



**Muyuma v Kaveva & another (Environment & Land Case
7 of 2021) [2025] KEELC 680 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 7 OF 2021
LG KIMANI, J
FEBRUARY 20, 2025**

BETWEEN

MBATHA MUYUMA PLAINTIFF

AND

GEORGE MUKOVA KAVEVA 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion dated 12th of February 2024 seeking the following orders:
 1. Spent
 2. That this Honourable Court be pleased to order stay and or lift of the Warrants of attachment dated 20th December 2023 pending hearing and determination of this application
 3. That this Honourable Court be pleased to issue an Order restraining the Defendant/Respondent by himself, their officer, agents and/or anyone acting on their behalf from going to the Plaintiff's/Applicant's homestead to attach any property.
 4. That this Honourable Court be pleased to grant the Plaintiff/Applicant leave to respond to the Notice to Show Cause dated 30th June 2023, on why execution should not be granted.
 5. That costs be in the cause.
2. The application is supported by the Applicant's affidavit, in which he deposed that the Defendant/Respondent was awarded costs of the suit through the Ruling dated 24 May 2023 awarding the Defendant/Respondent Ksh. 390,080.



3. The Applicant claims that he has never been served with any other documents subsequent to the ruling. On January 26, 2024, goons came to his homestead to attach his property based on the warrants of attachment against the Plaintiff/Applicant. When his advocate attempted to verify the orders, their efforts were frustrated as the court file could not be traced in the registry.
4. On February 9, 2024, the goons went to the Plaintiff/Applicant's homestead to attach his property again, but the area chief intervened. On the same day, the Court registry communicated that the file had been traced. Upon perusing the Court file, the Applicant found that the Defendant had filed a Certificate of Taxation, Notice to Show Cause, Application for Execution of Decree and Warrant of Attachment without serving him with any of these documents.
5. The Applicant therefore deposes that it is in the interest of justice that the warrant of attachment be stayed or lifted for the Plaintiff/Applicant to respond to the Notice to Show Cause.
6. He further deposed that there has been no delay in making this application and that no prejudice will be suffered by the Defendant/Respondent.

The Defendant/Respondent's Replying Affidavit.

7. The Defendant/ Respondent filed a replying affidavit deposing that he is the judgment creditor in this matter and that the application is devoid of merit and is an abuse of the Court process. It is his position that the Plaintiff/Applicant has been aware of the costs taxed because he made an application on 5th June 2023 to set aside the taxation which application was dismissed.
8. The Defendant/Respondent applied for execution by way of attachment and sale of the Plaintiff's moveable properties through M/S Samumu Auctioneers, who went to the Plaintiff's home to remove the proclaimed goods, but the Plaintiff chased them away and subsequently hid the proclaimed livestock and removed them from his homestead.
9. Regarding the Notice to Show Cause, he deposed that it was compromised by the application to set aside the taxation order and was abandoned when the attachment was taken out.
10. Further, the Defendant/Respondent pointed out that the Applicant has not offered to pay the taxed costs but has been filing a multiplicity of applications to frustrate the recovery of the taxed costs.

Plaintiff/Applicant's Submissions

11. Counsel for the Plaintiff/Applicant submitted that the Defendant/Respondent filed a Bill of Cost dated 18th April 2023 which was taxed at Kshs. 390,080. The Plaintiff/Applicant filed an Application dated 5th June 2023 seeking to set aside the taxation. Despite the Defendant/Respondent being aware of the application, he filed a Notice to Show Cause dated 30th June 2023 which was to be heard on the 18th July 2023. Interestingly the Defendant / Respondent has two Applications for execution of the Decree one filed on the 9th of June 2023 and another filed on the 18th of December 2023. The Defendant/Respondent relied on the latter one on the 20th December 2023, to file a Warrant Sale of property in execution of a Decree for Money. On the 26th of January 2024, without issuing a Proclamation Notice the Defendant/Respondent sent some strangers/goons with a lorry to the Plaintiff/Applicant's homestead to attach his property.
12. Counsel submitted that the following are the issues for determination: 1. Whether the certificate of costs was executable in the circumstances of this case and 2. Whether the warrants of attachment dated December 20, 2023, were executed prematurely.



13. On the ^{first} issue, Counsel submitted that the Defendant/Respondent did not obtain a Decree but executed based on a certificate of costs contrary to the law that a certificate of costs is not an executable instrument. This is as per section 51(2) of the *Advocates Act* explained in the cases of Rubo Kimngetich Arap Cheruiyot v Peter Kiprof Rotich [2006] eKLR and Ndungu Githuka Advocates V Geoffrey Moriaso Ole Mailoy (2019) eKLR.
14. The Plaintiff/Applicant submits that the Defendant/Respondent never sought the adoption of the certificate of costs as an order of the Court before execution.
15. On the issue of the warrants of attachment dated December 20, 2023, Counsel submits that warrants of attachment were executed prematurely as there were discrepancies in obtaining the said warrants. Further, the Defendant/Respondent never issued the Plaintiff/Applicant with a Proclamation Notice therefore rendering the attachment process premature.

The 1st Defendant/Respondent's Submissions

16. Counsel for the 1st Defendant/Respondent submitted that the Applicant is asking the Court to prevent execution against him through auctioneers without providing an alternative means of settling the taxed costs. Further, the Applicant failed to respond to the Notice to show cause previously issued to him.

Analysis and Determination

17. This is a matter in which judgment was delivered on 16th March 2022, dismissing the suit with costs to the 1st defendant. The 1st Defendant/ decree holder filed a bill of costs dated 18th April 2023 which was taxed at Ksh. 390,080.00/= as per the Certificate of Taxation dated 7th June 2023.
18. The Court has considered the application herein, the replying filed and the submissions by Counsel for the parties.
19. On prayers 2, 3 and 4, the court notes it is not in dispute that the sum of Kshs. 390,080.00/= was found due and owing by the Applicant as per the Certificate of Taxation dated 7th June 2023 and the said sum has not been settled. The Plaintiff/Applicant herein participated in the hearing and determination of the suit and his Counsel was present for the reading of the judgment and participated in the taxation process. The Applicant was therefore fully aware that he owes the Decree holder the sum of Ksh.390,080.00/= as costs of the suit.
20. The Court record shows that on 5th June 2023, the Plaintiff/Applicant filed an application dated the same date seeking to set aside the taxation of the Bill of Costs dated 18th April 2023. The application was on 27th September 2023 dismissed for want of prosecution.
21. The 1st Defendant had in the meantime filed an application for execution filed in court on 9th June 2023. According to the said application, the mode in which the assistance of the court was required was by the issuance of a Notice to Show Cause (NTSC) why the judgment debtor should not be committed to civil jail. A NTSC was issued by the court on 13th June 2023 and the same was to be heard on 18th July 2023. The said NTSC was never heard as it seems to have been overtaken by the hearing of the application for setting aside the orders of taxation of the 1st Defendant's bill of costs dated 5th June 2023.
22. The Defendant/Respondent then proceeded to make an application for execution filed in court on 18th December 2023 seeking the assistance of the court by and sale of the judgment debtor's movable properties lying at his homestead or elsewhere to be executed by Samumu Auctioneers. Warrants for the sale of property in execution of a decree for money were issued by the court on 20th December 2023.



23. The Applicant herein states that he was visited by goons on the 26th of January 2024 and the 9th of February 2024 and now seeks to stay or lift the warrants of attachment. The application is brought under Order 51 Rule 1, Order 22 and Order 10 Rule 11 of the Civil Procedure Rules.
24. Counsel for the Applicant herein challenged the execution process on the ground that the Defendant/ Respondent did not obtain a decree but executed based on a certificate of costs contrary to the law that a certificate of costs is not an executable instrument, as per section 51(2) of the Advocates Act and as explained in the cases of Rubo Kimnetich Arap Cheruiyot v Peter Kiprop Rotich [2006] eKLR and Ndungu Githuka Advocates V Geoffrey Moriaso Ole Mailoy (2019) eKLR among other cases.
25. The Plaintiff/Applicant submitted that the Defendant/Respondent never sought the adoption of the certificate of costs as an order of the Court of execution. On the contrary, the Defendant/Respondent applied for execution of a Decree and obtained warrants of attachment.
26. The court has perused the court record and indeed it is true that no decree was extracted by any of the parties. The two applications for execution filed by the 1st Defendant on 9th June 2023 and 18th December 2023 were both titled "Application for the execution of Decree"
27. Section 38 of the Civil Procedure Act provides for the power of the court to enforce execution and states that:

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of decree---”

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts;
- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require.”

28. Order 22 Rule 6 of the Civil Procedure Rules provides for the procedure used for execution and states that:

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions herein before contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

29. In the judgment of the court rendered on 16th March 2023 in this suit, the court dismissed the suit with costs to the 1st Defendant. The 1st Defendant obtained a certificate of costs after taxation.
30. It is trite law that a certificate of costs is not an executable instrument, as explained in the case of Rubo Kimnetich Arap Cheruiyot v Peter Kiprop Rotich [2006] eKLR

“It is my view that a Decree duly approved and signed had to be on record for any execution to take place, whether for the eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being “executed”. Warrants of attachment and sale cannot in law be issued on



the basis of a certificate of costs. There must be a decree first. It is true that the Decree may not be necessarily or always contain the ascertained costs. Costs can be determined before a decree is issued or subsequently, after the Decree has been drawn. However for one to recover costs, there must be a decree. Any money awarded by court including costs is only payable under a decree particularly, if it is through enforcement (see Order XXI, Rule 1).”

31. As indicated earlier, the 1st Defendant made an application for execution of the “Decree” and used the forms provided for under Order 22 Rule 6 of the Civil Procedure Rules. In the Court’s view, in order to apply under this Rule, there must exist a Decree.
32. In the present case, there was no decree under which the certificate of costs could be underpinned. The certificate of costs is only for the ascertainment of the payable costs and is not the decree.
33. The Court therefore finds that the execution for costs herein and the issuance of the warrants of attachment and sale were irregular, null and void for the reasons given above.
34. Prayer 3 seeks an Order restraining the Defendant/Respondent by himself, their officer, agents and/or anyone acting on their behalf from going to the Plaintiff’s/Applicant’s homestead to attach any property. The court finds that the prayer is merited but subject to the limitation that the 1st Defendant is at liberty to proceed with execution after obtaining a decree in this suit.
35. Prayer 4 of the application herein seeks an order that the Applicant be granted leave to respond to the Notice to Show Cause dated 30th June 2023 on why execution should not be granted. The Court is of the view that, having found that the process of execution for costs herein and the issuance of the warrants of attachment and sale were irregular, null and void, the court cannot allow the applicant to reply to the Notice to Show Cause dated 30th June 2023. The said notice was issued pursuant to an application for execution that was faulty.
36. On the question of costs of the application, the court declines to award the applicant costs of the application because the taxed costs remain unpaid and from the affidavit in support of the application, no efforts have been made to settle the same.
37. From the foregoing, the court finds that the application dated 12th February 2024 has merit and partly succeeds in the following terms;
 1. The Warrants of attachment dated 20th December 2023 are hereby lifted with liberty to the 1st Defendant to apply for execution following the procedure set out in law.
 2. An order is hereby issued restraining the 1st Defendant/Respondent by himself, their officer, agents and/or anyone acting on their behalf from attaching the Plaintiff’s property on the strength of the warrants of attachment dated 20th December 2023.
 3. Prayer 4 of the application herein is disallowed.
 4. Each party shall bear their costs of the application.

READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 20TH DAY OF FEBRUARY 2025.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

In the presence of:

No appearance for Applicant.



No appearance for Respondent.

Court assistant: Michael.

