



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 42 OF 2015

ROBELLA BETTY AYODE OMAIDO.....PLAINTIFF

VERSUS

ELIPHINEAS JACKSON EKIM OMAIDO.....DEFENDANT

AND

ESHIKHONI AUCTIONEERS.....RESPONDENT

KENNEDY KWEYU.....RESPONDENT

ARCHBOLD NYUKURI.....RESPONDENT

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated **16/4/2019** expressed to be brought under **Section 3A, 63(e), Order 22 Rule 22 (2), Order 40 Rule (1) (a) (b) of the Civil Procedure Rules, 2010**. The applicant is seeking orders thus:-

(1) ...spent

(2) ...spent

(3) THAT this court be pleased to issue an order of stay of further execution of the decree herein.

(4) THAT this court be pleased to restrain the respondents by themselves and/or their agents or servants from selling, or disposing of the applicant's movable property simultaneously proclaimed and attached on the 6/4/2019.

(5) THAT this court be pleased to order that the 3rd and 4th respondents do retribute to the plaintiff/applicant a 32 inch TCL television set in working condition and Kshs.10,000/= which the respondents irregularly simultaneously proclaimed and attached on the 9/4/2019.

(6) Costs of this application be provided for.

2. The application is premised on the applicant's supporting affidavit sworn on **15/4/2019**.

3. The grounds relied upon are that the respondents herein did not follow the due process of the law during the simultaneous proclamation and attachment of the applicant's property; that the 2nd, 3rd and 4th respondents ought to have issued a required statutory notice of **7 days** before attachment of the applicant's property as per the **Auctioneers Rule 1997**; that the 2nd respondent's document of proclamation is false because until **3/4/2019**, the applicant herein was away in Turkana County; the applicant was not at Kitale on **25/3/2019** so as to be able to receive the said notice of proclamation and decline to sign and that on **9/4/2019**, the respondents without prior notice of proclamation and attachment, attached the applicant's property.

4. The plaintiff filed submissions on **17/6/2019** while the respondents on **20/6/2019**.

The Applicant's Submissions

5. In her submissions she avers that a warrant of attachment of movable properties was issued on 28/3/2019 and the notice of proclamation is dated 25/3/2019 a date by which the warrant had not been issued. For this reason the applicant avers that the apparent backdating of proclamation to 25/3/2019 was fraudulent, a forgery and illegal and the respondents should not benefit from it. Another objection raised to the warrant they were addressed to one Eliphineas Jackson Ekim Omaido as the judgment debtor and the respondents nevertheless proceeded to proclaim and attached the applicant's properties.

6. Secondly the applicant submits that under **Section 2(1) (c)** of the **Auctioneers Rules 1997** she was not given a **7 day notice** in respect of the execution.

The Respondents' Submissions

7. The respondents submitted that the applicant was duly served with a proclamation before the attachment and that she is merely misleading the court when she state that she was not in Kitale on 25/3/2019 the date of service; that in any event the applicant is indebted to the tune of Kshs.227,525/= for which she had not given any proposal for payment; that no appeal or reference on taxed costs has ever been preferred against the judgment of this court; that this court has no mandate to stay the execution of costs and that the application is made in bad faith. A further ground appearing in the respondents' submission is that the application is defective in that it seeks a permanent order of stay of execution of the decree yet payment has not been made and no proposal on settlement of the decretal amount and costs has been put forward by the applicant. It is the submission of the respondent that the applicant has not annexed any evidence that she was not in Kitale on 25/3/2019 and that pursuant to **Section 107** of Evidence Act he who alleges must prove without such documentation submits the respondent the applicant does not deserve the orders sought.

8. On the issue defects on the warrant of attachment and proclamation notice the respondent submits that those defects cannot form a basis for refusing the decretal amount and costs and he terms them as mere typographical errors. He argues that even if the court orders the items proclaimed and attached that is, a television set and Kshs.10,000/= be released to the applicant execution will still subsequently take place; in lieu of such release the respondent urges that the amount collected so far be applied in satisfying the decretal amount and costs in this case as they still remain outstanding.

9. It is noteworthy that the respondent never filed any replying affidavit to the application and I find that the facts in the supporting affidavit are undisputed.

Determination

Issues for Determination

10. The following issues arise for determination in this application

(1) Whether the proper execution procedure was followed;

(2) Whether the warrants were defective

(3) Whether the restitution should be ordered.

(1) Whether the proper execution procedure was followed

11. Whereas I find it to be correct that no appeal or reference on taxed costs has been filed by the applicant the principle issue at hand in the instant application is whether the respondents complied with the rules of the procedure with regard to execution against the applicant.

12. I have examined the provisions of **Section 12(1) (c)** of the Auctioneers Rules which states as follows:

“Upon receipt of a court warrant or letter of instruction the auctioneers shall in case of movables other than goods of a perishable nature and livestock in writing give to the owner of the goods seven days' notice in form No. 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.”

13. In **Kisumu Civil Appeal No. 40 of 2013 between Rozaah Akinyi Buyu and Independent Electoral and Boundaries Commission Hanson Njuki Mugo and John Olago Aluoch** the court stated as follows:

“...failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same.”

14. The above decision may be unrelated to execution of a decree or order, but there is no doubt that service of notice under **Rule 12(1) (c)** of the Auctioneers Rules is still considered service of process in the litigation that it emanates from. Non-service of a hearing notice under the Civil Procedure Rules may lead to the setting aside of a judgment emanating from the affected proceedings *ex debito justitiae*.

15. In circumstances similar to those of this case in **Nairobi Civil Appeal Division Civil Appeal No. 336 of 2010 K-Rep Bank Limited -**

vs- John Mochama Onchoke eKLR the court stated as follows:

“In my view the defendant appellant should serve a proper notification of sale as required in law, the parties should have a meeting and determine the amount in arrears. The appeal is therefore dismissed.”

16. Only an express denial from the respondents with proper evidence annexed to an affidavit could have effectively controverted this ground. None was forthcoming and it is this court’s conclusion that no such notice was issued.

17. The execution process was therefore vitiated by the absence of service of notice under **Rule 12 (1) (c)** of the Auctioneers’ Rules.

(2) Whether the Warrants were Defective

18. The warrants and proclamation notice name Eliphineas Jackson Ekim Omaido as the judgment debtor and the applicant as the judgment creditor. In my view those warrants and proclamation notice should have named the applicant as the judgment debtor and the respondent as the judgment creditor. Upon issuance they could only be enforced as against the judgement debtor. The proper recourse was to return to court and extract documents that were appropriately addressed to the applicant. This never happened. In my view execution of such warrants against the applicant amounted to a nullity.

(3) Whether the Restitution should be Ordered

19. The argument of the respondent is quite attractive. He submits that since the decretal amount and costs have not been paid by the applicant this court should decline to issue any order of restitution and the seized assets should be applied towards the offsetting of the decretal amount and costs. Execution against the applicant having been demonstrated to have been illegal the only remedy is that such execution should be quashed and restitution ordered.

20. It may be true that even after restitution another process of execution may commence against the applicant and after fulfilling the procedural requirement the same may be successful and free of the challenges that beleaguer the current process of execution.

21. However it should be observed that a faulty execution process is a nullity from the beginning and retention of its proceeds cannot be justified on the basis that if repeated in future with strict compliance with the rules it would result in the seizing of the same proceeds.

22. In our justice system compliance with procedure especially with regard to service of process that is bound to affect the constitutional and property rights of a citizen as happened in this case is mandatory. It is to be observed that a proper notice under **Section 12(1) (c)** of the Auctioneers Rules 1997 would have afforded the applicant a chance to remit the decretal sum and costs to the respondents and thereby avert the embarrassing spectacle of physical seizure of her goods under the process of execution. Execution without notice does not observe or protect a citizen’s right to protection of property and amount to arbitrary deprivation thereof yet under **Article 40 (2) (a)** not even Parliament can enact a law that empowers any person to arbitrarily deprive a citizen of his property.

23. I find it difficult to comprehend the respondents’ argument that this court can countenance the retention by the respondents of goods seized contrary to the relevant rules on execution and the constitutional safeguards contained in Article 40. It matters not that a successful process of execution may issue again. In the meantime this court must uphold the rights of the applicant to her property until it is seized after due observance of process.

24. In the circumstances the only remedy that presents itself is to quash the faulty procedure and order the restitution of the seized properties and subject the parties, if they must, to a fresh exercise in which none of them will cry foul.

25. I therefore find the application dated **16/4/2019** has merit, but only to the extent that the warrants of execution and proclamation which were relied on by the respondents are hereby quashed for being defective and for want of compliance with **Section 12(1) (c)** of the Auctioneers Rules. **Prayers No. 4 and 5** of that application are hereby granted. The respondents shall jointly and severally bear the costs of this application.

It’s so ordered.

Dated, signed and delivered at Kitale on this 15th day of July, 2019.

MWANGI NJOROGE

JUDGE

15/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Applicant

N/A for the Respondent

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

15/7/2019