



Nyagah v Transchem Pharmaceuticals Limited (Employment and Labour Relations Cause E127 of 2021) [2024] KEELRC 704 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 704 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E127 OF 2021**

**K OCHARO, J
MARCH 28, 2024**

BETWEEN

FRANCIS NDWIGAH NYAGAH CLAIMANT

AND

TRANSCHEM PHARMACETICALS LIMITED RESPONDENT

RULING

1. By a Notice of Motion Application expressed to be under the provisions of Order 22 Rule 6, 22 49, Order 51 Rule 1 of the *Civil Procedure Rule*, 2019 the Respondent/Applicant seeks:
 - a. That this court does certify this matter urgent and place the same to be heard on a priority basis and service of the same to be dispensed with in the 1st instance.
 - b. That this Honourable court be pleased to discharge the warrants of attachment of the Respondent's Motor Vehicle Registration Number KCB 113H by the Decree holder, his agents or anyone authorized by him and set aside all execution proceedings and/or order to attach the Respondent's vehicle unconditionally, pending the hearing and determination of this application.
 - c. That this Honourable court be pleased to issue an injunction restraining the Decree Holder, his agents or anyone authorized by him from advertising for sale, auctioning or disposing of motor vehicle registration number KCB 113H pending the hearing and determination of this application.
 - d. That costs of this Application be provided for.
2. The application is anchored on the grounds set out on the face of the Application, and the supporting affidavit sworn by Lydia Muthoni Wahome, the Respondent's Managing Director.



3. The application is resisted by the Decree Holder through a replying affidavit sworn by Eliud Chai Wambu, the Auctioneer.
4. The Respondent/Applicant stated that before commencing the execution of decree proceedings herein, the Claimant /Decree Holder did not serve it with a certified copy of the decree. He only served a Party and Party bill of costs and an undated and unsigned notice on taxation.
5. It was further stated that on 21st November 2023, the Respondent's motor vehicle Registration Number KCB 113H was seized in execution of the decree, by Chaoor Auctioneer. The attachment and seizure were not preceded by any proclamation notice.
6. The Respondent contended that it has since settled the decretal sum. However, the Auctioneer has refused to release the seized motor vehicle, insisting that his charges must be paid first. Further, they are demanding exorbitant costs which can not be justified under the *Auctioneers Act* and *Rules*.
7. Additionally, the Auctioneer cannot claim to be entitled to any costs as the attachment was a product of an illegal process.
8. The auctioneer stated that on the 8th of November, he delivered warrants of attachment and sale dated the same day requiring him to execute as against the Respondent for the sum of KShs.1,717,858.00, being the decretal sum, taxed costs and interest on the decretal amount.
9. It was further asserted that on the 9th November, 2023 he proceeded to the Respondent's premises and proclaimed its motor vehicle. Upon proclaiming, he served the proclamation on a lady at the Respondent's office, but who declined to disclose her name, and acknowledge receipt of the Proclamation by stamping and signing on his copy. The certificate of service of 6th December 2023, is a testament to the service.
10. It was further stated that on 21st November 2023, the motor vehicle KCB 113H was attached and taken to Startruck Car Yard and Storage.
11. The auctioneer asserted that the entire process leading to the seizure of the motor vehicle was done in strict adherence to the law. He is entitled to his charges as they were rightfully earned.

The Respondent's /Applicant's submissions

12. The Applicant identified two issues for determination in the instant application, thus, whether motor vehicle KCB 113H was legally attached by the Decree Holder's agents, and who should bear the costs of the application.
13. Counsel for the Applicant submitted that the procedure for attachment is well spelled out in Order 21 Rule 38 of the *Civil Procedure Rules* and Rule 12 of the *Auctioneer Rules*. Further, the interplay between Order 21 Rule 38 of the *Civil Procedure Rules* and Rule 12 of the *Auctioneer Rules* was elaborated by the Court of Appeal in Civil Appeal No. 195 of 2004, *National Industrial Credit Bank Ltd v SIC Ndegwa Auctioneer* (2005) eKLR, that;

“It is true that the manner and Procedure of attachment stipulated in Order 21 Rule 38 of the Civil Procedure Rules appear to be in conflict with the Procedure prescribed under Rule 12 of the *Auctioneer Rules*. However, it is clear that the *Auctioneers Act* is a modern statute and the procedure contained in Rule 12 of the *Auctioneers Rules* is indeed intended to be a reform of the old procedure contained in Order 21 Rule 38 of the *Civil Procedure Rules* which clearly needs to be amended to remove any inconsistencies.



The actual words used in the two Rules are not decisive whether an attachment has taken place. One has to consider the essence and purpose of the attachment. The purpose of attachment is the execution of the decree. The essence of attachment is to remove the goods from the possession of the judgment debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment debtor does not pay the debt

14. The Applicant further submitted that Rule 12 of the Auctioneers Rules, is structured in a manner that a judgment debtor is accorded the opportunity to settle the debt when the process of execution sets in. The circumstances leading to the instant application are all indicative that it was not given the opportunity. No decree or proclamation notice was served upon it.
15. The Applicant further submitted that it duly settled the judgment debt within 4 days of the seizure of the motor vehicle. This conduct cannot be that of a judgment debtor unwilling to settle the decretal sum.
16. In the circumstances of this matter, the auctioneer cannot be entitled to the auctioneer's fees, as such fees cannot lie where the entire process of attachment is irregular.

The Decree-Holder/Respondent's submissions

17. Counsel for the Decree-Holder identifies four issues for determination, thus, whether the execution of the decree was lawful, whether the Respondent's motor vehicle was legally proclaimed and attached by the auctioneer, whether the fees charged by the auctioneer is exorbitant and if so whether the same is a sufficient ground for setting aside the valid proclamation, attachment and/or seizure, and whether the Respondent is entitled to the remaining orders sought.
18. The Claimant argued that at all material times, the Respondent/Applicant was aware of the amount payable. He was served with both the decree and certificate of taxation. Imperative to note that the judgment herein was delivered in the presence of both counsel for the parties. The Respondent knew that naturally execution would follow if the sum of the decree was not settled.
19. The Respondent/Applicant through its letter dated 27th July 2023, addressed to Counsel for the Claimant/Decree-Holder, sought to be indulged to settle the decretal sum in six equal monthly instalments. This speaks to a party who was duly aware of the amounts payable under the judgment. Its argument that it was not aware of the amount to pay, is an afterthought.
20. The Claimant/Decree-Holder argued further that the Respondent/Applicant does not challenge the correctness of the decree, herein extracted. The decree is in accord with the provisions of Order 21 Rule 7 of the *Civil Procedure Rules*, therefore.
21. The Claimant/Decree-Holder submitted further that Order 22 Rule 8 of the *Civil Procedure Rules* provides a two-prolonged approach for extraction of a decree. First, under Rule 8 (1) (4) parties may exchange draft decrees for approval and second under Rule 8(7), the court may directly (on its own) extract the decree. A party is at liberty to choose either of the approaches. The decree herein was extracted by the court under Rule 8(7).
22. It was further argued that execution can only be set aside on account of failure to serve the decree if it is shown that the decree, the subject of the execution is erroneous and not in agreement with the judgment. To buttress this submission, reliance was placed on the cases of *Florence Cherugut v Cheptum Murei Annah* (2022) eKLR and *Eco Bank Ltd v Elsek & Elsek (Kenya) Ltd & 3 others* (2015) eKLR.



23. It was further argued that the auctioneer's deposition as regards the date, time and manner of proclamation has not been controverted by the Respondent/Applicant. The judgment debtor's representative was served with the proclamation but refused to sign on the auctioneer's copy in acknowledgement of the service. As per Rule 12 (1) (6) of the *Auctioneers Rules* 1997, the Auctioneer prepared a certificate of service. The Auctioneer duly complied with the Auctioneers Rules. The Respondent/Applicant had notice of how much it was required to pay under the decree and was given the requisite time to, but deliberately failed to settle the sum before its property could be seized.
24. The Claimant/Decree Holder submitted that an allegation that the fee charged by an auctioneer is exorbitant, cannot be a ground for settling aside of an execution process. Further, the Respondent/Applicant just made a bare assertion, without demonstrating how the Auctioneer's itemized bill on the proclamation is exaggerated.
25. The Auctioneers Rules, Rule 55 (2) provides for a route to be followed by a judgment-debtor aggrieved by any charge by an auctioneer. The route is, to make an application for assessment of the auctioneer's fee. This the Respondent failed to do. Further, it has not asked this court to assess the costs.

Analysis and Determination

26. At the centre of the Respondent's/Applicant's application is the question of whether the process for the execution of the decree herein was properly initiated and effected. However, before I delve into interrogating this question, it is important to state that careful a thorough consideration of the prayers sought in the application reveals that they are "pending the hearing and determination of the application," to an extent that, therefore, once this court gave the temporary orders, as it did on 29th November 2023, nothing was left for canvassing inter partes. No relief was left outstanding on which I can give orders now. It cannot be the business of this court to give orders not prayed for.
27. The Respondent/Applicant contended that the seizure of the motor vehicle was not preceded by any proclamation as required by the Civil Procedure, and Auctioneer Rules and therefore the whole execution process leading to the seizure, was improper and should be declared so.
28. In response to this accusation, the auctioneer gave details on how the proclamation was done, and under the Auctioneer Rules, filed a Certificate of Service to fortify its explanation. This court notes that the Respondent/Applicant has not in any meaningful way challenged and controverted these pivotal assertions by the Auctioneer. Reasonably, one could expect the Respondent/Applicant, to attack the assertions, by filing a further affidavit, and or demanding that the deponent of the replying affidavit and or the certificate of service, be subjected to a cross-examination on the contents thereof. The Applicant did neither of these. I come to a clear view that the proclamation notice was served as explained by the Claimant/Decree Holder.
29. Having come to the above-stated conclusion, I find it unnecessary to proceed to consider the other issues raised in the parties' submissions for instance whether or not the decree herein was properly extracted.
30. In the upshot, I find the Applicant's application lacking in merit. It is hereby dismissed.
31. The foregoing premises notwithstanding, I am impelled to make the following orders for the wider interest of justice and pursuant to the overriding objectives of this court.
 - a. The parties to agree on the Auctioneer's charges within 7 days of today. In the defaulting, the Auctioneer shall file his bill of costs in court for taxation by the Deputy Registrar.



- b. Motor vehicle KCB 113H be released to the Respondent/Applicant upon it depositing KShs.100,000/- with the auctioneer, to avoid further escalation of costs, pending the agreement on or taxation of, the auctioneer's charges.

READ, DELIVERED AND SIGNED THIS 28th DAY OF MARCH, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Mr. Ochieng for Claimant

Machina for Respondent/Applicant

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

