



REPUBLIC OF KENYA



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**Odhambo & another v Munyao t/a Mbeki Auctioneers & another;
Omole (Judgment debtor) (Civil Application E081 & E082 of 2024
(Consolidated)) [2024] KECA 1811 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1811 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E081 & E082 OF 2024 (CONSOLIDATED)
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA
DECEMBER 20, 2024**

BETWEEN

MAUREEN ONYANGO ODHIAMBO 1ST APPLICANT

SAMUEL MICHAEL EYINDA 2ND APPLICANT

AND

AGNES MUNYAO T/A MBEKI AUCTIONEERS 1ST RESPONDENT

HON ELISHA OCHIENG ODHIAMBO 2ND RESPONDENT

AND

BOOKER NGESE OMOLE JUDGMENT DEBTOR

*(Being applications pending the hearing and determination of the intended
appeal for an injunction against a ruling of the High Court at Siaya
(D. O Ogola, J.) dated 23rd March 2024 in HCCC No. E001 of 2020)*

RULING

1. The mandate of this Court under Rule 5(2)(b) of the [Court of Appeal Rules](#) was explained in [Trust Bank Ltd & Another - vs- Investech Bank Ltd & 3 Others](#) [2000] eKLR in the following terms:-

“The jurisdiction of the Court under Rule 5(2)(b) aforesaid, is original and discretionary, and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous; and secondly that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory.”



2. Following the judgment delivered on 28th July 2021 in Siaya HCCC No. E001 of 2020, Booker Ngesa Omole (the judgment debtor) was found to have defamed Hon. Elisha Ochieng Odhiambo (the 2nd respondent) and damages amounting to Kshs.7,996,290/= were awarded against him. In effort to recover the amount, the 2nd respondent's advocates instructed Agnes Munyao T/a Mbeki Auctioneers (1st respondent) to execute the warrants of attachment and sale that the court had issued.
3. The 1st respondent proceeded to the judgment debtor's premises and proclaimed the household goods therein. Upon the expiry of 7 days, she unsuccessfully attempted to collect the attached goods. This led to the filing of a motion dated 5th June 2023 in which the 1st respondent sought that the OCS Kilimani Police Station and the OCS Syokimau Police Station do provide security for her to access the judgment debtor's goods at Urban Oasis Apartments, Block "A" Unit 10 in Kilimani in Nairobi and Sodowe Estate in Syokimau in Machakos for the purposes of attachment and sale.
4. The motion was opposed by way of a preliminary objection filed by the judgment debtor who stated that court lacked territorial jurisdiction to grant the orders sought, among other grounds. Maureen Onyango Odhiambo (1st applicant) and Samuel Michael Eyinda (2nd applicant) filed a motion dated 23rd June 2023 to permanently restrain the selling of the proclaimed goods. The 1st applicant deponed that she was the owner of the premises located at Sodowe Estate, Syokimau, and the owner of the attached goods in the house. The 2nd applicant deponed that he was the registered owner of the motor vehicle registration number KCX 090R which had been proclaimed by the 1st respondent for purposes of sale to recover the debt. He had brought it from the judgment debtor on 1st August 2020. The 1st applicant admitted that she had previously been in a relationship with the judgment debtor.
5. In the ruling delivered on 23rd March 2024 by the learned D.O. Ogola, J., it was found that the judgment debtor had acted in a manner to conceal his properties to evade the execution of the decree by frantically and dishonestly purporting to sell and transfer the house to the 1st applicant and the motor vehicle to the 2nd applicant. The applicant's bid to stop the auction by way of injunction was accordingly dismissed.
6. The applicants each filed a notice of appeal to this Court seeking to challenge the ruling. The 1st applicant applied under Rule 5(2)(b) of this Court's Rules for an injunction to restrain the selling in an auction or otherwise of the goods proclaimed on 23rd May 2023 to recover the decretal sum pending the hearing and determination of the appeal. On the same date, and under the same Rule, the 2nd applicant sought an injunction to stop the sale of the motor vehicle pending the hearing and determination of the appeal. Each applicant filed an affidavit in support, annexing documents of ownership of the respective properties. The judgment debtor filed an affidavit dated 2024 in which it was deponed that the learned Judge had ignored direct evidence that the proclaimed goods did not belong to him.
7. The applications were not opposed.
8. We consider that both applicants referred to the memorandum of appeal dated 15th June 2024 stating, inter alia, that the learned Judge erred in holding that they had not provided any evidence of ownership of the proclaimed assets; ignoring uncontroverted evidence of the 1st applicant's ownership to determine the application of objection to attachment; in allowing attachment of the 2nd applicant's property despite such property having been transferred prior to the execution proceedings and attachment by the auctioneers, in allowing attachment of the applicants' properties despite the judgment debtor availing other adequate properties and arrangements for selling the same in settlement of the decretal sum; and in granting warrants of attachment based on an application supported by an affidavit that was neither drafted nor commissioned by an advocate.



9. We have further considered the written submissions and authorities cited to us by counsel for the applicants.
10. There was no averment or submission that, if execution is allowed to proceed and the attached goods sold, the 2nd respondent would be unable to refund the value of the goods in the event that the appeals are successful. In other words, the nugatory aspect of the applications has not been demonstrated.
11. The gravamen of the applicants' appeals and applications is that they were the owners of the items that the 1st respondent attached on instructions of the 2nd respondent; and that, the items did not belong to the judgment debtor. The learned Judge found that the judgment debtor disposed of the motor vehicle to the 2nd applicant and the Syokimau house that had the attached items to the 1st applicant in order to defeat the execution of the decree. We have gone through the record. The judgment was delivered on 28th July 2021. The 2nd applicant admitted that the vehicle was transferred to him by the judgment debtor on 1st August 2021. The 1st applicant annexed a copy of the title deed to the Syokimau property showing that the judgment debtor transferred it to her on 3rd November 2022. In as much as we are not supposed to make any definitive findings of either fact or law at this point, we can say that we are not persuaded that the intended appeals are arguable.
12. Our conclusion of the matter is that the applications have failed to meet the threshold under Rule 5(2) (b). We dismiss them with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 20TH **DAY OF DECEMBER 2024

ASIKE-MAKHANDIA**

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

