



Mombasa Trade Centre v East Africa Institute of Certified Studies Limited & 2 others (Civil Suit 104 of 2021) [2024] KEELC 4523 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 4523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 104 OF 2021
LL NAIKUNI, J
MARCH 18, 2024**

BETWEEN

MOMBASA TRADE CENTRE PLAINTIFF

AND

**EAST AFRICA INSTITUTE OF CERTIFIED STUDIES
LIMITED 1ST DEFENDANT**

DANIEL WAKABA MACHARIA 2ND DEFENDANT

SERAH WANJIRU MACHARIA 3RD DEFENDANT

RULING

I. Introduction

1. What is before the Honorable Court for its determination is the Notice of Motion Application dated 23rd February, 2024 by the Applicant – Brayan Mwangi t/a Vintage Auctioneers. It was instituted against the 1st, 2nd and 3rd Defendants/Respondents herein. The application was brought under the dint of section 3A of *Civil Procedure Act* Cap 21 and the *Auctioneers Act* and Rules 9 (1-2).
2. Upon service of the application, the 1st, 2nd and 3rd Defendants/Respondents' filed a Replying Affidavit dated 4th March, 2024.

II. The Applicant's Case

3. The Applicant sought for the following orders: -
 - a. Spent
 - b. That leave from the Court to attach the proclaimed motor vehicles in wherever jurisdiction within the Republic of Kenya.



- c. That leave to attach the proclaimed motor vehicles in wherever jurisdiction within the Republic of Kenya and/or any police station under whose jurisdiction they may be traced.
 - d. That leave to have police officers to accompany the auctioneer keep law and order during the execution of warrants of attachment and sale belonging to East Africa Institute of Certified Studies Ltd. and 2 others for recovery of the decretal amount.
 - e. That the Costs of the application to be provided for.
4. The application is premised on the grounds, testimonial facts and the averments made of under the 9 paragraphed Supporting Affidavit of Brayan Mwangi sworn on the even date and together with three (3) annextures marked as “BM - 1 to 3” annexed thereto. He averred as follows: -
- a. The Deponent was a Licensed Auctioneers Class “B” under Act No. 5 Rules 9 (A-C) of 1996.
 - b. He received the warrants of attachment and sale from the ELC dated 8th February, 2024 to execute against the 1st, 2nd and 3rd Defendants/Respondents for debt arrears of a sum of Kenya Shillings Ninety Three Million Seven Seventy Four Thousand Six Fourty Hundred and Thirty Three cents (Kshs. 93,774,640.33/=) and attached was a copy of the said warrant marked as “BM - 2” thereof.
 - c. On 14th February, 2024 he proceeded to the 1st, 2nd and 3rd Defendants/Respondents place of work and proclaimed the assets for 7 days and served the notice as per the attached herein and marked and marked as “BM - 3” in the said notice.
 - d. On 22nd February, 2024 at 9.30 A.M. after the expiry of the 7 days’ notice he returned to the Judgment Debtors place of work and found their property locked with some of the proclaimed Motor vehicles inside.
 - e. The Deponent went back to the Defendants/Respondents’ place of work and found the Judgment Debtor who had hired goons and who threatened to harm them.
 - f. The Defendants/Respondents had since scattered the proclaimed motor vehicles all the Republic of Kenya to different countries which had made it difficult for the Deponent to recover the decretal amount.
 - g. Due to the above stated reason he was unable to attach the proclaimed assets belonging to the Judgment Debtor.
 - h. He made this application under the Auctioneers Rule 12 for the Honorable Court to grant authority under the Supervision of the Officer in Charge of Central Police Station Mombasa or any other Police Station within the Republic of Kenya to attach the Proclaimed Motor vehicles in wherever jurisdiction to accompany the Deponent maintain peace and order during the execution of warrants for recovery of the decretal sum of Kenya Shillings Ninety Three Million Seven Seventy Four Thousand Six Fourty Hundred and Thirty Three cents (Kshs. 93,774,640.33/=

III. The Replying Affidavit by the 1st, 2nd and 3rd Defendants/Respondents

5. While opposing the application the Defendants filed a 9 Paragraph Replying Affidavit sworn by Daniel Wakaba Macharia sworn and dated 4th March 2024 together with 2 annextures marked as “DWM-1 and 2” annexed hereto. He averred as follows:-



- a. He was the 2nd Defendant/Respondent and also a Director of the 1st Defendant/Respondent Company duly authorized to make this affidavit on behalf of the 3rd Defendant/Respondent.
- b. He was served with the Notice of Motion application dated 23rd February, 2024 by Brayan Mwangi trading as Vintage Auctioneers.
- c. The said affidavit was full lies and falsehoods. The 1st Defendant/Respondents operated a school and college in Mombasa which was opened during the school holidays from Monday to Saturday it was never closed.
- d. It was not true that the Auctioneers came to the college on Thursday 22nd February, 2024 and found it closed and were chased away by goons stationed at the college as in fact the school/college was open and the Auctioneers attached and carried away the 1st Defendant's three (3) buses bearing registration Numbers KCY 030D, KCX 124X and KCX 129X without any hindrance. He attached copies of the logbooks for the said motor vehicles marked as "DWM-1".
- e. On Friday 1st March, 2024 the Auctioneers again visited the college premises seized and took away the 1st Defendant's two other buses bearing registration Numbers KCX 076X, KCX 133X and KCV 850M. he attached copies of the Logbooks for the said motor vehicle marked as "DWM - 2" annexed thereof.
- f. The application by the Auctioneers for assistance from the OCS Central Police Station was merely meant to punish the Defendants/Respondents and saddle the Defendants/Respondents with increased and unnecessary costs and expenses.
- g. He prayed that the application to be dismissed with costs.

IV. Analysis and Determination: -

6. I have critically assessed the Notice of Motion application dated 23.2.2024 by the Applicant and the Replies by 1st, 2nd and 3rd Defendants/Respondents, the provisions of the [Constitution of Kenya](#) 2010 and the statutes.
7. For the court to reach an informed decision, it will be guided by two (2) parameters for its determination. These are:-
 - a. Whether the Notice of Motion application dated 23rd February, 2024 has any merit.
 - b. Who will bear the costs of the application.

Issue No. (a) Whether the Notice of Motion application dated 23rd February, 2024 has any merit.

8. Under this sub-heading the main substrata is singular and straight forward. It is whether the execution in terms of the proclamation of assets for the Judgment Debtor and the sale thereof should proceed on as provided for by the [Auctioneers Rules](#). The principles on execution of Court Orders/decrees after the delivery of Judgment are well spelt out under the provisions of Order 22 Rules 1 to 86 of [Civil Procedure Rules](#), 2010 and the [Auctioneers Act](#), no. 5 of 1996. The role of causing execution upon obtaining warrants issued by court are bestowed upon the Auctioneers as governed by this [Act](#). The [Act](#) was established to exercise general supervision and control over the business and practice of Auctioneers. Further, to supervise and discipline licensed auctioneers or expedient for proper discharge of its functions under the [Act](#).



9. A Licensed Auctioneer being an officer of Court and holding licenses are expected to execute their legal mandate professionally with diligence dedication and devotion. The said officers are professionally guided by their profession ethics and etiquettes. Should they act in the contrary to this standards, a complaint may be lodged before the Auctioneers Licensing Board established to control and supervise Auctioneers as provided for under Section 3 of the Act. The objective of the execution of decree is well stated from the provisions of the Civil Procedure Rules, 2010 and the commentary by “Mulla on Code of Civil Procedure” are all in force on this concept of execution of Court’s Decree and orders.
10. Now turning to the issues from the instant case. From the facts of the case, this Honourable Court after a lengthy adjudication of the case, on 22nd June, 2023 delivered its Judgment in favour of the Plaintiff. Its indicative to note that, the Defendants being aggrieved preferred an appeal at the Court of Appeal – being “Civil Appeal No. E107 of 2023 - East Africa Institute of Certified Studies Ltd. v Mombasa Trade Centre Limited”. The appeal is still pending hearing and final determination by the Superior Court. In the meantime, it has now come to my attention (put it taken Judicial notice) of the brief proceedings before the Court of Appeal on this matter. That on 29th September, 2023 the 1st Defendant filed an application before the Court of Appeal under the provision of Rule 5(2) (b) of the Appellate Court Jurisdiction Rules seeking for stay of execution of the decrees granted by this court. Upon hearing and considering the said application, the Court reserved to render its ruling on 24th April, 2024. However, prior to the arrival of date, on 15th February 2024 the Respondents herein moved the Court seeking to have the orders of the Notice of Motion application dated 29th September, 2023 be expedited as they were getting apprehensive that the appeal may end up being mere academic exercise and they were likely to suffer great prejudice. Their explanation to Court for making that early move was arising from the steps taken by the Decree Holder having caused the costs be taxed on 6th December, 2023. Further, the Judgement Debtor averred that the Decree Holder had a Certificate of Taxation issued and by a letter dated 25th January, 2024 from their Advocates a draft Decree was sent to the Judgement Debtor’s Advocates who were given three (3) days to approve the same. Indeed, the Decree had been signed by the Deputy Registrar and hence to them the execution process of the Decree had commenced in earnest.
11. Resultantly, the Court of Appeal directed that while awaiting for it to deliver its ruling on 24th April, 2024 and not taking the risk of declaring the whole exercise a mere academic and in the interest of justice that an order of status quo between the parties as of 5th March, 2023 to be maintained.
12. Based on the fore going, this court wishes to make several observations here. Firstly, undoubtedly there exists a Judgment and Decree delivered by this Court on 22nd June, 2023 in favour of the Plaintiff. It follows that, the Decree – Holder has judicial right to enjoy the fruits of the said Judgment. Secondly, being aggrieved by the decision of the Court, the Defendants/Respondents herein preferred an appeal before the Court of Appeal as evident from the proceedings and the contents of this Ruling hereof. Thirdly, despite of the Judgement and the Decree being issued there exists no stay of execution whatsoever under the provision of Order 42 Rule (1) (2) and (6) of the Civil Procedure Rules, 2010 by this court nor Court of Appeal under the provision of Rules 5 (2) (b) of the Appellant Court Rules. Fourthly, the Applicant has already commenced the execution process – through proclamation of the assets belonging to the Defendants/Respondents and what they were seeking was for leave to advance the execution process and with the help of the police from the Coast and other regions from the jurisdiction where the proclaimed assets for the Judgment Debtor may be found and/or located in keeping law and order. The Applicant has already alluded to the existence attacks and threats allegedly by goons hired by the Defendants/Respondents to create a stumbling block to the execution process. Clearly, should that be truthful, though the Defendants/Respondents have vehemently denied it as being falsehood, then the whole act of omission and commission is not only unlawful, irregular but



unacceptable by all standards. Suffice it to say, on the said allegations meted by the Applicant, this court wishes to accord the Defendants/Respondents some benefit of doubt in that should there have been any attacks or threats how comes then they were able to proclaim and even attached six (6) buses and whereby the Defendants/Respondents have even provided copies of the Motor Registration Books – (Log Books) bearing the full particulars for each of the buses marked as DWM – 1 to 3” respectively. The Honorable Court gets the gut feeling the Appellant is playing from the gallery in an exaggerated manner perhaps to solicit sympathy from the court. Let us not digress.

13. Be that as it may, the Court’s attention has been drawn to the proceedings from the Court of Appeal and in particular the Ruling delivered on 8th March, 2024 the same subject matter. Procedurally, the Defendants/Respondents ought to not only have extracted but also attached a Certified Copies of the Court Order and the said Ruling as part of the annexure in their Replies hence forming part of this court’s proceedings. They sat and waited for the Court to go digging for this information by itself. Nonetheless, it would be wrongful and unfair based on “the Doctrine of Stare Decisis” for this court having seized al these information to assume or pretentiously ignore the record of the Court of Appeal. Based on this Doctrine this court is bound by the decision of the Superior Court in all ways. Though I reiterate the said Court never granted any stay of execution but it ordered *inter alia*:-

“We have noted that this application seeks to stay execution of the Decree pending delivery of the Ruling of this Court. At the time of filing the initial application, the Respondent had not obtained the decree, but has since extracted it and is already executing the Decree against the applicants so as to ensure that the Ruling is not rendered a mere academic exercise in futility. It is in the interest of justice that the order that bests lends itself, having regard to the circumstances is for the status quo between the parties as at today 5th March 2023 to be maintained pending delivery of the Ruling of this Court on the Notice of Motion dated 29th September, 2023.

14. Clearly from the above courts assertion it would be erroneous and wrongful for this court to purport to be proceeding in disposing off the application dated 23rd February, 2024 by the Applicant herein. The best alternative is to defer it awaiting the outcome of the Court of Appeal

V. Conclusion & findings.

15. Upon conducting the analysis of the framed issues emanating from the filed application, the Honourable Court proceeds to make the following orders:-
- a. That the orders sought from the Notice of Motion application dated 23rd February, 2024 by the Applicant be and is hereby deferred and/or suspended awaiting the Ruling and its outcome by the Court of Appeal scheduled for 24th April, 2024.
 - b. That this matter to be mentioned on 16th May, 2024 to ascertain progress made and provide further direction on the Notice of Motion application dated 23rd February, 2024.
 - c. That costs to be in the cause.

It is so orders accordingly.

RULING DELIEVERD THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED IN CHAMBERS AND DATED AT MOMBASA THIS 18TH DAY OF MARCH ., 2024.

HON. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA



Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Bryan Mwangi Auctioneer t/a Vintage Auctioneers Agencies.
- c. Dr. Chokaa Advocate for the 1st, 2nd & 3rd Defendants.

