



Patriotic Group of Companies Ltd v Sewe & 15 others (Appeal E020 of 2024) [2025] KEELRC 2070 (KLR) (14 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2070 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2024**

**JK GAKERI, J
JULY 14, 2025**

BETWEEN

PATRIOTIC GROUP OF COMPANIES LTD APPLICANT

AND

- JOHN OGANGO SEWE 1ST RESPONDENT**
- JOHN OCHIENG 2ND RESPONDENT**
- ALLAN MAJWA 3RD RESPONDENT**
- CAROLINE AUMA 4TH RESPONDENT**
- CARSTONE ODHIAMBO 5TH RESPONDENT**
- GEORGE OJOWO 6TH RESPONDENT**
- ALICE AKOTH 7TH RESPONDENT**
- JOHN OKELLO 8TH RESPONDENT**
- WILLICE ONYANGO 9TH RESPONDENT**
- NICHOLAS OKARA 10TH RESPONDENT**
- JACKLINE ATIENO 11TH RESPONDENT**
- CHARLES RAY ONYANGO 12TH RESPONDENT**
- JOHN ORIEDA 13TH RESPONDENT**
- DAVID ODHIAMBO 14TH RESPONDENT**
- CHRISTOPHER WAKHUNGU 15TH RESPONDENT**
- GEORGE OUMA OUNDO 16TH RESPONDENT**



RULING

1. Before the court for determination is the applicant's Notice of Motion dated 14th May, 2025 filed under Certificate of Urgency seeking orders that:
 1. Spent.
 2. This Appeal be marked as settled upon the Respondents agents unconditionally releasing the Applicant/Appellant's motor vehicles attached i.e KBP 989N NISSAN and No. KCE 359N to the Applicant/Appellant.
 3. The Officer Commanding Central Police Station or any nearest police command within Nairobi County be directed to supervise release of the attached motor vehicle to the Applicant/Appellant.
 4. Costs of this application be provided for.
2. The Notice of Motion is expressed under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 1 and 2 of the *Civil Procedure Rules*, and is based on the grounds set out on its face and the Supporting Affidavit of Jennifer Koech sworn on 14th May, 2025, who deposes that on 15th April, 2025 they paid the sum of Kshs.809,594 to the Respondent settling the claim.
3. The affiant deposes that they paid the respondent's agents Kshs.150,000.00 and the respondent proclaimed its goods on 21st February, 2025, motor vehicle registration number KPB 989N and KCE 359N and was apprehensive that they would be auctioned and the auctioneer was unco-operative and violent.

Respondent's response

4. By a Replying Affidavit sworn on 21st May, 2025 in opposition to the application, Mr. John Odango Sewe deposed that the applicant merely paid Kshs.600,000, with the sum of Kshs.209,394 still outstanding.
5. That the applicant's counsel submitted cheques to the auctioneer of Kshs.150,000 but cheque No.001195 was dishonoured and still owed the auctioneer the sum of Kshs.100,000.
6. The affiant further deposed that the applicant was still required to pay storage charges due to Pangani Auction Centre where the attached motor vehicles were kept at Kshs.300 per day for KBP 989N plus Kshs.1,500 and 16% VAT and Kshs.250 per day plus Kshs.1,500 and 16% VAT for KCE 395N since the proclamation took place prior to the part-settlement of the decretal sum and auctioneer's fees.
7. The affiant urges that the application herein lacked merit on account of the outstanding amount due from the applicant as well as storage charges.

Respondent's submissions

8. As to whether the decretal sum of Kshs.809,594 had been settled counsel, submitted that while the sum of Kshs.600,000 was paid, Kshs.209,594 was still outstanding and parties had agreed that the applicant could collect its attached motor vehicles subject to payment of the auctioneer's fees and storage charges since the attachment was lawful.



9. That although the appellant issued cheques number 001194, 001195 and 001197 for Kshs.50,000 each, post-dated 30th May, 2025, 13th May, 2025 and 5th May, 2025 in favour of the auctioneer, only cheque number 01197 had been honoured.
10. Counsel, further submitted that the Orders sought by the applicant could not issue because its hands were unclean owing to the balance of Kshs.209,594.00 and the applicant did not make full disclosure of the facts and it had not paid storage and auctioneer's charges and the application ought to be dismissed.

Analysis and determination

11. It is common ground that the respondents obtained judgment against the applicant at the Magistrate's court and its application to have the judgment set aside by the trial court was dismissed on 6th June, 2024 and filed the instant appeal against the decision of the trial court.
12. In its maiden application dated 9th July, 2024, the applicant sought a temporary stay of execution and a stay pending the hearing and determination of the appeal, but did not express its readiness or willingness to provide security, which became the waterloo for the application. A day later the applicant filed another application under Certificate of Urgency and was accorded 45 days to deposit security but did not do so and filed another application dated 9th January, 2025 contesting the amount it was supposed to deposit as security.
13. According to the applicant, the sum was Kshs.582,500 but according to the Judgment and party and party costs and the decree and warrants of attachment, the sum stood at Kshs.809,594.00.
14. The application was dismissed but the court accorded the applicant 10 days to deposit the security. The applicant, it is apparent did not do so.
15. To embellish its case, the applicant availed a letter dated 15th April, 2025 to Achola Jaoko & Co. Advocates stating that the sum of Kshs.809,594.00 had been deposited in Account Number 0406xxxxxx at Diamond Trust Bank, Ronald Ngala Branch.
16. Strangely, no bank statement, deposit slip or transfer was enclosed which would have clearly shown the account deposited and by whom.
17. Also attached was a copy of the auctioneer's fee note dated 19th March, 2025 for Kshs.214,612.45, amended by hand and signed as follows:

“Discounted toKSHS.150,000 signed 0722xxxxxx”
18. This modification appear to have been the genesis of the three cheques for Kshs.50,000 each.
19. By a letter dated 16th May, 2025 the auctioneer notified the respondents' advocates that it had reviewed its fee note downwards after the applicant engaged it in negotiations and whereas one cheque had been honoured one had been dishonoured and the auctioneer was awaiting maturity of the last cheque due on 30th May, 2025.
20. The auctioneer requested for proof of settlement of its fees while the storage charges had been accruing since March 2025 for the two motor vehicles at the Pangani Auction Centre.
21. The court is a loss why the applicant was seeking release of its motor vehicles with assistance of the police if it had indeed paid the decretal sum in full, auctioneer fees and storage charges.



22. Instructively, the applicant has not alleged that the auctioneer was holding its motor vehicles illegally or contested the attachment or alleged that it had discharge all its liabilities to the respondent, and the auctioneer and avail verifiable evidence to that effect as nothing would have been easier.
23. It is common knowledge that payment of cash via a bank account or by cheque has a definite trail and is clearly documented. Transfers and account balances are effortlessly demonstrable.
24. The applicant has not and cannot contend that it had no documentary evidence other than letters to show that payment of all monies due from it as decretal sum, storage charges and auctioneer's fees had been paid in full.
25. A cheque is neither a legal tender nor evidence of payment until it is actually paid by the bank on which it is drawn referred to the drawee bank.
26. The applicant did not avail such evidence in respect of the decretal sum or any other payment it purportedly effected.
27. It is trite law that he who alleges bears the burden of proof as encapsulated by the provisions of the Evidence Act, and in particular Sections 107 and 109.

Section 107 provides that:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

Section 109:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

28. It requires no belabouring that the applicant bore the burden of proof and was duty bound to prove its case on a preponderance of probabilities. It bore the evidential burden as held in Suleiman Kasuti Murunga V IEBC & 2 others [1918] eKLR, Sagala V Sagala [2024] KEHC 5573 (KLR), Hellen Wangari Wangechi V Carumera Muthini Gathua [2005] eKLR, Miller V Minister of Pension [1942] 2 ALLER 372, and James Muniu Mucheru V National Bank of Kenya [2019] eKLR among others.
29. In James Muniu Mucheru V National Bank of Kenya Ltd (supra) the court stated;

Indeed, it is settled law that in Civil cases the standard of proof is on a balance of probability. This is in effect to say that the court will make a finding based on which party version of the story is more believable”.
30. And as held in CMC Aviation Ltd V Crusair Ltd [978] KLR 103 [1976-80] KLR 835, mere averments do not amount to evidence. The applicant or claimant must adduce evidence which signifies ground for the knowledge, indication or testimony which renders the facts clear.
31. For the foregoing reasons, it is discernible that the applicant has failed to discharge the burden of proof.
32. Consequently, the Notice of Motion dated 14th May, 2025 is bereft of merit and it is accordingly dismissed with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 14TH DAY OF JULY, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

