



**Wagon Loading Services Limited v Shikuku (Appeal E165 of 2024)
[2024] KEELRC 13418 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13418 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E165 OF 2024
M MBARŪ, J
DECEMBER 16, 2024**

BETWEEN
WAGON LOADING SERVICES LIMITED APPELLANT
AND
JACOB WANJALA SHIKUKU RESPONDENT

RULING

1. The appellant filed an application dated 5 August 2024 seeking orders;

Order that the Immediate Auctioneers to produce Tractor Registration No. KTCB 014Q is pending the hearing and determination of the main Appeal.

The order that the National and Safety Authority (NTSA) from transferring Tractor Registration No. KTCB 014Q to James Wahiu Mbugua, his agent, servant, employee and/ or person claiming authority through him or to any other third party pending the hearing and determination of the Appeal.
2. The application is supported by Naomi Kinuva's affidavit on the grounds that the respondent obtained a judgment in Mombasa CMELRC No.E586 of 2022 on 12 March 2024 for the sum of Ksh.149, 642 against the appellant. The judgment was delivered in the appellant's absence on 19 April 2024. The respondent served the appellant with notice of the judgment and an outline of costs. Both parties exchanged communications in a bid to agree on the costs and the unremitted NSSF dues, which the trial court did not award.
3. While parties were negotiating, the respondent instructed auctioneers to attach the appellant's tractor registration no. KTCB 014Q and move it to their yard without serving a Proclamation Notice. The respondent did not follow the mandatory requirements before attachment, which are 10 days' notice, a decree certificate of stated costs, and a Proclamation Notice.



4. The appellant moved the trial court through an application dated 20 June 2024 to quash the illegal attachment of its property and to have the execution proceedings declared null and void. Before the application was heard, the appellant issued two cheques to the respondent amounting to Ksh.217, 742 in full and final settlement of the decretal sum and costs.
5. In the supporting affidavit, Ms Kinuva avers that on 29 June 2024, the two cheques were banked and cleared. They also wrote and requested a breakdown of the auctioneers' costs, but what was outlined was grossly excessive.
6. Before the matter could be fully resolved, the trial court delivered its ruling, declared the execution process a nullity and recalled the Warrants of Attachment for having been issued irregularly. However, the auctioneers rejected the issued cheques and indicated that the Tractor had already been sold on 2 July 2024, the matter of which had not been disclosed to the court.
7. Despite paying the entire decretal amount, the respondent instructed auctioneers to attach their goods fraudulently and illegally. The appellant was ready and willing to pay the decretal sum and had issued two cheques in full settlement. The value of the attached Tractor, KTCB 014Q, is Ksh.1, 500,000, which is way above the auctioneers' costs, which were stated to be Ksh.113, 077.43. These costs were contested as grossly excessive and should have been assessed by the court. By proceeding to auction the Tractor, the respondent, and the auctioneers acted fraudulently and illegally.
8. Unless the orders sought in this application are granted, the appellant will suffer irreparable loss and damage. To preserve the substratum of the appeal, the respondent should be restrained from transferring the subject tractor, No. KTCB 014Q. The NTSA should be restrained from transferring the Tractor to any third party pending the appeal's hearing and determination.
9. The respondent filed the Replying Affidavit of Kitonga O Kiiva, an advocate who avers that the trial court delivered judgment on 12 March 2024 with an award of Ksh.149 642 and costs. The respondent issued notice to the appellant to pay on 19 April 2024. In reply, the appellant contested the costs, and on 6 May 2024, the respondent amended the same. On 15 May 2024, the appellant requested a Ksh.3, 600 reduction as unremitted NSSF.
10. Kiiva avers that eventually, the costs were assessed at Ksh.74, 800 and on 28 May 2024, a decree was issued for Ksh.152634.89 and set in motion the execution process. On 6 June 2024, the auctioneers proclaimed the appellant's goods but declined to sign the warrants. The auctioneers impounded vehicle registration No.KTCB 014Q was advertised for auction on 2 July 2024. On 28 June 2024, the appellant delivered two cheques of Ksh.150 000 and a postdated cheque of Ksh.67, 742 which were less than the decretal sum, costs and auctioneers fees. There was no agreement on instalment payments. The auctioneers had conducted the sale by the time the auctioneers conducted the auction.
11. The appellant filed an application seeking to stay the execution, but the orders issued were served on the wrong email address: info@twklaw.com instead of info@twklaw.co.ke. Thus, the appellant cannot claim that the respondent acted outside the law. The orders were issued on 3 July 2024, while the auction took place on 2 July 2024, hence being overtaken by events.
1. The appellant filed a second application seeking to stop the transfer of the auctioned vehicle KTCB 014Q on 15 July 2024 and the court declared it was functus officio. The subject of the application, vehicle KTCB 014Q was not among the proclaimed properties of the appellant. There was no evidence to this effect. The appellant has not enjoined the auctioneers who auctioned the subject vehicle to this appeal to obtain the orders sought. The application has no merit and should be dismissed with costs.
12. Both parties attended and agreed to file written submissions and also make oral submissions.



13. The appellant submitted that upon judgment by the trial court, the Respondent, on two (2) occasions, furnished the Appellant with tabulations dated 19 April 2024 and 5 June 2024, both of which included awards not granted in the trial Court's Judgment dated 12 March 2024. Instead of making the necessary amendments, the Respondent attached (without Proclaiming) the Appellant's Tractor Registration No. KTCB 014Q. Nonetheless, on 28 June 2024, the Appellant furnished the Respondent with two cheques of Kshs. 150,000.00 dated 28th June 2024 which was banked on 29th June 2024 and Kshs. 67,742.00 through his Advocates.
14. The Respondent, whether through himself, his Advocates or Immediate Auctioneers, had the right to demand that the Appellant pay the decretal sum together with the disputed auctioneer's fees of Kshs 113,077.43 since the law provides for a clear procedure for an aggrieved auctioneer to demand and execute for their fees when and where disputed. However, in this case, the Appellant agreed to pay the Auctioneer's fees but refused to release the Appellant's Tractor Registration No. KTCB 014Q.
15. The appellant submitted that under Order 42 rule (6)(2) of the Civil Procedure Rules, an applicant seeking a stay of execution must satisfy that substantial loss is incurred if the orders sought are not issued. At the time of the hearing of this Application, it stands to lose Tractor Registration No. KTCB 014Q despite having furnished the Respondent with a decretal sum before the purported Tractor sale. If the stay is not allowed, the appeal will be rendered nugatory.
16. The present Application was filed five (5) days after the Ruling of the trial Court; thus, there was no delay. The Appellant is willing to abide by the orders of this Court on security for due performance. It only requests that the Court consider that at the time of this Application, the Appellant has been dispossessed of the Tractor and had provided the decretal sum. In the case of *Biiy v Kenya National Union of Nurses (Cause 13 of 2020) [2022] KEELRC 3864 (KLR) (27 July 2022)*; and *Bloomingtondale Roses Kenya Ltd v Ndiritu (Employment and Labour Relations Appeal E012 of 2022) [2022] KEELRC 14670 (KLR)* the court allowed stay of execution to enable the appellant urge its appeal on the merits.
17. The respondent submitted that the guiding principles for granting a temporary injunction are settled in the case of *Giella v Cassman Brown [1973] EA*. The applicant must have a prima facie case and prove there will be irreparable loss and damage and that the balance of convenience favours him. These principles are addressed in the case of *Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR*. In this case, the appellant's appeal relates to a ruling by the trial court, which held that it was ex officio, having addressed the matter in question before.
18. The appellant did not serve an application dated 20 June 2024 or the order dated 3 July 2024, which was sent to the wrong address. There is no evidence of service when the auctioneers sold the subject tractor. After completing the sale, the respondent only became aware of the application and order. No right has been infringed, and the balance of convenience favours the respondent as held in *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR*. The instant application lacks merit and should be dismissed with costs.

Determination

19. The appellant is seeking to preserve the substratum of the appeal pending the hearing and determination of the instant appeal. The case is the payment of the entire decretal sum as directed in *Mombasa CMELRC E586 of 2022*. Still, the respondent has instructed Immediate Auctioneers to proclaim its property, which has since been sold. Unless NTSA is restrained from transferring it to a third party, the appeal will be rendered nugatory.



20. The respondent, for his part, urges the court that the sale of the subject motor vehicle has completed a lawful execution. There is a valid judgment, and following the process of execution, the orders sought should not be issued.
21. There is a right of appeal, which should be secured as the court appreciates that the respondent has a valid judgment. The contention that the full decretal sum is paid, yet the appellant's vehicle and property have since been auctioned to recover them, should be interrogated before the court can address the substratum of the appeal herein.
22. In *Farm Engineering Industries Limited v Patel Kalyanji Premji & Company & another* [2021] KEHC 79 (KLR), the court held that where there is a money decree, the applicant should be allowed to urge its case.
23. This position is reiterated in the case of *Gianfranco Manenthi & another versus Africa Merchant Assurance Company Ltd* [2019] eKLR that the applicant must show and meet the condition of payment of security for the due performance of the decree. Under this condition, a party who seeks the right of appeal from the money decree of the lower court for an order of stay must satisfy this condition on security;

In this regard, the security for the due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

24. In this case, the respondent does not deny that the appellant has issued cheques amounting to Ksh.150,000, but these are challenged as not being payment in full. The respondent also proceeded with execution on 2 July 2024 despite the trial court declaring the execution process a nullity and recalling the Warrants of Attachment for having been issued irregularly. These matters call for introspection in this appeal, and the orders sought by the appellant are valid and justified.
25. Accordingly, pending the hearing and determination of the appeal, an order is hereby issued for;
 1. Immediate Auctioneers to produce Tractor Registration No. KTCB 014Q to the court within 24 hours of this ruling is pending the hearing and determination of the main Appeal.
 2. The National and Safety Authority (NTSA) is hereby restrained from transferring Tractor Registration No. KTCB 014Q to James Wahiu Mbugua, his agent, servant, employee and/or person claiming authority through him or to any other third party pending the hearing and determination of the Appeal.
 3. Mention on 18 December 2024 to confirm (a) above;
 4. Costs to abide by the outcome of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

