



**Orowe & 2 others (Suing as the Administrators of the Estate of Austin Francis Orowe, Deceased) v National Land Commission & 2 others (Environment and Land Case Civil Suit 78 of 2017) [2024] KEELC 4858 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4858 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 78 OF 2017  
SO OKONG'O, J  
JUNE 19, 2024**

**BETWEEN**

**BRIDGET MARY ONYANGO OROWE ..... 1<sup>ST</sup> PLAINTIFF  
JULIUS OROWE ..... 2<sup>ND</sup> PLAINTIFF  
LAWRENCE OROWE ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF AUSTIN FRANCIS  
OROWE, DECEASED**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT  
KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 29<sup>th</sup> May 2023, judgment was entered for the Plaintiffs against the 2<sup>nd</sup> Defendant on the following terms:

“By consent, judgment is entered for the Plaintiffs against the 2<sup>nd</sup> Defendant in the sum of Kshs. 18,874,503/-. The costs of the suit and the timeline for payment shall be discussed and agreed upon by the parties failure to which the same shall be determined by the court. The matter shall be mentioned on 27<sup>th</sup> September 2023 to record further consent on the remaining issues.”



2. On 27<sup>th</sup> September 2023, the court made the following further orders in the matter:
  - “ 1. The 2<sup>nd</sup> Defendant has had sufficient time to arrange on how to settle the judgment sum of Kshs. 18,874,503/-. I find the 90 more days requested by the 2<sup>nd</sup> defendant unreasonable. I hereby order that the said amount shall be paid within 60 days from the date hereof in default of which the Plaintiffs shall be at liberty to set in motion the process of execution.
  2. The parties shall also agree on the issue of costs within the same period of 60 days in default of which they shall file submissions in respect thereof so that the court can determine the same.
  3. The matter shall be mentioned on 23<sup>rd</sup> November 2023 for further directions.”
3. On 23<sup>rd</sup> November 2023, the Plaintiffs’ advocates informed the court that the 2<sup>nd</sup> Defendant had not settled the judgment amount within 60 days as was ordered by the court. On that day, the court made the following order:

“Since the principal amount in the consent judgment made on 29<sup>th</sup> May 2023 has not been paid within the time that was given by the court, the Plaintiff is at liberty to take the necessary steps to recover the amount. The matter shall be mentioned on 22<sup>nd</sup> February 2024 for further directions.”
4. On 28<sup>th</sup> November 2023, the Plaintiffs filed an application for execution against the 2<sup>nd</sup> Defendant for the recovery of the judgment sum of Kshs. 18,874,503/-. The court issued warrants of attachment and sale of the 2<sup>nd</sup> Defendant’s movable properties on 30<sup>th</sup> November 2023. On 1<sup>st</sup> December 2023, Victoria Blue Services Auctioneers acting on the instructions of the Plaintiffs attached the 2<sup>nd</sup> Defendant’s movable properties including office furniture and motor vehicles in execution of the said warrants.
5. What is now before the court is the 2<sup>nd</sup> Defendant’s Notice of Motion application dated 13<sup>th</sup> December 2023 brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Section 68 of the *Kenya Roads Act*, Section 23 of the *Auctioneers Act* and Rule 12 of the *Auctioneers Rules*. In the application, the 2<sup>nd</sup> Defendant sought an order lifting the warrants of attachment and sale dated 30<sup>th</sup> November 2023 and the resultant proclamation notice dated 1<sup>st</sup> December 2023, and a declaration that the said warrants were prematurely and irregularly obtained. The 2<sup>nd</sup> Defendant also sought an order that the costs of the application and the unlawful execution be borne by the Plaintiffs.
6. The application which was brought on the grounds set out on the face thereof and on the affidavit of Lawrence Maruti sworn on 13<sup>th</sup> December 2023 was brought on several grounds. The 2<sup>nd</sup> Defendant contended that the execution process initiated by the Plaintiffs was a nullity. The 2<sup>nd</sup> Defendant contended that the Plaintiffs’ costs had not been assessed or taxed and no leave had been obtained under Section 94 of the *Civil Procedure Act* for execution before taxation. The 2<sup>nd</sup> Defendant averred further that the execution proceedings were carried out in breach of the provisions of Section 68 of the *Kenya Roads Act* which prohibits attachment of the 2<sup>nd</sup> Defendant’s moveable properties in execution of a decree against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant averred further that the motor vehicle registration No. KDA 850P which was attached and forcibly driven away by Victoria Blue Services Auctioneers was not one of the 2<sup>nd</sup> Defendant’s properties that were proclaimed by the said auctioneers. The 2<sup>nd</sup> Defendant averred that the attachment of the said motor vehicle was therefore illegal as it contravened Rules 12(1)(b), (c), (d) and (g) and 12(2) of the *Auctioneers Rules* as read with Section 23(b) of the *Auctioneers Act*.



7. The application was opposed by the Plaintiffs through a replying affidavit sworn by the 1<sup>st</sup> Plaintiff on 17<sup>th</sup> January 2024. The Plaintiffs averred that although the costs of the suit had not been taxed, the court had given the Plaintiffs leave to execute the decree. The Plaintiffs averred further that Section 68 of the [Kenya Roads Act](#) was not applicable since the judgment that was being executed was a consent judgment.
8. The Plaintiffs filed a further affidavit sworn by Felix Owuor Apollo, an auctioneer on 14<sup>th</sup> March 2014. Felix Owuor Apollo stated that when Victoria Blue Services Auctioneers attached the 2<sup>nd</sup> Defendant's moveable properties on 1<sup>st</sup> December 2023, they attached to the proclamation, a list of motor vehicles belonging to the 2<sup>nd</sup> Defendant one of which was motor vehicle registration No. KDA 850P which appeared as No. 13 in the said list.
9. The application was argued by way of written submissions. The 2<sup>nd</sup> Defendant/Applicant filed its submissions dated 3<sup>rd</sup> April 2024 while the Plaintiffs filed submissions dated 12<sup>th</sup> March 2024. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the Plaintiffs in opposition to the application. Finally, I have considered the submissions by the parties and the many authorities that were cited.
10. The 2<sup>nd</sup> Defendant is established under Section 3 of the [Kenya Roads Act](#), 2007(hereinafter referred to only as "the Act") and its functions are set out in Section 4 of the [Act](#). Sections 3 and 4 of the [Act](#) provide as follows:

“ 3. Establishment of the Kenya National Highways Authority

There is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding and disposing of movable or immovable property;
- (c) borrowing money with the approval of the Minister and the Minister responsible for Finance; and
- (d) doing or performing all such other things or acts for the proper performance of its functions under this Act as may lawfully be done or performed by a body corporate.

4. Functions of the Authority

- (1) The Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.
- (2) For the purposes of discharging its responsibility under subsection (1), the Highways Authority shall have the following functions and duties—
  - (a) constructing, upgrading, rehabilitating and maintaining roads under its control;



- (b) controlling national roads and road reserves and access to roadside developments;
- (c) implementing road policies in relation to national roads;
- (d) ensuring adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under this Act;
- (e) ensuring that the quality of road works is in accordance with such standards as may be prescribed by the Minister;
- (f) in collaboration with the Ministry responsible for Transport and the Police Department, overseeing the management of traffic and road safety on national roads;
- (g) collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under this Act;
- (h) monitoring and evaluating the use of national roads;
- (i) planning the development and maintenance of national roads;
- (j) advising the Minister on all issues relating to national roads;
- (k) preparing the road works programmes for all national roads;
- (l) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads; and
- (m) performing such other functions related to the implementation of this Act as may be directed by the Minister.”

11. Section 68 of *Kenya Roads Act*, 2007(the Act) which deals with execution against the 2<sup>nd</sup> Defendant provides as follows:

Notwithstanding anything to the contrary in any law—

- (a) where any judgment or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director- General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by the judgment or order, be awarded against the Authority;



(b) no property of an Authority shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Director-General.”

12. There is no doubt from the provisions of Section 68 of the Act that no attachment or execution can be levied against the property of the 2<sup>nd</sup> Defendant. The Section provides that where there is a monetary judgment against the 2<sup>nd</sup> Defendant, the Director-General of the 2<sup>nd</sup> Defendant shall settle the same out of the revenue of the 2<sup>nd</sup> Defendant. I agree with the 2<sup>nd</sup> Defendant that the mode of execution that was adopted by the Plaintiffs against the 2<sup>nd</sup> Defendant was unlawful as it was contrary to the express provisions of the Act. I agree with the Plaintiffs that the court had given them the liberty to proceed with the recovery of the judgment amount after the 2<sup>nd</sup> Defendant failed to make payment within the period that was given to them by the court. The order made on 27<sup>th</sup> September 2023 put the Plaintiff “at liberty to set in motion the process of execution” while the order of 23<sup>rd</sup> November 2023 gave the Plaintiffs “liberty to take the necessary steps to recover the amount.” As correctly submitted by the 2<sup>nd</sup> Defendant, those orders did not exempt the Plaintiffs from following the law on recovery of judgment debts from the 2<sup>nd</sup> Defendant.

13. In my view, the Plaintiffs were supposed to demand that the Director-General of the 2<sup>nd</sup> Defendant satisfies the judgment debt and in default, they were to file an application for judicial review for an order of mandamus to compel the said Director-General of the 2<sup>nd</sup> Defendant to perform his statutory duty under Section 68 of the *Act*. In *Halsbury’s Laws of England*, 4<sup>th</sup> Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.”

14. In *Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the court explained the principle pronounced in the foregoing passage from Halsbury’s Laws of England as follows:

...an order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of persons has failed to perform the duties to the detriment of a party who has a legal right to expect the duty to be performed.”

15. If an order of mandamus was sought, issued and defied by the Director-General of the 2<sup>nd</sup> Defendant, the Plaintiffs could take out contempt of court proceedings against him. This is the procedure for execution against the Government or Government organs or bodies shielded from execution by the establishing Act or the *Government Proceedings Act*, Chapter 40 Laws of Kenya. See, *Five Star Agencies Limited v. National Land Commissions & Another*, Nairobi Civil Appeal No. E290 of 2023 consolidated with *Kenya National Highways Authority v. Five Star Agencies Limited & Another*, Nairobi, Civil Appeal No. E328 of 2023.

16. Due to the foregoing, it is my finding that the warrants of attachment and sale that were issued by the court on 30<sup>th</sup> November 2023 on the Plaintiffs’ application for execution against the 2<sup>nd</sup> Defendant were irregularly issued since the application for execution was filed contrary to Section 68 of the Act.



The 2<sup>nd</sup> Defendant had also challenged the said warrants of attachment and sale on the ground that the same were issued contrary to Section 94 of the *Civil Procedure Act* in that the Plaintiffs commenced execution before taxation without leave. I find no merit in this argument. From the orders made by the court reproduced earlier in the ruling, the court had allowed the Plaintiffs to proceed with the process of recovering the judgment amount notwithstanding that the issue of costs had not been determined. The execution process that was initiated by the Plaintiff was therefore not bad in law for breaching Section 94 of the *Civil Procedure Act*. The other ground of objection to the attachment was that the auctioneers had attached and forcibly moved motor vehicle registration No. KDA 850P to their premises although the vehicle was not among those that they had proclaimed and without issuing a notification of sale. Having held that the entire execution process was unlawful, I do not need to determine this issue save as stated below.

## Conclusion

17. In conclusion, it is my finding that the 2<sup>nd</sup> Defendant has made a case for the grant of the orders sought in the application dated 13<sup>th</sup> December 2023 save for costs. The desperate but rather unlawful attempt by the Plaintiffs to attach the 2<sup>nd</sup> Defendant's movable assets was a result of the 2<sup>nd</sup> Defendant's failure to settle a consent judgment. The judgment was entered for the Plaintiffs against the 2<sup>nd</sup> Defendant on 29<sup>th</sup> May 2023 and by 28<sup>th</sup> November 2023, 6 months later when the Plaintiffs applied for execution against the 2<sup>nd</sup> Defendant, the judgment amount had not been settled. To condemn the Plaintiffs to pay the costs of the application and the attachment would be to condone the 2<sup>nd</sup> Defendant's defiance of the court that entered the judgment.
18. I therefore allow the 2<sup>nd</sup> Defendant's Notice of Motion application dated 13<sup>th</sup> December 2023 in terms of prayer 4 thereof. Each party shall bear its costs of the application. The auctioneer's charges if any shall be borne by the 2<sup>nd</sup> Defendant to be agreed upon failure to which the same shall be taxed by the taxing officer of this court. In assessing the auctioneers' charges, the charges or fees associated with the attachment and removal of motor vehicle registration No. KDA 850P to the auctioneers' premises shall be omitted as I have been persuaded by the 2<sup>nd</sup> Defendant that the auctioneers did not comply with the provisions of the Auctioneers Rules in the purported attachment and removal of the said vehicle to their premises.

**DELIVERED AND DATED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF JUNE 2024**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs

N/A for the 1<sup>st</sup> Defendant

Ms. Oduor h/b for Mr. Ragot for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

Ms. J. Omondi-Court Assistant

