attachment and sale. The applicant relied on the authority of *Wanjala v Walukhuchi & 3 others* [2023] KEELC 21540 (KLR) and urged the court to allow the application.

The Plaintiff/respondent's Submissions

10. The plaintiff/respondent submitted that the application was overtaken by events as motor vehicle registration number KCT 149 B had already been sold after due process was followed. The plaintiff further submitted that the applicant was represented by counsel who were aware of the judgment. That the warrants of attachment and sale cannot be set aside since the sale has already taken place. The plaintiff maintained that the application had been overtaken by events. He relied on the following authorities and urged the court to dismiss the application with costs:

    a. *Natural World Mombasa Safaris Ltd v Karuri* [2022] KEHC 9979 (KLR);

    b. *Nadeem A. Kana v Lucy Wambui Mwangi* [2021] eKLR;

    c. *Avistia RSO Limited v Njenga & 8 others* [2024] KECA 1210 (KLR).

Analysis and Determination

11. I have carefully considered the application and given due regard to the submissions made by the parties. The suit herein was defended and the defendant participated in the proceedings until the end. Judgment herein was delivered on 27/2/2023. The record indicates that the same was delivered in the presence of one Miss Dege for the defendant and in the absence of counsel for the plaintiff. In the circumstances, no notice of entry of judgment was required to be served upon the defendant before execution was levied. The gist of the application is that the plaintiff did not follow the process of execution as laid down by the law.

12. I have perused the record. Despite the fact that judgment was delivered on 27/2/2023, the decree herein was extracted on 7/1/2025. Order 21 rule 8 of the *Civil Procedure Rules* stipulates the following procedure:

    (1) A decree shall bear the date of the day on which the judgment was delivered.

    (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

    (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(4) On any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.

(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.

(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order."

13. From the record, there is no evidence to show that a draft decree was served upon the applicant before the same was approved by the court. Nevertheless, the applicant has not complained and a careful reading of the above provisions reveals that the court may approve a draft decree even where a copy has not been served upon the adverse party. I have perused the decree and certificate of costs. It is worth noting that a decree and certificate of costs are two separate and distinct documents although in most cases, they would appear together. A decree should be dated and signed separately from the certificate of costs even where they appear in the same document. The decree herein is not dated nor signed. What has been dated and signed is the certificate of costs.

14. Order 21 rule 9 of the *Civil Procedure Rules* provides in part that:

(1) Where the amount of costs has been—

(a) agreed between the parties;

(b) fixed by the judge or magistrate before the decree is drawn;

(c) certified by the registrar (Sub. Leg. Cap. 16); or

(d) taxed by the court, the amount of costs may be stated in the decree or order.

(2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with subrule (1), after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate." (Emphasis supplied)

15. The costs herein were not ascertained by any means provided for under Order 21 rule 9(1) above. This clearly illustrates that the certificate of costs ought to have signed separately from the decree. Order 22 rule 9A of the *Civil Procedure Rules* stipulates that a party claiming costs at a Magistrates Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought. There is no evidence to show that the plaintiff followed this procedure before taking steps to execute the decree. The plaintiff clearly ambushed the defendant with the execution proceedings. In my view, the reason why there is a procedure for preparation of decrees and ascertainment of costs is to promote consensus and also avoid execution by ambush. In as much as a party may be aware of judgment against them, it would be fair, in my view,

for the decree-holder to give notice of their intention to execute. The notice referred to is by way of involving the judgment-debtor in the process of extracting the decree and certificate of costs.

16. Furthermore, the decree does not indicate how the interest on the decretal sum was calculated. The period for which the interest was calculated is not indicated. For those reasons, I find the decree to be defective. Although the applicant did not raise an issue on the form and substance of the decree, I do not think it would be prudent to allow execution to proceed on a defective decree. The applicant alleges that no proclamation notice was served upon her before the motor vehicles were attached. Before dealing with the issue of the proclamation, there is need to interrogate how the warrants of attachment and sale were obtained. Order 22 rule 6 of the *Civil Procedure Rules* provides that:

> Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A..."
>
> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

17. The foregoing indicates that there is a prescribed procedure and form for applying for execution of a decree. There is no evidence to show that the plaintiff applied for execution in the proper and prescribed manner. The record reveals that in applying for the warrants of attachment and sale, the plaintiff's counsel did so through a letter. That was not the proper procedure. Without an application for execution, the warrants of attachment and sale have no basis. I now move to discuss the issue of proclamation notice. The applicant alleges that no proclamation notice was issued before the motor vehicle was attached. On the other hand, the interested party stated that the proclamation notice was served. A copy of the notice was attached to the interested party's replying affidavit.

18. Rule 12 of the *Auctioneers Rules* provides in part as follows:

> (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
>
> (a) record the court warrant or letter of instruction in the register;
>
> (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
>
> (c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;
>
> (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
>
> (e) ensure safe storage of the goods pending their auction;

(f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;

(g) not remove any goods under the proclamation until the expiry of the grace period." (Emphasis supplied)

19. Was the above procedure followed by the interested party? Apart from stating casually that a proclamation notice was issued, the interested party has not disclosed who issued the notice and to whom. There is no indication of who was served with the proclamation notice. The notice exhibited to court indicates that whoever was present declined to sign. The Rules provide that the inventory of proclaimed goods should be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached. The interested party did not disclose who declined to sign. Furthermore, the Rules require that if the person served declines to sign on the inventory, the Auctioneer must prepare and sign a certificate to that effect. No such certificate was exhibited to court. I find that the interested party and by extension the decree-holder have failed to sufficiently establish that the applicant was duly served with a proclamation notice.

20. The interested party alleged that motor vehicle registration number KCT 149 B was sold already by public auction. That the sale was advertised in the Standard Newspaper for 25/2/2025. No such evidence was attached to the interested party's replying affidavit. I am not sure whether the interested party expected the court to go out and look for the newspaper in order to confirm. In addition, no evidence was attached to show that the motor vehicle was sold. The name of the buyer was not disclosed. The price at which the motor vehicle was allegedly sold was not disclosed. It would appear that the fact of selling the motor vehicle by way of auction is known to the interested party alone. The plaintiff did not indicate whether he was aware that the motor vehicle had been sold.

21. Assuming that indeed, the interested party already sold the motor vehicle, was due process followed? The interested party alleged that the motor vehicle was sold on 5/3/2025. According to the interested party, proclamation was done on 7/2/2025. Upon proclamation, the interested party was required to issue a notification of sale of movable property. There is absolutely no evidence to show that such notification was issued. I have already indicated that there is no evidence to show that the interested party advertised the motor vehicle for sale. There is no evidence to show that the interested party made an application to court for purposes of effecting transfer of ownership of the motor vehicle to the undisclosed purchaser as required by Rule 17(5) and (6) of the Auctioneers Rules.

22. There is also no evidence to show that the interested party issued a purchase receipt to the purchaser of the motor vehicle as required by Order 22 rule 64 of the *Civil Procedure Rules* and rule 18(3) of the *Auctioneers Rules*. No evidence has been adduced to show that the proceeds of the alleged sale were remitted to either the court or the plaintiff. There is no itemized account for such proceeds. From the material on record, I conclude that no auction or sale of the applicant's motor vehicle was done. From the above analysis, it is clear that the execution process was flawed. Such a process cannot be allowed to stand. The decree-holder cannot be allowed to circumvent the law for the sake of expediency, just because there is a balance to be paid by the applicant. It appears that the decree-holder and the interested party ore out to hoodwink the court in order to steal a match against the applicant.

23. In her application, the applicant alleged that the interested party had attached two of her motor vehicles. On the other hand, the interested party alleged that only one motor vehicle was attached. The applicant further alleged that the motor vehicles were loaded with cargo at the time of attachment, a fact that the interested party denied. The applicant did not adduce any evidence to show that the motor vehicles were loaded with cargo at the time of attachment. The applicant did not file

a supplementary affidavit to rebut the allegations by the interested party. From the applicant's submissions, it appears that she was not aware of the interested party's response to the application. However, in her submissions, the applicant alluded to the fact that only KCT 149 B had been attached by the interested party. Be that as it may, the execution process was flawed and as such, it must of necessity be stopped.

Disposition

24. In view of the foregoing, I find merit in the application dated 26/2/2025 and make the following orders:

    a. The firm of Okwera Oteko & Company Advocates is hereby granted leave to come on record for the Judgment debtor in place of the firm of Muchui & Company Advocates;

    b. Blegif Consult Auctioneers is hereby joined as an Interested Party;

    c. The Decree and Certificate of costs issued herein on 7/1/2015 are hereby set aside. The decree-holder is directed to follow the laid down procedure and extract a proper decree and certificate of costs;

    d. The warrants of attachment and sale of movable property issued on 6/2/2025 are hereby set aside. Consequently, a stay of execution of the decree is granted until such time when the Decree holder will extract a proper decree and certificate of costs and file a proper application for execution;

    e. The Interested Party is hereby directed to unconditionally release the Defendant's motor vehicle reg. no. KCT 149 B and any other movable property in their custody, forthwith;

    f. If there are any charges to be paid to the interested party, the same shall be paid by the plaintiff/respondent;

    g. Given that the applicant did not ask for costs of the application, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 13TH DAY OF MAY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A. SHIKANDA