



**Aguko Osman & Company Advocates v Garden Real Estate Development Limited  
(Miscellaneous Application E047 of 2022) [2023] KEELRC 1480 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1480 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E047 OF 2022**

**MN NDUMA, J**

**JUNE 8, 2023**

**BETWEEN**

**AGUKO OSMAN & COMPANY ADVOCATES ..... CLAIMANT**

**AND**

**GARDEN REAL ESTATE DEVELOPMENT LIMITED ..... RESPONDENT**

**RULING**

1. The Decree holder/applicant filed notice of motion dated 18<sup>th</sup> November, 2022 seeking an order in the following terms:-
  1. Spent
  2. Spent
  3. Spent
  4. That an order be issued allowing the applicant/decree holder to sell by way of Public auction all such items as proclaimed and surrendered under prayer 2 or 3 as shall be applicable.
  5. That this Honourable Court be pleased to grant leave to the applicant's advocates to institute contempt of Court proceedings against the Directors and officers of the Respondent Company Garden Real Estate Development Limited and specifically Mrs Gao Rong and Mr. Wang Jing Gang.
  8. That upon prayers above, this Honourable Court be pleased to find that the Directors and officers of the Respondent Company Garden Real Estate Development Limited and specifically Mrs Gao Rong and Wang Jing Gang are in contempt of the orders of this Honourable Court and they be committed to Civil Jail for a period of six (6) months for the said acts of contempt.



2. The application is premised on grounds 1 to 40 set out on the notice of motion and supporting affidavit of Gad Aguko, advocate for the applicants the nub of which is that the applicant has in their favour a Ruling against the respondent for a sum of Kshs 755,247 dated 18<sup>th</sup> October, 2022. That a Certificate of Taxation was issued to the applicant on 19<sup>th</sup> October, 2022. That the application to have the Certificate of Taxation adopted as a decree of the Court was allowed on 29<sup>th</sup> March, 2022.
3. That the applicant's auctioneers – Keysian Auctioneers obtained proclamation Orders/Warrants of attachment from the Court on 31<sup>st</sup> October, 2022 and proceeded to proclaim the judgment Debtor/ Respondent's assets on 1<sup>st</sup> November, 2022.
4. That the judgment debtors filed two Chamber Summons applications dated 31<sup>st</sup> October, 2022 and 3<sup>rd</sup> November, 2022 under Certificate of urgency seeking among other prayers stay of execution aforesaid in terms of the Ruling dated 18<sup>th</sup> October, 2022; Certificate of taxation issued on 19<sup>th</sup> October, 2022 and decree dated 29<sup>th</sup> October, 2022.
5. Stay was not granted *ex parte* and directions to serve the application was granted which service was done on 3<sup>rd</sup> November, 2022. The judgment debtor then fixed the hearing of the applications *ex parte* on 10<sup>th</sup> November, 2022 without inviting the applicant to fix a suitable date for hearing of the applications.
6. On 8<sup>th</sup> November, 2022, the Auctioneers, Keysian Auctioneers attached the goods of the judgment debtor as proclaimed on 1<sup>st</sup> November, 2022.
7. That the judgment debtor unlawfully carted away the proclaimed goods out of reach of the applicants. The judgment debtor by a letter dated 9<sup>th</sup> November, 2022 committed to pay the applicant the sum of Kshs200,000 by forwarding cheque number 0755 of a similar amount from Prime Bank issued in favour of the applicant which was to act as security for stay of execution which the applicant was to consent to its grant on 10<sup>th</sup> November, 2022 when the matter was fixed for hearing.
8. On 10<sup>th</sup> November, 2022, the Court issued stay of execution on the strength of the cheque No. 0755 which was to act as security. The applicant compromised the application for stay on the strength of the cheque issued in its favour. Matter was to be mentioned on 28<sup>th</sup> November, 2022 for further directions.
9. Immediately, thereafter the respondents vide Mrs Gao Rong and Wang Jing Gang instructed their Bank not to clear the cheque No. 0755 in the sum of Kshs.200,000. The consent for stay of execution was thus fraudulently obtained by the respondents and in contempt of the Court. The respondent wrote a letter thereafter blaming the return of the cheque on an error on the part of the bank. This was however not true since on 11<sup>th</sup> November, 2022, the Applicant's bank responded by issuing a return cheque advice indicating that the payment was stopped by the drawer. This was deliberate deceit and dishonesty on the part of the respondents. Therefore, the Order for stay of execution granted by the Court on 10<sup>th</sup> November, 2022 was obtained through deceit, misrepresentation, falsehood and fraud.
10. The goods proclaimed on 1<sup>st</sup> November, 2022 have also been carted away to defeat the lawful decree of the Court. That the Court issuing the Conservatory Orders sought to protect the interest of the applicant.
11. That the object of the Conservatory Orders sought as stated by the Court of Appeal in *Assanand - vs- Pettitt* [1989] KLR 242 at page 244 is to keep things in status quo so that if at the hearing the plaintiffs obtains judgment in their favour, the Defendants will have been prevented from dealing with the property in such a way as to make that judgment ineffectual.
12. That the application be allowed with costs.



13. The respondents filed a replying affidavit of Gao Rong stating that the Proclaimed goods were not the property of the respondent but were her personal private and individual household goods including sofa sets, washing machine and microwaves. That she is distinct and separate from the respondent and both reside in different building.
14. That the orders dated 10<sup>th</sup> November, 2022 were not obtained through fraud, deceit or misrepresentations as alleged by applicant or at all.
15. That there was no consent orders recorded before Hon. Justice Manani, J. on 10<sup>th</sup> November, 2022 or at all.
16. That the record of proceedings show that when the parties appeared before the Court on that day the judge recorded:-

“ In the meantime, the Decree holder is restrained from further execution by way of collection of and/or sale of the attached goods; pending hearing of the application inter-partes.”
17. The matter was then fixed for mention on 28<sup>th</sup> November, 2022. That this application was filed by the applicant before the parties appeared for mention for further directions as directed by Manani, J. on 28<sup>th</sup> November, 2022.
18. That the Court gave no conditions of whatever nature upon issuing the Order on 10<sup>th</sup> November, 2022. The respondents have not therefore violated the Order by the Court dated 10<sup>th</sup> November, 2022. The allegations of fraud and misrepresentation are therefore without basis.
19. That the directors of the respondent, were coerced by the auctioneers to give the auctioneers Kshs.50,000 in cash and to draw a cheque of Kshs.200,000 in favour of the applicant on 8<sup>th</sup> November, 2022. That the respondent’s directors complied purely in a bid to stop the auctioneers from carting away her personal belongs. That the director quickly took steps to stop the illegal payment made under duress by calling the bank and cancelling the cheque.
20. That the agreement to pay by cheque Kshs.200,000 was obtained through duress and was thus voidable at the cheque drawer’s will.
21. That the application be dismissed with costs.

### **Determination**

22. The parties filed written submissions which the Court has carefully considered together with the deposition by the parties. The record of the Court does not depict, a consent Order recorded by the parties on 10<sup>th</sup> November, 2022 on the strength of payment of Kshs. 200,000 as security or at all. Manani J. simply at his own discretion granted an order for stay of execution pending further directions on the hearing and disposal of this application.
23. The Court is satisfied however that the applicant has in their favour against the respondent a lawful decree issue by this Court in the sum of Kshs 755,247.00 against the respondent. The Court is also satisfied that the directors had lawfully issued a cheque in favour of the applicants in the sum of Kshs.200,000 toward part payment of the decretal sum.
24. The respondents have not preferred any appeal against the judgment of the Court delivered on 18<sup>th</sup> October, 2022 pursuant to which a Certificate of Taxation was issued in favour of the applicant on 19<sup>th</sup> October, 2022 and a decree issued in favour of the applicant against the respondent on 29<sup>th</sup> October, 2022.



25. This Court therefore allows this application and grants the following orders:-

- (a) The applicant/decree holder is allowed to execute the decree of the Court dated 29<sup>th</sup> October, 2023 against the assets of the respondent, Judgment debtor.
- (b) The stay of execution of the decree dated 29<sup>th</sup> October, 2023 in favour of the applicant against the respondent is set aside.
- (c) The respondent to pay costs of this application including costs incurred by the applicant as a result of the stoppage of the cheque No. 0755 in the sum of Kshs.200,000 issued in favour of the applicant by the respondent, and unlawfully stopped by the respondent before the same was paid.

26. Other prayers sought by the applicant are found to be without merit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

Appearances

Mr. Mabuka for Applicant

Mr. Ogembo for Respondent

Mr. Ekale – Court Assistant

