



REPUBLIC OF KENYA



**KENYA LAW**

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**Koech v Kondol; Kibos Sugar and Allied Industries & another (Objector) (Employment and Labour Relations Cause 128 of 2018) [2023] KEELRC 647 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 647 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE 128 OF 2018**

**HS WASILWA, J**

**MARCH 9, 2023**

**BETWEEN**

**KIPLAGAT ARAP KOECH ..... CLAIMANT**

**AND**

**DALSIT KONDOL ..... RESPONDENT**

**AND**

**KIBOS SUGAR AND ALLIED INDUSTRIES ..... OBJECTOR**

**SHEM INYUMILI SHIMEJERO ..... OBJECTOR**

**RULING**

1. Before me for determination is the 1<sup>st</sup> objector/applicant's notice of motion dated 1<sup>st</sup> February, 2023 filed under certificate of urgency pursuant to Order 45 (1), Order 51 Rule 11 & 15, Order 12 Rule 7, Order 36 Rule 10 of the *Civil Procedure Rules*, section 3 A of the *Civil Procedure Act*, section 16 of the *Employment and Labour Relations Court Act*, Rule 33 of the *Employment and Labour Relations Court(Procedure) Rules*, 2016 and all other enabling provisions of law, seeking for the following Order; -
  - a. Spent.
  - b. That pending the hearing and determination of this application inter-parties, this honorable court be pleased to issue an order for stay of sale of the applicant's motor vehicle registration number KCP 104 S by Direct 'o' Auctioneers
  - c. That this honorable court be pleased to issue an order for stay of sale of the applicant's motor vehicle registration number KCP 104 S by Direct O Auctioneers.



- d. That the honourable court be pleased to review/vary and set aside the orders issued on December 15, 2022 by Hon Lady Justice Hellen Wasilwa J. with regard to motor vehicle registration number KCP 104 S.
  - e. That this honourable court be pleased to issue an order declaring the applicant Kibos Sugar & Allied Industries as the bona fide registered owner of motor vehicle registration number KCP 104 S.
  - f. That this honourable court be pleased to issue an order for release of the subject motor vehicle registration number KCP 104 S to the applicant forthwith and without any conditions.
  - g. The costs of this Application be provided for
2. The application is premised on the grounds set out in the face of the application and the supporting affidavit of Epainito Apono Okoyo, the manager of Kibos Sugar and Allied Industries, the 1<sup>st</sup> objector objector herein.
  3. The affiant avers that the 1<sup>st</sup> Objector is a limited liability company with registered offices in Kenya. That it acquired the legal and equitable rights over the subject motor vehicle registration number KCP 140 S, Toyota saloon car from its immediate previous owner Vijay Popatlal Chohani.
  4. That at the time of wearing the affidavit in support this application, the subject motor vehicle was registered in the name of the 1<sup>st</sup> Objector herein. He then exhibited record documents marked as annexure EAO-2.
  5. He stated that he was not contacted by his advocate to make an affidavit in support of their previous application to stop the sale of their motor vehicle and opted to rely on the affidavit of the 2<sup>nd</sup> objector. but when the ruling was delivered by this court on December 15, 2022, the affiant was informed of the need to swear an affidavit in support of the application for stopping sale of their vehicle, informing the filing of the current application.
  6. He stated that the said vehicle was attached by Direct 'O' Auctioneers limited while in custody of Avtar Kaur Kondola, who was in possession of the subject vehicle with permission of the Objector.
  7. He stated that, the objector is not the judgement debtor and the vehicle was erroneously attached by the decree holder through its Auctioneers, Direct 'O' Auctioneers, because due diligence was not carried out by the Auctioneers.
  8. He prayed for the application to be allowed and the vehicle released immediately without conditions, to the objector because it is not owned by the judgement debtor, neither can it be used in satisfaction of the decree.
  9. In the supplementary affidavit, the affiant stated that, they were not served with either the notification of sale or redemption notice to enable them take immediate action. Further that there was no advertisement of sale made in the newspaper, or a valuation done to establish the forced market value of the vehicle.
  10. He reiterated that the motor vehicle has not been transferred to the third party as the registration documents are still in the name of the 1<sup>st</sup> Objector. He added that there is no proof of sale of the vehicle as intimated by the Respondent.
  11. That the alleged auction sale was done way after this application was filed and served upon the claimant' advocate and that the company stands to suffer irreparable damages if the said motor vehicle is no returned back to the objector.



12. The application is opposed by the claimant who filed a replying affidavit deposed upon on the February 13, 2023. In the affidavit, the claimant stated that the issue of sale of the motor vehicle KCP 140 S, was handled in the application whose ruling was delivered by this court on December 15, 2022, giving the auctioneer green light to sale the said vehicle.
13. Subsequently that the said motor vehicle was sold vide public Auction on February 13, 2023 as per the certificate of sale attached herein, therefore that the application has been overtaken by events.
14. The affiant avers that the issues raised in this application are similar to the issue and prayers sought in the application of June 29, 2022.
15. He contends that the actions by the objector are aimed at frustrating his efforts of securing the fruits of his judgment which were awarded by this court.
16. He also stated that the said Epanito Apono Oloyo has not filed any authorization from the 1<sup>st</sup> objector to confirm that he is indeed the manager and an official of the Objector as such his locus standi is questionable.
17. He maintained that the application has been used as a delay tactic and also that there are no grounds of review that have been demonstrated by the applicant. further that to allow the orders sought in the application will contravene the averring objectives of this court under section 3A of the [Civil Procedure Act](#).
18. The affiant in conclusion, prayed for the application to be dismissed with cost.
19. Directions were taken for the application to be disposed of by written submission. The applicant filed its submission on the February 17, 2023 however the claimant chose to rely on his affidavit.

#### **1st Objectors/Applicant's Submissions.**

20. The objector submitted on three issues; whether it has proved the ownership of the subject motor vehicle, whether it is entitled to the reliefs sought and whether the instant application has been overtaken by events.
21. On the first issue it was submitted that the reason their previous application of July 1, 2022 was not allowed was because, the objector did not swear an affidavit in support instead relied on the affidavit of the 2<sup>nd</sup> objector which was not taken well by the court. He argued that the current application has different prayers because it seeks for stay and release of the motor vehicle which orders are different from Orders sought in the previous application as such that the application is not res judicata as implied by the claimant.
22. The applicant submitted that, the attachment done by the claimant through Direct 'O' Auctioneers was not procedural because due diligence was not carried out and to allow the status quo to remain would mean that the applicant will be forced to pay a debt it does not owe, in effect suffering irreparable harm. In this they relied on the case of [New Kenya Co-operative Creameries Ltd v Omari Msee Segal; Kenya o-operative Creameries Ltd\(Defencat\)](#) [2020] eKLR where the an objector had discharged the burden of proving ownership of the attached property and the Court opined that such property shall be discharged and cannot be sold in execution of warrants against the Judgement-debtor.



23. It also relied on the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR, where the Court held that; -
- “The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. H as the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree.”
24. The Applicant further submitted that execution even against subsidiary companies of the Judgement debtor is not allowed in law as was held in *Chai Trading Co. Limited v Muli Mwanzia and 2 others* [2019] eKLR and the case of *Hannab Maina t/a TAA Flowers v Rift Valley Bottlers Limited* [2016] eKLR.
25. On whether the applicant is entitled to the orders of stay and review sought, the applicant submitted that it has proved that it is the registered owner of the subject motor vehicle at the time of attachment making the attachment improper in the first instance. In this they relied on the case of *Precast Portal Structure v Kenya Pencil Company Ltd and 2 others* [1993] eKLR.
26. On whether the application has been overtaken by events, the applicant submitted that it filed this application on February 1, 2023 and served on the claimant/ respondent herein on February 3, 2023 as evidenced by the return of service filed on the February 8, 2023, which fact was admitted by their advocate in court when this matter came up for mention on February 14, 2023, demonstrating that the claimant knew of the application but still moved to sale the motor vehicle to circumvent the instant application.
27. It was also submitted that the alleged sale breached the *Auctioneers Rules* under Rule 12(f) and 16(2) because there was no notification of sale issues, no redemption notice given, no valuation was done and that no advertisement of the sale was done by the auctioneers. This, he argued made the sale improper, which should be cancelled by the court. Further that the subject motor vehicle is still registered in the name of the objector/ applicant. On that basis, the applicant submitted that the application has not been overtaken by events.
28. In conclusion, the Applicant prayed for the application to be allowed and the vehicle released back to them unconditionally.
29. I have considered all the averments and submissions of the parties before me.
30. The applicant objector contends that the motor vehicle KCP 104S belongs to them hence the application to stay its sale and review this court’s orders of 15/12/2022 ordering execution by sale of the said motor vehicle.
31. The applicants have vide this application demonstrated ownership of the motor vehicle.
32. The applicants were parties to the objection proceedings previously but made no attempt to demonstrate ownership of this vehicle.
33. That as it may be however, the respondents contend that the motor vehicle was sold and therefore orders being sought have been overtaken by events. They aver that the sale took place on 13/2/2023 at 12.10pm.
34. Before the sale, there was a notice of sale in the Star Daily of 6/2/2023. It is true that this application was filed on 1/2/2023 and the sale on 13/2/2023. There were no any orders lifting the sale order and therefore the sale proceeded as directed by court.



35. That being the case, this court cannot give orders to stay any event that has already occurred because this court cannot grant orders in vain.
36. In the circumstance, I find that the orders sought cannot be granted and are therefore denied.
37. The application is struck out accordingly.

**RULING DELIVERED VIRTUALLY THIS 9TH DAY OF MARCH, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

**Miss Daye for Respondent – present**

**Mongeri & Co. for Claimant/Applicant – absent**

**Court Assistant – Fred**

