



**Kiguru v The Board of Management, Bavuni Secondary School & another
(Cause 148 of 2015) [2022] KEELRC 4867 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4867 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 148 OF 2015
HS WASILWA, J
SEPTEMBER 20, 2022**

BETWEEN

GEORGE KIMITI KIGURU CLAIMANT

AND

**THE BOARD OF MANAGEMENT, BAVUNI SECONDARY
SCHOOL 1ST RESPONDENT**

THE PRINCIPAL, BAVUNI SECONDARY SCHOOL 2ND RESPONDENT

RULING

1. This ruling is in respect of the respondents/applicants' application dated June 9, 2022, filed under certificate of urgency on even date by the Honourable Attorney General pursuant to order 22 rule 22 and order 29 of the Civil Procedure Rules, sections 1A, 1B and 63(e) of the Civil Procedure Act, seeking the following orders;
 - 1) That this honourable court be pleased to lift the proclamation dated May 23, 2022 and notification of sale of movable property dated June 8, 2022 by direct 'o' auctioneers pending the hearing and determination of this application.
 - 2) That this honourable court be pleased to restrain direct 'o' auctioneers from in any way dealing, alienating, disposing off or putting up for sale motor vehicle registration number KBN 592 E scania bus pending the hearing and determination of this application.
 - 3) That this honourable court be pleased to order the OCS central police station Nakuru to release the motor vehicle registration number KBN 592E scania bus back to the applicants for the reason that the decretal sum has already been settled.
 4. That the costs be provided for.



2. The application is supported by the affidavit sworn on June 9, 2022 by Ngira Lynn, the advocate ceased of this matter on behalf of the applicants/respondents and based on the following grounds:-
 - a) That Judgment in this matter was delivered on the March 31, 2022 for the claimant as against the respondent for payment of kshs 199,200/= being one-month salary in lieu of notice together with 10 months' compensation for unfair termination.
 - b) That service of the decree was not served upon the Respondent to enable them settle the decretal sum but the claimant/respondent herein proceeded with execution proceedings before serving the applicants with the decree.
 - c) She states that on May 23, 2022 the applicants' Bus Registration number KBN 592E Scania was proclaimed by direct 'o' auctioneers. On June 8, 2022, the said Bus was waylaid while carrying on the school business.
 - d) The matter was reported to Nakuru central police station where the police detained the said bus to restrain the claiming of the said bus till a decree was served upon the applicants.
 - e) The same day on the June 22, 2022, after illegally proclaiming the said school bus, the claimant served the applicants the said decree via email at around 2:24 pm.
 - f) Upon receipt of the decree the claimant was issued with a cheque of the entire decretal sum which was paid in full.
 - g) The affiant prayed for the application to be allowed as prayed.
3. In opposing the application, Juma Ebby, the advocate ceased of the conduct of this matter on behalf of the claimant/respondent herein, swore a replying affidavit dated June 20, 2022 averring that when judgment was delivered in this matter, both the claimant and the respondent's advocates were present in court as such were aware of the decretal amount due to the claimant.
4. He states that he later received a call from the applicants' advocate, requesting for a copy of the decree and bill of costs to enable them settle the entire claim and they served the applicants' advocates with a copy of the judgment and the bill of costs for their action.
5. The affiant avers that they did not receive any response from the applicants herein for about 2 months when they had extracted a copy of the decree and served upon the Honourable Attorney General on the May 13, 2022 which decree was not acted upon by the respondent/applicants.
6. On May 23, 2022, they instructed direct 'o' auctioneers to pursue the said decretal sum, which was duly followed to the latter by the auctioneers herein. She avers that the said auctioneers served the applicants with a proclamation notice on May 30, 2022 without any objection received, the auctioneers proceeded on June 8, 2022 to attach the Respondent motor vehicle Registration Number KBN 592E and booked it at central police station vide OB NO 64/08/06/2022.
7. It is the respondent's case that the auctioneers followed due process and that the decretal sum ought to have been settled before the said process was commenced.
8. He urged this court to compel the applicants to settle the costs pending together with auctioneers' fees and also costs of this application having lied to this court that the proclamation was illegal when they had served the claimant with decree on the May 13, 2022.
9. The application herein was disposed of by way of written submissions with the applicant filing on the 6th June, 2022 while the respondent filed theirs on the July 19, 2022.



Applicant's submissions.

10. The applicant submitted that the warrant of attachment, proclamation notice, notice of attachment and subsequent notification of sale of movable property were all erroneous having been procured based on wrong decretal sum since the claimant had not taxed the bill of cost to ascertain the total decretal sum. it was further argued that the decree was never served upon the respondent till the proclamation had been done contrary to the law.
11. It is their submissions that in the execution process the claimant failed to observe the express provision of order 22 rule 18(a) of the Civil Procedure Rules.
12. The applicants maintain that the warrant of attachment dated May 30, 2022 and the subsequent notice of sale dated June 8, 2022 were erroneous and based on wrong calculation which were not preceded by taxation of the bill of costs therefore were illegal null and void ab initio.
13. They submitted that having failed to proceed with the sale the auctioneers are not bound to be paid by the applicant but by the instructing party. In support of this they relied on the case of Francis Mwachia Macharia T/A Freeman Auctioneers Services v Tata Africa Holdings (Kenya) (2019) eklr and the case of Kenya Oil Company Limited v Jovan H Kariuki T/A Moran Auctioneers (2020) eklr where Justice Onkwany held that;

“Be that as it may, this court is minded, in the interest of justice to address the pertinent question of who should pay the auctioneers fees in this case..... from the proceedings the auctioneers could have recovered his fees from the debtor if the sale went through. He is entitled to work done. The sale was called off meaning that the instructing party was to pay for the instruction given out. Having regard to the above, this ruling finds that the party liable to settle the auctioneers’ costs is instructing party in the suit that gave rise to the execution which was west mont power (K) Limited.....”

14. Accordingly, it was submitted that the claimant having instructed the direct ‘o’ auctioneer before serving them with the decree ought to settle the auctioneer’s fees and therefore urged this court to allow its application herein.

Respondent's submissions.

15. The respondent on the other hand maintained that it followed due process before the said proclamation in that judgment was delivered in this matter on the March 31, 2022 and the decree served on the May 13, 2022 before attachment was carried out on the June 8, 2022. It was submitted that it was until June 9, 2022 after the attachment that the applicant issued them with a cheque for the decretal sum without charges and auctioneers fees, therefore that having following due process the applicants are liable to pay the auctioneers fees in addition to costs.
16. It was submitted that rule 7 of the auctioneers rules 1997 mandates the debtor to pay auctioneers fees at all times unless the said debtor is not found, is a pauper or the sale proceeds are insufficient to cover the charges which was not the case in this matter.
17. It is the respondent’s submissions that the circumstances leading to the instructing of the auctioneers was based on the inaction by the applicant of failing to pay the decretal sum, therefore they ought to be compelled to pay the said auctioneers costs. To buttress its case the Respondent relied on the case of Re Ennio Limited (2009) eklr and Bonface Bandari Chipa v Mwadzomo Jumbale and 3 others (2016) eklr.



18. I have examined the averments of the parties herein, I note that the applicants have paid the decretal sum as admitted by the respondents this being paid after the execution proceeded.
19. What remains unpaid are costs and which the Respondents failed to tax.
20. The applicant has submitted that the respondent failed to observe the express provision of order 22 rule 18 (a) of the CPA which states as follows;

“Notice to show cause against execution in certain cases

(1) Where an application for execution is made—

(a) more than one year after the date of the decree;”
21. Judgment in this case was delivered on March 31, 2022 and indeed a year has not passed since the date the decree was extracted and so the provision of order 22 rule 18(a) do not apply in my view.
22. The applicant also submitted that the bill of costs had not been taxed and so the total decretal sum was never ascertained.
23. The respondents further aver that the respondents never served them with the decree before proclamation.
24. The respondents submitted that they followed due process before proclamation.
25. From the evidence on record however, the respondents counsel the state law office were served with the decree on May 13, 2022 indicating that the decretal sum was 182,600/=. The proclamation was done on June 8, 2022 after the service of the decree.
26. It is therefore apparent that the contention by the applicant that they were never served with the decree is not true.
27. It is true that the decree was served earlier on and the applicants chose to ignore the same.
28. It is therefore my finding that the judgment debtor applicant should be responsible for paying the auctioneers costs and which order I hereby grant.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of;

Ngira for the Applicant/Respondent – present

Juma for Claimant/Respondent – present

Court Assistant – Fred

