



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wambua & 15 others v W. E Tilley (Muthaiga) Limited (Cause  
441 of 2016) [2024] KEELRC 611 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 611 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 441 OF 2016  
JK GAKERI, J  
MARCH 19, 2024**

**BETWEEN**

**BENARD KITHUKU WAMBUA ..... 1<sup>ST</sup> CLAIMANT  
HARRISON KIKUVI ..... 2<sup>ND</sup> CLAIMANT  
PETER NJOROGE KIMANI ..... 3<sup>RD</sup> CLAIMANT  
PENUS LENKAL PATEL ..... 4<sup>TH</sup> CLAIMANT  
BERNARD CHEGE KIHIGI ..... 5<sup>TH</sup> CLAIMANT  
SAMUEL KIPYEGON KOKOO ..... 6<sup>TH</sup> CLAIMANT  
SAMUEL MWANGI GACHIGUA ..... 7<sup>TH</sup> CLAIMANT  
SIMON KAGWI GITHIRI ..... 8<sup>TH</sup> CLAIMANT  
CHARLES GATHUNGU NJIRIRI ..... 9<sup>TH</sup> CLAIMANT  
FREDRICK KISUKO MWANGO ..... 10<sup>TH</sup> CLAIMANT  
JONES MUSYOKA ..... 11<sup>TH</sup> CLAIMANT  
JOHN NJUGUNA KAMENJU ..... 12<sup>TH</sup> CLAIMANT  
JAMES KARIUKI GICHU ..... 13<sup>TH</sup> CLAIMANT  
ZIPHORA MAKUMI ..... 14<sup>TH</sup> CLAIMANT  
ONESMUS MBITHI KIKUVI ..... 15<sup>TH</sup> CLAIMANT  
PETER NDIBA THARIKI ..... 16<sup>TH</sup> CLAIMANT**

**AND**

**W. E TILLEY (MUTHAIGA) LIMITED ..... RESPONDENT**



## RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 6<sup>th</sup> November, 2023 filed under Certificate of Urgency seeking orders that;
  1. Spent.
  2. Spent.
  3. Spent.
  4. This Court be pleased to grant an injunction restraining the Claimants herein, its servants and agents including Moonstar Enterprises Auctioneers from selling either by way of auction or in any way purporting to exercise their power of sale in so far as it relates to the Respondent's movable and immovable property.
  5. Spent.
  6. This Court be pleased to stay, set aside and or revoke the warrant of attachment issued on 16<sup>th</sup> October, 2023 to Moonstar Enterprises Auctioneers and any consequential attachment and proclamation declared illegal.
2. The Notice of Motion is expressed under Article 159 of the *Constitution* of Kenya, Order 10 Rule 11, Order 22 Rule 51 (1) and (2), Order 51 Rule 1 of the *Civil Procedure Rules, 2010* and Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act, 2010* and the Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit of Zulfika Haideralli Jessa sworn on 6<sup>th</sup> November, 2023 who depones that after the judgment herein was delivered on 19<sup>th</sup> July, 2022, the Respondent filed a Notice of Appeal and sought typed copies of the proceedings vide letter dated 22<sup>nd</sup> July, 2022 and 21<sup>st</sup> July, 2022 respectively, and the same were supplied 16<sup>th</sup> May, 2023 by which time the prescribed duration of filing the record of appeal had lapsed and lodged an application to file the appeal out of time dated 20<sup>th</sup> July, 2023.
3. That the Application was heard on 30<sup>th</sup> October, 2023 but the ruling is yet to be delivered.
4. The affiant deposes that he was served with warrants on 3<sup>rd</sup> November, 2023 and a Proclamation Notice dated 19<sup>th</sup> October 2023 by Moonstar Enterprises Auctioneers in execution of the judgment.
5. It is the affiant's case that in November 2015, an order issued in HCC 522 of 2015 froze all the bank accounts and assets of the Respondent.
6. The affiant states that the auctioneer did not visit the Respondent's premises but issued a blanket attachment without identification of the premises.
7. That the Respondent's assets listed in the Proclamation Notice are affected by the Order in HCC of 2015 and attempt to attach and auction the assets will be in breach of the Court Order in HCC 522 of 2015.
8. That without a stay of execution or lifting of Warrants of Attachment, the Claimants are at liberty to attach and sell the applicant's assets by public auction.



9. That the application for leave to appeal is arguable with chances of success and execution will render the intended appeal nugatory and the applicant will suffer irreparable financial loss and the financial status of the Claimants is unknown in the event the intended appeal succeeds.

### **Response**

10. In her Replying Affidavit sworn on 17<sup>th</sup> November, 2023, Ziphora Makumi, the 14<sup>th</sup> Claimant deposes that she had been authorized by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Claimants to swear the affidavit.
11. The deponent admits the contents of paragraphs 1, 2, 3, 4 and 5 of the Supporting Affidavit.
12. The affiant states that the application for extension of time to file an appeal out of time was heard inter partes on 30<sup>th</sup> October, 2023 and was dismissed and as such no appeal is pending determination in this matter and the execution process commenced by the Decree-holders is legal.
13. The affiant states that the Order in HCC No. 522 of 2015 froze the disposal, mortgaging, charging, assigning, transferring, alienating, operating, interfering and/or dealing with any of the applicants assets within the jurisdiction of the court and the orders were vacated upon and completion of the inter parties hearing.
14. That no evidence had been adduced to show that the orders granted on 27<sup>th</sup> October, 2015 were extended.
15. The affiant disposes that the applicant is not entitled to a stay of execution as there was no pending appeal or orders barring execution and the financial status of the Claimants is inconsequential as no refund will ensue, and the Respondents stand to suffer prejudice if the application is allowed.

### **Applicant's submissions**

16. Counsel submitted on whether the court can permit an illegality (Proclamation, attachment and sale) contrary to a freezing order and whether the court should issue a stay pending appeal.
17. On the 1<sup>st</sup> issue, counsel submitted that the order granted in November 2015 (copy of which was not availed) and which was extended pending the hearing and determination of the main suit was still subsisting and the court ought to allow the application to set aside/revoke the Warrants of Attachment Proclamation and any intended sale as doing otherwise would be aiding an illegality.
18. Reliance was made on the decisions in *Regional Institute of Management V Ondong* Civil Appeal No. 420 of 2019 and *Heptulla Noor Mohamed* Nairobi, Civil Appeal No. 62 of 1983 as were the sentiments of the court in *Burchell V Burchell* Case No. 364 of 2005, *Trusted Society of Human Rights Alliance V Cabinet Secretary for Devolution and Planning & 3 others* (2017) eKLR among others on the effect of court orders and the essence of their observance.
19. That the Respondents conduct amount to contempt of court and ought not to be aided by the court.
20. According to counsel, the Claimants ought to apply to be joined in HCC No. 522 of 2015 *Imperial Bank (In Receivership) V W. E Tilley (Muthaiga) Ltd & others* to seek the setting aside of the freezing orders.
21. Reliance was also made on Section 63 of the *Civil Procedure Act* on the court's jurisdiction to grant orders necessary to meet the ends of Justice, to urge that the warrants of attachment, proclamation notice attachment and intended sale be set aside.



22. On the issue of stay pending appeal, counsel submitted that there was an application before the Court of Appeal for leave to file an appeal out of time and cites Order 42 Rule 6 of the *Civil Procedure Rules, 2010* on the elements to submit that the applicant had met the threshold for the grant of an Order of stay.
23. Counsel submitted that the applicant stood to suffer substantial loss as the sum of Kshs.2,737,141.5, the decretal sum was colossal and the financial status of the Claimants was unknown citing *Stanley Karanja Wainaina & another V Ridon Anyangu Mutubwa* (2016) eKLR on the burden of proof of financial wherewithal of the Respondents.
24. On delay, counsel submitted that because the applicant was aware of the freezing orders, it did not file the application for stay upon delivery of judgment and the auctioneer served its documentation on 3<sup>rd</sup> November, 2023 and the application was filed without undue delay.

### **Respondent's submissions**

25. On 17<sup>th</sup> December, 2023, parties were accorded 14 days a piece to file and exchange submissions.
26. On 13<sup>th</sup> February, 2024, the applicants counsel informed the Court that they had filed submissions but counsel for the Decree-holders had not and promised to do so by close of business and prayed for a ruling date which the court gave as 19<sup>th</sup> March, 2024.
27. By 21<sup>st</sup> February, 2024 when the court retired to prepare this ruling, the Respondent's submissions were still outstanding and were subsequently filed on 6<sup>th</sup> March, 2024. Regrettably, the court deemed them too late for consideration.

### **Determination**

28. The singular issue for determination is whether the Applicant's Notice of Motion dated 6<sup>th</sup> November 2023 is merited.
29. The applicant's Notice of Motion is grounded on two pillars namely; the High Court Order in HCC No. 522 of 2015 and the pending application to file an appeal out of time.
30. On regards, auctioneer's Warrants of Attachment, Proclamation attachment and proposed sale of the applicant's assets to satisfy the decretal sum, the applicant argues that the process is a failure ab initio as the Court Order granted in HCC No. 522 of 2015 *Imperial Bank Ltd (In Receivership) V W.E. Tilley Mutbaiga & 20 others* which froze all the applicant's bank accounts and assets was still in force.
31. Puzzlingly, the applicant did not file or annex the extensions of the order and could not tell when the original order was made.
32. The extensions were material to this application as the order relied upon by the applicant was temporary, made pending the hearing and determination of the application before the High Court is dated 15<sup>th</sup> October, 2015.
33. Equally, the applicant made no attempt to enlighten the court on the status of HCC No. 522 of 2015.
34. Surprisingly, in their submissions, counsel for the applicant submitted that the orders made by the HCC No. 522 of 2015 on a date counsel did not identify were extended pending the hearing and determination of the suit on a date counsel did not indicate.



35. In their Replying Affidavit sworn by Ziphora Makumi, the Claimant/Respondents averred that the Orders made by the High Court in HCC No. 522 of 2015 were conditional upon the inter partes hearing and were vacated upon the occurrence and completion of the inter partes hearing.
36. Analogous to the applicant's argument on the issue, the Respondent's averment lacked corroborative evidence to substantiate the allegations.
37. To their credit, however, the Respondent filed 4 pages of the activities that had taken place in HCC No. 522 of 2015 from 21<sup>st</sup> January, 2016 to 23<sup>rd</sup> November, 2023 and a ruling was delivered by D.S. Majanja J. on 19<sup>th</sup> October, 2023.
38. From the record, it is evident that the main suit is yet to be heard and determined as the court has been handling applications.
39. Regrettably, the record is silent on subsisting or interim orders the court may have made. Though the effort is creditable, it does not demonstrate that the orders cited by the applicant lapsed or were not extended.
40. Thus, none of the parties bothered to confirm the current position of HCC No. 522 of 2015 and both are urging the court to accept its version.
41. Guided by the mantra that he who alleges must prove encapsulated in the provisions of Section 107, 108 and 109 of the *Evidence Act*, the burden of proof in this case fall on the applicant to demonstrate the orders in question was still in force.
42. The second pillar is the contention that the applicant has a pending appeal before the Court of Appeal exemplified by the Notice of Appeal dated 22<sup>nd</sup> July, 2022 and a request for typed copies of proceedings dated 21<sup>st</sup> July, 2022.
43. More significantly, the applicant contends that its application dated 20<sup>th</sup> July, 2023 for leave to lodge an appeal out of time is pending ruling by the Court of Appeal though hearing was concluded on 30<sup>th</sup> October, 2023.
44. Intriguingly, the applicant placed no material before the court to demonstrate the current status of the application which the court heard on 30<sup>th</sup> October, 2023 more than three months earlier.
45. The intrigue is compounded by the fact that the Respondent has produced documents from the Judiciary e-filing portal showing that Case No. COACAPPL/E340/2023 *W.E. Tilley (Muthaiga) Ltd V Bernard Kitbuku Wambua & others* was filed on 20<sup>th</sup> July, 2023 and was not certified urgent on 24<sup>th</sup> July, 2023, was heard on 30<sup>th</sup> October, 2023 and dismissed by the Hon. Lady Justice Abida Ali-Aroni and the matter closed. The applicant was seeking extension of time.
46. The applicant did not respond to this evidence or controvert it in its submissions.
47. Undoubtedly, the substratum of the applicant's notice of motion is highly contested by the Respondents who have provided copies of documents which tend to bring into question the credibility and reliability of the applicant's assertions and submissions.
48. According to the Respondents, there is neither a court order under HCC No. 522 of 2015 nor a pending ruling before the Court of Appeal.
49. In the course of drafting this ruling on 21<sup>st</sup> February, 2024, it occurred to the court that certain material information was necessary to enable the court render its ruling from a point of information,



in particular on the true state of affairs as regards the purported ruling that has been pending since October 2015 and the status of HCC No. 522 of 2015.

50. The court suo motu caused a mention scheduled for 6<sup>th</sup> March, 2024 and notice was given to counsels for the parties and whereas the Claimants/Decree holders were represented, the Applicant/Respondent was not.
51. The court directed that;
  1. The Respondent/Applicant shall avail a copy of the court order in HCC No. 522 of 2015 on the current status of the suit within 10 days.
  2. Ruling shall be on 19<sup>th</sup> March, 2024.
  3. Counsel for the Claimant/Decree holders to serve notice and court's directions on the Respondent/Applicant.
52. Pursuant to the directions on 14<sup>th</sup> March, 2024, the Respondent/Applicant's counsel filed a copy of the order in HCC No. 522 in *Imperial Bank Ltd (under statutory Receivership of the Receiver Manager V W.E. Tilley (Muthaiga) Ltd & 19 others* duly signed by the Deputy Registrar of the High Court of Kenya at Nairobi.
53. In addition to the order of the court, counsel filed a copy of the order as previously availed to court with no authentication of the Deputy Registrar.
54. Further, counsel filed an Affidavit sworn on 13<sup>th</sup> March, 2024 affirming that the copy of the Court Order provided was a copy of the order issued by Justice Fred Ochieng and published in the Newspaper Edition of Wednesday 27<sup>th</sup> October, 2015.
55. Counsel deposes that the orders have been extended from time to time and confirmed by the Hon. Justice Mary Kasango to be in place until the hearing and determination of the main suit.
56. Finally, counsel deposes that HCC No. 522 of 2015 *Imperial Bank Ltd V W.E. Tilley & 19 others* comes up for mention before the Hon. Justice Mabeya on 21<sup>st</sup> March, 2024 for parties to be granted hearing dates.
57. The affidavit is silent on the ruling pending before the Court of Appeal.
58. Significantly, the information availed lays it bare that HCC No. 522 of 2015 is still active before the High Court at Nairobi and the Orders granted by Fred Ochieng J. in 2015 are still in force.
59. It is also important to underline the fact that the Respondent/Applicant was placed under the Receivership of the Kenya Deposit Insurance Corporation (KIDC) on 13<sup>th</sup> October, 2015 initially for a period of 12 months which the court has routinely extended.
60. Thus KIDC assumed the management and control of all the assets, liabilities and affairs of the Respondent Bank.
61. Although counsel for the Claimants/Decree holder argued vociferously that the properties mentioned in the warrants of attachment are not covered by the orders made in 2015, a careful examination of the Orders reveal that their scope is extensive as they encompass the fixed assets, monies in bank accounts of the applicant and any other asset in Kenya.



62. Order No. 3 states as follows;

“That pending the hearing and determination of this suit, this honourable court do and hereby do issue an injunction barring the Defendant/Respondents, their agents and/or agents or otherwise, howsoever from removing from this jurisdiction disposing of, mortgaging (and or further mortgaging, charging (and/or further charging, assigning, diminishing, transferring, disposing, alienating, operating and or otherwise interfering and/or dealing with any of the assets within this jurisdiction, which said assets include but are not limited to;

- a. All Bank Accounts in the names of the Defendants in Kenya.
- b. The following Real estate and/or land, buildings and the development thereon: . . .”

63. The Claimant/Decree-holders agent, Moonstar Enterprises Auctioneers identified the following items as movable property for purposes of attachment and execution;

1. One motor vehicle Reg. No. KAV 646F – old Kshs.120,000/=.
2. 3 Trailers with containers – old Kshs.1,500,000/=.
3. KBP 910V – old Kshs.650,000.00.
4. 10 pieces of fibre coolers – no value.
5. Assorted metal scraps – no value.
6. And any other attachable assets belonging to the Judgement debtor enough to cater for the principal amount plus costs.

Proclamation done in the presence of the watchman who declined to sign.”

64. Although the foregoing list lacks essential particulars for purposes of execution, it identifies assets owned or belonging to the Respondent/Applicant the subject matter of the order in HCC No. 522 of 2015.

65. More significantly, however, in the court’s view, the orders made in HCC No. 522 of 2015 in 2015 envisaged that no property or assets of the Respondent, be it movable or immovable would be dealt with, disposed of, assigned, transferred or interfered with pending the hearing and determination of the suit.

66. In the court’s view, allowing the execution herein to proceed as insisted upon by the Decree-holders would be tantamount to rendering the orders of Fred Ochieng J. ineffectual in so far as certain movable assets of the Respondents are concerned while the suit is still on-going yet its outcome will impact on all the assets of the Respondents in Kenya.

67. Having been appraised of the current status of the suit before the High Court, the court is not persuaded that this is the opportune time for the proposed execution to be actualized.

68. The foregoing is fortified by the fact that the process of receivership of the 1<sup>st</sup> Respondent is on-going and the suit is pending before the High Court.

69. Allowing execution at this stage would render proceedings against the Respondents assets disorderly if not chaotic, which the orders issued in 2015 were intended to safeguard against.



70. In sum, the court's hands are tied by the orders of the High Court in HCC No. 522 of 2015.
71. Consequently, the warrants of attachment issued on 16<sup>th</sup> October, 2023 to Moonstar Enterprises Auctioneers and any consequential attachment and proclamation are stayed pending the hearing and determination of HCC No. 522 of 2015 or directions of the court.
72. In the meantime, counsel for the Decree-holders shall serve a copy of the judgment and decree of the court on the Official Receiver of the Respondent.
73. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF MARCH 2024**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

