



In re Chris Allan Butende t/a Status Auctioneers (Environment and Land Appeal 32 of 2022) [2024] KEELC 6015 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 32 OF 2022
LL NAIKUNI, J
SEPTEMBER 20, 2024**

BETWEEN

STATUS AUCTIONEERS APPLICANT

AND

CHRIS ALLAN BUTENDE T/A STATUS AUCTIONEERS AUCTIONEER

AND

LINN ALEXANDER JAMES DENHOLM APPELLANT

AND

CATHERINE NDUKU MUEMA RESPONDENT

(Arising from Judgement delivered on 22 nd on November 2023 and decree issued on 11th day of December, 2023 issued)

RULING

Introduction

1. This Honourable Court was tasked on making a determination onto the Ex - Parte Notice of Motion application dated 21st March, 2024. The said application was brought by Chris Allan Butende T/A Status Auctioneers, the Applicant herein pursuant to the provision under Rule 9 (1) & (2) and Rule (5b) of the Auctioneers' Rules 1997 and the Auctioneers' Amendment Rules, 2009.
2. Upon service of the application, it elicited a response by the Judgement Debtor while opposing the said application. The Honorable Court will be dealing with the issues on their merit accordingly.

II. The Applicant's case

3. The Applicant's sought out for the following orders:



- a. Spent.
 - b. That this Honourable Court be pleased to authorize M/s Status Auctioneers, duly licensed Auctioneer to break-in and enter the premises of the suit premises know as Plot No.11616/III/MN situate at Mtwapa and implement and/or enforce a lawful eviction pursuant to from Judgement delivered on 22nd on November 2023 and decree issued on 11th day of December, 2023.
 - c. That this Honourable Court be pleased to direct and/or Order the Officer Commanding Station (O.C.S)- Mtwapa Police Station and/or any other Police Officer under his command to offer/ provide enough security to M/s. Status Auctioneers in order to implement and/or enforce a lawful eviction pursuant to from Judgement delivered on 22nd on November 2023 and decree issued on 11th day of December, 2023.
 - d. That Costs of the application to be provided for.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 15th Paragraphed Supporting Affidavit of Chris Allan Butende sworn and dated 21st March, 2024 with four (4) annexures marked as ‘CAB - 1 – 4’ annexed thereto. The Applicant averred that:
- a. He was a duly Licensed Auctioneer of this Honourable Court trading under the name and style of M/s. Status Auctioneers. Annexed in the affidavit and marked as “CAB - 1” was a copy of his Licence.
 - b. On 22nd November 2023 the Honourable Court delivered a Judgement and decreed that the suit property and house standing on all that parcel of land known as Plot No.11616/III/MN situated at Mtwapa belongs to Appellant/Decree holder herein in which the Respondent had fraudulently transferred in her name, upon which the Defendant later relocated to United States of America.
 - c. Consequently, the Appellant/Decree Holder had extracted the court’s decree hereof and served upon the Respondent and the Registrar of Lands to immediately transfer the suit property to the Appellant, the said Decree had since been registered on the said title in favour of the Appellant. Annexed in the affidavit and marked as “CAB - 2” was a copy of the said Decree.
 - d. The Appellant had on several occasions tried to enforce the aforesaid orders and decree against the Respondent in order to access the suit premises, the said attempts had been met with hostility, blackmail and intimidation by the Respondent and her agents without any legal and lawful consideration.
 - e. The Respondent through her advocate had been writing unlawful and illegal letters claiming ownership of the suit property to circumvent the court orders as decreed by this Honourable Court.
 - f. The Judgment Debtor filed two formal applications dated 5th and 18th December 2023 seeking for in Court for stay of execution of the aforesaid Judgement and the Decree which prior to being litigated were discreetly withdrawn. Annexed hereto and marked as ‘CAB - 3’ was a copy of the said Notice of withdrawal.
 - g. He was further re-issued with Warrants of Attachment and Sale dated 29th November, 2023 to enable the Applicant to proceed with execution by way of Sale through public Auction



schedule on 8th December, 2023 as per the advertisement in the daily newspaper. Annexed hereto and marked as “CAB - 4” was a copy of the newspaper advertisement.

- h. Under the provision of Rule 9 (1) & (2) of the Auctioneers' Rule 197 and the Auctioneers Amended Rules 2009, he was allowed to apply to this Honourable Court to be issued with Security from the nearest Police Station for implementation of any Court Order and this particular case, to execute the Warrants of Attachment and Sale herein.
- i. The Security Agents could not involve themselves in all Civil matters without a Court Order authorizing them to do so.
- j. He was strongly convinced that there was nothing he could do if he was not given police security to do the assignment advanced to him and hence unless the orders sought are granted, the warrants of sale in situ will remain useless in his hands.
- k. Unless orders sought were granted, the Court's work, time and authority would in effect be ridiculed and rendered useless.
- l. It was in the interest of justice that this application be allowed ex – debito justitiae since the same was just a formality.

III. The Grounds of Opposition by the Respondent dated 3rd April, 2024

- 5. The Respondent opposed the Applicant's application dated 21st March, 2024 through the Grounds of Opposition dated 3rd April, 2024. The grounds were on the following:-
 - a. The Application was fatally defective and bad in law which ought to be dismissed pronto by this Honourable Court Ex debito justitiae. Since the same was brought by a non-party to the suit as there was no party known as Chris Allan Butende T/A Status Auctioneers who had been enjoined in this suit capable of making any application as the instant one. Consequently the Application was fatally defective and its only fate that it must suffer was a dismissal.
 - b. An Auctioneer could not bring an application as the instant application and the Applicant should be rightly guided. The Application was a non - starter and could not stand under any circumstances. The same could not be cured under any rules and/or powers of this court.
 - c. The Judgment sought to be executed had already been appealed against at the Court of Appeal and an application for stay of execution due for Ruling on 12th July, 2024 thus the Application herein was just but an attempt at stealing a match which this Honourable Court should frown upon.
 - d. The Application was a drastic one which sought to take away the proprietary rights of the Respondent when the Respondent still had not exhausted the avenues provided for by law.
 - e. There was no emergency and/or urgency and the Applicant's move was suspect as the main aim was to defeat the Respondent's rights having appealed against the Judgment of this Honourable Court.
 - f. The Respondent herein having appealed against the Judgment sought to be appealed herein had an appeal with high chances of success which appeal would be rendered nugatory if the Applicant was left to proceed with the application of instance.
 - g. The instant Application went against the rules of procedure and all tenets of fair hearing and was thus an abuse of the court process.



- h. The Applicant's application would serve no purpose in the dispensation of justice but only avert the wheels of justice since there was already an appeal whose main aim was to overturn the orders of this court. Such an eventuality would only be but an academic exercise should this Honourable court grant the orders sought herein.
- i. In the circumstances of this case the only order that commend itself and which this Honourable court ought to grant an order that status quo be maintained to await the outcome of the Court of Appeal Ruling on Stay of execution.
- j. If this court were to go ahead and grant the orders sought herein the same would lead to an embarrassment on the face of the court and an absurdity should the Court of Appeal rule that stay of execution was granted.

IV. Submissions

6. On 22nd March, 2024 the Honourable Court directed that the Ex - Parte - Notice of Motion application dated 21st March, 2024 be canvassed by way of written submission. The Honourable Court took cognizance that the two Learned Counsels – Mr. Ondeng and Mr. Adala for both the Decree Holder/ Applicant and Judgement Debtor vehemently submitted on these issues. The Honourable Court was sincerely grateful to them for executing their duties very effectively. Pursuant to that on 4th April, 2024 the Honourable Court reserved a ruling date on notice.

A. The Written Submission by the Respondent

7. The Learned Counsel for the Respondent being the Law firm of Messrs. Musa, Boaz & Thomas advocates filed their written submissions dated 12th April, 2024. Mr. Adala Advocate commenced by stating that the submission was on opposition of the application by the Applicant dated 21st March, 2024. He averred that the Application was fatally defective and bad in law which ought to be dismissed pronto by this Honourable Court Ex debito justitiae. Since the same was brought by a non-party to the suit as there was no party known as Chris Allan Butende T/A Status Auctioneers who had been enjoined in this suit capable of making any application as the instant one.
8. Consequently the Application was fatally defective and its only fate that it must suffer was a dismissal. He averred that the Applicant could not bring an application as the instant application and the Applicant should be rightly guided. The Application was a non - starter and could not stand under any circumstances. The same could not be cured under any rules and/or powers of this court. It was not a technicality. The right party ought to be the one moving Court and in the right procedure. The importance of a party moving the Court in the correct manner was to enable the Respondent affected by the orders sought to be able to respond accordingly. In the instant application the Respondent could not ably respond to an improper and defective application by a non – party to the suit.
9. According to the Learned Counsel, an Auctioneer could not bring an application as the instant one in the main suit. The Applicant should be rightly guided. As such the application was a non – starter and could not stand under the circumstances. It followed that it could not be cured under the rules and and/or power of this Court.
10. Further, the Learned Counsel asserted that the Judgment sought to be executed herein had been appealed against at the Court of Appeal and an application for stay of execution due for Ruling on 12th July 2014. It was the Respondent's case that the Application herein was just but an attempt at stealing a match which this Honourable court should frown upon.



11. Thus, as far as he was concerned, an eviction order had far reaching implications as it entails as in this case the removal forcefully of a party from land that she had been in occupation/possession of for some time. Before such an order was given the court must be satisfied on its merits which means any person who stood to be affected by any order the court may make was entitled to be heard.
12. The right to be heard, included the right to exhaust all the avenues provided in law and the appeal procedures before the court could put its hand of approval to the eviction. He averred that to err was human. That was a statement that confirmed the natural principal of human fallibility. This court should entertain the possibility that the court above might reach a conclusion different from what it did. That was a possibility just in the same way this court reached a conclusion different from the court below. Just by that fact alone, this court should not rush to issue the drastic orders of eviction when there was a chance that the court above could fault it. What would be the net effect should the court above reach that conclusion. This court would have already issued orders that would have destabilized families.
13. The Application was a drastic one which sought to take away the proprietary rights of the Respondent when the Respondent still had not exhausted the avenues provided by law. There was no emergency and or urgency and the Applicant's move was suspect as the main aim was to defeat the Respondent's rights having appealed against the Judgement of this Court. The Learned Counsel averred that the appeal had a high chances of success.
14. The Learned Counsel held that the Application of instance went against the rules of procedure and all tenets of fair hearing and was thus an abuse of the court process. The Applicant's application would serve no purpose in the dispensation of justice but only avert the wheels of justice since there was already an appeal whose main aim was to overturn the orders of this court. Such an eventuality would only be but an academic exercise should this Honourable court grant the orders sought herein. Thus, he submitted that so as not to render the directions of the court of appeal on stay of execution which is due for delivery on 12th July 2024 this Honourable Court ought to grant an order that status quo be maintained to await the outcome of the Court of Appeal Ruling on Stay of execution.
15. In conclusion, the Learned opined that if this court were to go ahead and grant the orders sought herein the same would lead to an embarrassment on the face of the court and an absurdity should the Court of Appeal rule that stay of execution was granted.

V. Analysis and Determination

16. I have carefully read and considered the pleadings herein being the application dated 21st March, 2024 by the Applicant, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
17. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-:
 - a. Whether the break in order and other preceding consequential orders in the Notice of Motion application dated 21st March, 2024 is merited?
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who meets the costs of the Notice of Motion application dated 21st March, 2024?



Issue No. a) Whether the break in order and other preceding consequential orders in the Notice of Motion application dated 21st March, 2024 is merited.

18. Under this Sub – heading, the main substratum is on the issuance of the orders sought in the Notice of Motion application. The orders the Applicant seeks are orders that are mandantoty in nature. The background of this instant case is that on 22nd November 2023 the Honourable Court delivered a judgement and decreed that the suit property and house standing on Plot No.11616/III/MN situate at Mtwapa belongs to Appellant/Decree holder herein in which the Respondent had fraudulently transferred in her name, upon which the Defendant later relocated to United States of America. Consequently, the Appellant/Decree holder had extracted the court's decree hereof and served upon the Respondent and the Registrar of Lands to immediately transfer the suit property to the Appellant, the said dlecree has since been registered on the said title in favour of the Appellant. Annexed in the affidavit and marked “CAB - 2” is a copy of the said decree.
19. The Appellant had on several occasions tried to enforce the aforesaid orders and decree against the Respondent in order to access the suit premises, the said attempts have been met with hostility, blackmail and intimidation by the Respondent and her agents without any legal and lawful consideration. The Respondent through her advocate had been writing unlawful and illegal letters claiming ownership of the suit property to circumvent the court orders as decreed by this Honourable Court.
20. The court is mindful of the requirement of substantial justice under the provision of Article 159 of the Constitution of Kenya 2010 and the principle that procedure is the handmaid of justice and gateway to justice. However, as demonstrated above, the Appellant in this case appears to have closed the door on himself by his very conduct of the proceedings in the trial court.
21. To back itself on this point, the Court relies on the case of “Stephen Maina Kimanga and 4 others – Versus - Lucy waithira Mwangi and 2 others (2015) eKLR” where the court says;
- “However, where it is apparent that a party is unreasonably and unlawfully attempting to obstruct a lawful process or the cause of justice, a court of law will not hesitate to stamp its seal of authority using the lawful agencies of the state. I am satisfied that the current application for the use of external forces to oversee the execution of this court’s order is merited.”
22. Further, the Applicant relies on the provision of Rule 9 of the Auctioneers Rules: It states thus:-
Police assistance
- (1) Where an auctioneer has reasonable cause to believe that—
- (a) he may have to break the door of any premises where goods may be seized or repossessed; or
- (b) he may be subject to resistance or intimidation by the debtor or other person; or
- (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
- (2) An application under this rule shall be by motion by way of a miscellaneous application support by an affidavit and may be heard ex parte



23. The law as regards the principle to be applied when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. In the case of “Locabail International Finance Limited – Versus - Agro – Export & Another (1986)1 ALL ER 901” it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of Special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a watch on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

24. Based on the reasoning and the legal principles enumerated herein therefore, it goes without saying the that application must succeed.

Issue No. b). Whether the parties are entitled to the reliefs sought.

25. Under this sub – heading, and having stated what I have above, the main issue here becomes rather straight forward and easy to decipher thereof. Ideally, it is now well known that the courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

26. It is instructive to note that the Judgment Debtor had filed two formal applications dated 5th and 18th December 2023 in Court seeking for stay of execution of the Judgement and the Decree. However, prior to being litigated were discreetly withdrawn. Annexed hereto and marked as ‘CAB - 3’ is a copy of the said Notice of withdrawal. Subsequently, he was further re-issued with Warrants of Attachment and Sale dated 29th November, 2023 to enable the Applicant proceed with execution by way of Sale through public Auction schedule on 8th December, 2023 as per the advertisement in the daily newspaper. Annexed hereto and marked as “CAB - 4” is a copy of the newspaper advertisement. Under the provision of Rule 9 (1) & (2) of the Auctioneers’ Rule 197 and the Auctioneers Amended Rules 2009, he was allowed to apply to this Honourable Court to be issued with Security from the nearest Police Station for implementation of any Court Order and this particular case, to execute the Warrants of Attachment and Sale herein.

27. The Security Agents could not involve themselves in all Civil matters without a Court Order authorizing them to do so. He is strongly convinced that there was nothing he could do if he was not given police security to do the assignment advanced to him and hence unless the orders sought are granted, the warrants of sale in situ will remain useless in his hands.

28. Therefore, having carefully fully considered the material before me, I am satisfied that the Applicant has made out a case to warrant the grant of the orders sought herein. Once more, I reiterate, the application should be allowed.



Issue No. c). Who meets the costs of the Notice of Motion application dated 21st March, 2024

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21).
30. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See “Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Limited [1967] EA 28”. The Court in this instant case reserves the discretion of awarding no costs.

VI. Conclusion and Disposal

31. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the Applicant in the Notice of Motion application dated 21st March, 2024 has on balance and preponderance of probability established its claim. Therefore, for avoidance of any doubts, I proceed to specifically order: -
- a. That the Notice of Motion application dated 21st March, 2024 be and is hereby found to be have merit in entirety without costs.
 - b. That this Honourable Court be and hereby authorizes M/s Status Auctioneers, duly licensed Auctioneer to break-in and enter the premises of the suit premises know as Plot No.11616/ III/MN situate at Mtwapa and implement and/or enforce a lawful eviction pursuant to from Judgement delivered on 22nd on November 2023 and decree issued on 11th day of December, 2023.
 - c. That this Honourable Court be and hereby directs and orders the Officer Commanding Station (O.C.S)- Mtwapa Police Station and any other Police Officer under his command to offer and provide enough security to M/S Status Auctioneers in order to implement and/or enforce a lawful eviction pursuant to from Judgement delivered on 22nd on November 2023 and decree issued on 11th day of December, 2023.
 - d. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF SEPTEMBER 2024.

HON. MR. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant
- b. Mr. Ondeng Advocates for the Ex - Parte Applicant/ Decree Holder.
- c. Mr. Adala Advocate for the Judgement Debtor/Respondent.

