



Mukunga t/a Jabri Auctioneers & another v Lokere t/a Kiteri Limited (Miscellaneous Civil Application E002 of 2023) [2024] KEMC 49 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEMC 49 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
MISCELLANEOUS CIVIL APPLICATION E002 OF 2023
AT SITATI, SPM
NOVEMBER 15, 2024
IN THE MATTER OF POSSESSION OF MOTOR VEHICLE KHMA 380L AND KMHA 057H
AND
IN THE MATTER OF FOR AN APPLICATION FOR AN
ORDER TO SURRENDER PROCLAIMED PROPERTY**

BETWEEN

JARED OMONDI MUKUNGA T/A JABRI AUCTIONEERS 1ST APPLICANT

JOSEPH LOKERE T/A KITERI LTD 2ND APPLICANT

AND

JOSEPH LOKERE T/A KITERI LIMITED RESPONDENT

RULING

1. This ruling relates to 2 applications.
2. The first application is the Ex parte Notice of Motion application dated 23rd October, 2023 supported by the affidavit of Jared Omondi Mukunga containing 7 paragraphs. The reliefs sought were:
 - a. Spent
 - b. That an order be issued to the respondent to surrender motor vehicles registration no. KHMA 380L and KMHA 057H to the nearest police station immediately before inter partes hearing and determination of this application.
 - c. That the Officer Commanding Station (OCS) Maralal Police Station and/or any other police station in the Republic of Kenya ensure compliance of this order (limb 2) failure of which the respondent be arrested and charged with an offence prescribed in Rule 14 of the Auctioneers Rules as amended by legal notice no. 144.



- d. That the costs of this application be borne by the respondent.
3. The application relied on the main ground that on being instructed on 17th August, 2023 the applicant/auctioneer received instructions to repossess motor vehicles to satisfy the loan arrears of Kshs 13, 396, 699 and thereby trailed motor vehicle from Nyahururu to the defaulter's place in Maralal town to proclaim the motor vehicles KHMA 380L and KMHA 057H and it was not available.
4. At the ex parte hearing by then then trial magistrate Hon. J.H.S. Wanyanga Principal Magistrate, the following orders were issued:
1. That the matter is certified as urgent and should be served upon the lender and respondent forthwith.
 2. That the Respondent do surrender motor vehicle registration number KHMA 380L and KMHA 057H to OCS Maralal Police Station for lawful custody while awaiting the determination of the present application.
 3. That the Respondent to deposit the ownership registration documents in respect to motor vehicle registration number KHMA 380L and KMHA 057L in corut for safe keeping pending the hearing and determination of this application.
 4. That the inter partes hearing will be on 31st October, 2023.
5. The suit was opposed by a Replying Affidavit dated 30th October, 2023 containing 16 paragraphs. The respondent challenged the jurisdiction of the court on grounds that the dispute was between a SACCO and its member and the court should not entertain the same. He added that he had been faithfully repaying the loan advanced to him by the SACCO. He deposed that there was no court proceedings resulting in a repossession order against the respondent herein.
6. The second application was a Notice of Motion dated 26th October, 2023 by the Respondent supported by his affidavit in which the following reliefs were sought:
1. Spent
 2. That pending the inter partes hearing and determination of this application, the court be pleased to issue a stay of the ex parte orders issue on 24/10/2023.
 3. That pending the hearing and determination of this application, the court be pleased to issue a stay of the ex parte orders issued on 24/10/2023.
 4. That the court be pleased to strike out the Notice of Motion dated 23/10/2023 and the entire miscellaneous Civil Application No.E002 of 2023.
 5. That the costs of this application been borne by the 1st and 2nd respondent herein.
7. The application was premised on the main ground that there was no suit upon which the miscellaneous application/notice of motion dated 23/10/2023 is anchored. The further grounds were that there were neither repossession proceedings nor a repossession order capable of being executed through the court and consequently a breach of the Movable Property Security Rights 2017. Accompanying the application was the authority of Wanja &another Versus Roothaert (2022)KEHC 10255 where the following excerpt from the authority of Photo Energy Limited –v- Hashi Energy Limited MISC 180 of 2018 was relied on:

"Order 3 Rule (i)(iii) of the Civil Procedure Rules provides that very suit must be instituted by way of a plaint. As a general rule a suit can only be instituted by way of a plaint,



petition or an originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective.”

8. The firm of Kihoro Kimani & Company represented the respondent/counter-applicant.
9. The original applicant filed a Replying Affidavit dated 31st July, 2024 challenging the Respondent’s application. He deposed that he acted on written instructions and enabled by rule 5 of the Auctioneers Rule cap 526 enabling the auctioneer to attach movable properties under either a warrant of attachment issued by the court or a letter of instruction issued by the principal. He cited rule 12 of the Auctioneers Rules 1997:
 2. Movable goods other than perishable goods and livestock
 - (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.
10. The duty of the court is to determine the merits or demerits of the application.

Determination

11. From the material placed before the court, it was proved that the auctioneer received a written letter of instruction from the creditor authorizing him to seize goods namely vehicles so as to satisfy outstanding commercial debts. At the foot of the instruction letter, it is indicated that the instructing principal had complied with prior statutory requirements before issuing the instruction to attach. The procedure would then require a miscellaneous application since the auctioneer could not, having no personal claim against the debtor, institute a whole suit against the debtor against whom he had no privity of contract. Up to that point there was no fault by the auctioneer.



12. On the other hand, it was established by the Respondent that this was a dispute between Tower SACCO and its member who took out a loan and executed a Chattels Mortgage over the motor vehicles. Clause 5 of the letter of instruction makes reference to the Chattels transfer Act cap 28. In the said statute, a Cooperative Society is empowered in law to execute chattels mortgage between itself and a member under section 2 (j) therefore:

- (j) mortgages or charges granted or created by a company incorporated or registered under the [Companies Act](#) (Cap. 486) or by a co-operative society registered under the [Co-operative Societies Act](#) (Cap. 490);

Consequently, whenever a dispute arises between a member and the SACCO about such indebtedness including the recovery thereof, the jurisdiction to determine that dispute is vested in the Cooperative Tribunal under section 76 of the Cooperative [Societies Act](#) which was discussed in the authority of [Mbasibu Sacco Society Limited v Mnene \(Civil Suit 5 of 2021\)](#) [2024] KEHC 3982 (KLR) (22 April 2024) (Ruling) (Rayola Olel J.)

The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties.

17. This much was also appreciated by the court in Adero & another v Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;1).....2) The jurisdiction either exists or does not ab initio ...3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

18. Section 76 of the Cooperative [Societies Act](#) provides that;

76(1) ` If any dispute concerning the business of a cooperative society arises;

- a. Amongst members, past members and persons claiming through members, past members and deceased members; or
- b. Between members, past members, or deceased members, and the society, its committee or any officer of the society; or
- c. Between the society and any other cooperative society; it shall be referred to the tribunal.2.A dispute for the purpose of this section shall include;
 - a. A claim by a cooperative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased person, whether such debt or demand is admitted or not; or
 - b. A claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a cooperative society, whether such debt or demand is admitted or not.
 - c. A claim by a sacco society against a refusal to grant or revocation of license or any other due, from the Authority.



13. Consequently, the Auctioneer being instructed by the SACCO to proceed to recover the security against its member for indebtedness ought to have applied to the Cooperative Tribunal for appropriate reliefs consistent with the amount secured by the chattels mortgage by the SACCO Member. This is because section 76 of the Cooperative *Societies Act* demands all proceedings whether substantive or interlocutory between the SACCO and its member –debtor be ventilated before the Cooperative Tribunal. The end effect is that this court lacked the jurisdiction ab initio to entertain the application by the SACCO through the auctioneer for recovery orders. The application by the auctioneer has been filed in the improper forum and is dismissed with costs. All the previous orders issued without jurisdiction are vacated forthwith. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 15TH DAY OF NOVEMBER,
2024**

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

