



**Radar Limited v Ngocho & 8 others; Musya t/a Makuri Auctioneers (Interested Party)
(Miscellaneous Application E076, E077, E078, E079, E080, E081, E082, E083 & E084 of 2024
(Consolidated)) [2024] KEELRC 13553 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13553 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E076, E077, E078, E079,
E080, E081, E082, E083 & E084 OF 2024 (CONSOLIDATED)**

M MBARŪ, J

DECEMBER 19, 2024

BETWEEN

RADAR LIMITED APPLICANT

AND

PHOEBE MNAVU NGOCHO 1ST RESPONDENT

APOLLO ROGE MGHONE 2ND RESPONDENT

PAUL MATENGE MWADIME 3RD RESPONDENT

PHILIP NGAYAYA MWAKWENDA 4TH RESPONDENT

GEORGE MALEKWA OKOTH 5TH RESPONDENT

JOSIAH MRIANGULO MWAMBINGU 6TH RESPONDENT

GRANTON MWARINDA MWAMBURI 7TH RESPONDENT

KAREN NALIAKA WASIKE 8TH RESPONDENT

WINFRED BARAKA MWAKINA 9TH RESPONDENT

AND

JOEL TITUS MUSYA T/A MAKURI AUCTIONEERS INTERESTED PARTY

RULING

1. The ruling consolidates several related matters arising from the same cause of action. The main application considered is under ELRC Misc. Application E076 of 2024 consolidated with ELRC



- Misc. Applications E077, E078, E079, E080, E081, E082, E083 and E084 of 2024. The ruling herein shall apply in the consolidated files.
2. The applicant filed a reference dated 5 September 2024 seeking the interested party's joinder and directed them to unconditionally release the appellant's motor vehicle registrations, KBV 250R, KCQ 743A, and KFC 918K. The appellant is also seeking the police at Nyali, Kiambu, and Mombasa Central Police Stations to assist in executing these orders.
 3. The parties attended court on 7 November 2024 and indicated that all issues had been resolved except for the auctioneer's costs and storage charges for the attached motor vehicles. These issues were not settled, and the court should decide.
 4. The applicant submitted that they filed an application dated 24 July 2024 under a Certificate of urgency, and interim orders staying execution were issued. The application and orders were served upon the respondent and their advocates, but on 2 August 2024, the interested party, acting on instructions from the respondent, took out the Warrant for the attachment of movable properties in the execution of the decree.
 5. On 5 August 2024, the interested party proclaimed the appellant's movable properties, including motor vehicle registration No. KCD 267Z, KBT 020K and KCG 387T but instead seized motor vehicle registration No. KBV 250R, KCQ 743A and KCF918K, which vehicles did not appear on the proclamation.
 6. The applicant submitted that the respondent, through the interested party, can only attach property listed in the proclamation sheet by proclaiming motor vehicle No. KCD 267Z, KBT 020K and KCG 387T but proceeded to prefer other vehicles once stay of execution orders had been issued was unlawful and irregular. The court should direct the respondent and interested party to meet costs for storing vehicles illegally attached, motor vehicle registration No. KBV 250R, KCQ 743A and KCF918K.
 7. The judgment and decree thereof cannot be executed in instalments as herein done by the respondent as held in *Rubo Kimnetich arap Cheruiyot v Peter Kiprop Rotich* [2006] eKLR the court held that a decree as a legal instrument which is executable and not the judgment itself. The decree is the subject of execution. Motor vehicle registration No. KBV 250R, KCQ 743A and KCF918K. In reply, the respondent's case is that they had instructed the interested party to execute the occurring judgment but restricted it to the judgment sum. The judgment cannot be executed, but the decree is the legal instrument. Taxation is ongoing, and the attempted execution violates Section 94 of the [Civil Procedure Act](#) as held in *Transmara Sugar Co. v Charles O Mbaka* [2021] eKLR.
 8. The interested party moved in contempt of court by executing the judgment outside the proclaimed items. The interested party admitted that they seized motor vehicle registration No. KBV 250R, KCQ 743A and KCF918K do not appear on the proclamation list. They were aware of the orders of stay and acted contrary to Rule 12(2) (a) of the Auctioneers Rules and should not claim for costs from the applicant.
 9. In response, the respondent submitted that the applicant filed a reference dated 24 July 2024 challenging the decision of the taxing Master. The respondent opposed the reference and filed a Replying Affidavit. The applicant filed an application dated 5 September 2024 challenging the execution of the judgment exclusive of the taxed costs, which are subject to the appeal. Parties were directed to file submissions.
 10. The applicant filed the reference after the respondent filed the Bill of Costs on 3 May 2024. The applicant contested the award of costs on the basis that it was excessive in respect to item 1 of the Bill



of Costs. The taxing master delivered the ruling on 17 July 2024. The applicant filed an application dated 5 September 2024 seeking a stay of execution by misrepresenting facts to the court.

11. The applicant opted to file an appeal against the ruling of the taxing master and not the entire judgment, contrary to Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2024. The order of stay of execution granted on 30 July 2024 specifically applied to the ruling on the Bill of Costs and not the judgment itself. While taxed costs were stayed, the judgment amount excluding the taxed costs remained enforceable. Without any stay on the substantive judgment, Rule 21 of the Court Rules, the execution was lawful and justified. The principles of Order 22 Rule 22 of the Civil Procedure Rules allow a decree-holder to proceed with execution unless a specific order of stay is in place to stop the action. The principles in the case of *Rubo Kimnetich arap Cheruiyot* are that a decree can be issued without a certificate of costs, and the party therein is at liberty to proceed with execution.
12. The submissions that Section 94 of the *Civil Procedure Act* has been violated are not correct. In the case of *Joel Mutuma Kirimi & another v The Standard Digital & another* [2020] eKLR, the court held that the provisions of Section 94 of the *Civil Procedure Act* require that for execution of a decree before taxation to proceed, leave must be obtained from the court which may be sought informally or by way of an application. Section 94 of the *Civil Procedure Act* is not applicable herein as it relates to the High Court exercising its original jurisdiction as opposed to the current case. The application by the applicant should be dismissed with costs.

Determination

13. The question for determination herein is who should pay the auctioneer's fees and storage charges for the attached motor vehicles and the applicant's properties.
14. To start with, execution proceedings for judgments and decrees from this court and subordinate courts are regulated under Rule 73(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024;
 - (2) The Civil Procedure Rules shall govern the execution or stay of execution of an order or decree of the Court.
15. These provisions allow the court to rely on the procedures applicable under the High Court in applying the *Civil Procedure Act* and the Rules thereto in addressing execution proceedings. These provisions are comprehensive, and by Rule 73 of the Court Rules specifically referring to them, an applicant is allowed to apply the *Civil Procedure Act* as it relates to execution.
16. The respondent's case that Section 94 of the *Civil Procedure Act* only applies to the High Court, which has original civil jurisdiction, as opposed to the current case before this court, is a misapplication of the law. This court is bound in the execution proceedings under the *Civil Procedure Act* and the rules thereto by its rules of procedure under Rule 73.
17. The respondent admits that following the applicant filing the reference dated 24 July 2024, they filed a Replying Affidavit dated 24 July 2024. The respondent then proceeded to execute the judgment exclusive of the taxed costs subject to the appeal herein.
18. Under Section 94 of the *Civil Procedure Act*, leave to execute exclusive of costs should be obtained first. Indeed, the respondent has relied on the case of *Rubo Kimnetich arap Cheruiyot*, cited above, which set out the principles to be applied before executing a judgment pending determination of costs. In the case of *MAAA (Suing in his Capacity as the Administrator of the Estate of AMAA (Deceased) v FSS* [2021] KECA 206 (KLR); *Sparkle Properties Limited v Johana Ngai & 8 others* [2020] KEELC 412 (KLR) and *Board of Trustees, National Water Conservation & Pipeline Corporation (NWCPAC)*



Staff Superannuation Scheme v Mombasa Water Supply & Sanitation Co. Ltd [2017] KEHC 4807 (KLR) the courts have reiterated that Section 94 *Civil Procedure Act* requires unless the trial court grant an appropriate order, that costs be taxed before execution, a decree should issue before execution can proceed.

19. The respondent's submission that leave to proceed with execution should be obtained from the High Court is a misnomer. This is a Superior Court regulated under the *Employment and Labour Relations Court Act* and the Rules thereto, which directs that where execution is necessary, the *Civil Procedure Act* and the rules thereto apply. It cannot be a proper case that leaves necessary before execution pending taxation, and it should only apply in a case before the High Court under Section 94 of the *Civil Procedure Act*.
20. More fundamentally, in this case, the applicant moved the court through an application dated 5 September 2024 and interim orders of stay of execution issued on 6 September 2024. The respondent was served, and this fact is not denied.
21. However, the interested party proceeded with execution under the mistaken belief that the trial court's judgment could be executed exclusive of the challenged costs since leave was not necessary under Section 94 of the *Civil Procedure Act*. As outlined above, that was a misapplication of the law. Leave to execute pending determination of costs is imperative whether the matter is before this court or the High Court. Section 94 of the *Civil Procedure Act* does not allow for the execution of decrees before costs, meaning there needs to be a decree first. This decree makes clear the precise orders to be executed, which is why the law requires all parties to be allowed to approve it. Where a party seeks to execute before costs are determined, leave must be obtained first.
22. Upon the orders of stay of execution, the respondent or the interested party were restrained from executing the court Decree in Voi Chief Magistrate in Case No.E011 of 2023, which also applied to Misc. Cause Nos. 77 of 2024, 78 of 2024, 79 of 2024, 80 of 2024, 81 of 2024, 82 of 2024, and 84 of 2024. These orders applied and have not been varied, reviewed, or vacated.
The respondent and interested party were bound.
23. Even in cases where execution did not proceed, which was not the case here, the movable properties attached should have been as per the proclamation list. The Auctioneers Rules would be negated where an auctioneer, such as the interested party, is allowed to execute contrary to the Proclamation Notice. To proceed outside the outline listed items to other properties would negate the essence of the court Warrants, as issued, and render them worthless.
24. In this regard, the interested party, having moved while existing orders stopped execution, cannot claim fees or storage charges. This is further executed by attaching goods that had yet to be proclaimed. Further, the respondent cannot justify the execution proceedings outside the provisions of Section 94 of the *Civil Procedure Act*.
25. Accordingly, the applicant cannot pay the fees claimed by the interested party or the storage charges. These must be resolved between the respondent and the interested party.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet

..... and

