



REPUBLIC OF KENYA



KENYA LAW
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**Brits Freighters Limited v Muchendu t/a Icon Auctioneers (Commercial Case E142 of 2023)
[2025] KEHC 1038 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E142 OF 2023
RC RUTTO, J
FEBRUARY 28, 2025**

BETWEEN

BRITS FREIGHTERS LIMITED APPELLANT

AND

JEREMIAH KIARIE MUCHENDU T/A ICON AUCTIONEERS. RESPONDENT

(An appeal from the Ruling and order of the Chief Magistrate's Court at Nairobi (L. Koech SRM.) delivered on 20th June 2023 in Miscellaneous Application No. E555 of 2023)

JUDGMENT

1. This appeal arises from the ruling dated 20th June 2023 in which the trial Court allowed the Respondent's Notice of Motion dated 18th April 2023 that sought the following orders, that:
 - a. The Honourable court to grant the applicant or his authorized agent Police assistance into the premises occupied by Brits Freighters Limited in order to maintain law and order and enable him to remove the attached goods and issue notification of sale for the purpose of auctioning to recover decretal sum totaling Ksh. 4,062,026 plus other incidental cost of the attachment.
 - b. The officer commanding Shauri Moyo police station or an officer under his command in the rank of an assistant inspector do hereby give assistance for the purpose of breaking into the premise and maintaining law and order.
2. The appellant dissatisfied with the ruling has now moved this court by way of an appeal as contained in the memorandum of appeal dated 3rd July, 2023. The appeal seeking to dismiss the entire ruling is premised on the following grounds, that:
 - a. The learned Magistrate erred in fact and in law in allowing the application dated 18/4/2023 seeking to attach the Applicant's properties in execution of a decree issued in a separate matter.



- b. The learned Magistrate erred in law and fact by failing to consider that some of the motor vehicles the applicant sought to attach are owned by 3rd parties and some are co-owned with various banks as evidenced by the logbooks attached to the respondent's replying affidavit.
 - c. That the learned magistrate erred in fact and law by failing to consider that the applicant in the matter had filed three similar applications seeking similar orders which are yet to be determined before the filing of the instant application.
 - d. The learned magistrate erred in law and fact by failing to consider that the yard at Bahati that the Applicant made reference to did not belong to the Respondent;
 - e. The learned magistrate erred in law and fact in failing to be guided by law and procedure in determining the matter at hand therefore arriving at the wrong conclusion; and
 - f. The learned magistrate erred in law and fact in relying on extraneous matters in allowing the application.
3. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 19th July 2024 whereas the Respondent's submissions are dated 28th October 2024.
 4. The Appellant submitted that the Respondent had filed three similar applications seeking the same orders that were sought in the application dated 18th April, 2023 the subject of this Appeal. That pursuing two processes at the same time constituted and amounted to abuse of court.
 5. The appellant urged that the trial Court failed to appreciate that the three applications were yet to be prosecuted or determined and as such the application before it was sub judice. Reference was made to the Supreme Court Case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (2002) eKLR.
 6. It was the Appellant's contention that the application ought to have been dealt with in accordance with Section 34 of the Civil Procedure Act since it touched on execution proceedings.
 7. The Appellant further submitted that some of the motor vehicles subject of the attachment were not owned by the Appellant and neither did the yard where the vehicles were parked thus the Respondent could not purport to lay claim to the vehicles in satisfaction of the decree. They referred to the case of John Muita v Benjamin Fundi Nangoje (2020) eKLR.
 8. The Respondent on their part submitted that the Application before the trial Court was not sub-judice as the application merely sought police assistance to enable the Respondent access the Appellant's premises and attach the proclaimed goods and it had nothing to do with the execution proceedings. It was their submission that the Appellant did not tender any evidence that there were other suits pending over the same subject matter and between the same parties.
 9. The Respondent further submitted that the proclamation and attachment of the Appellant's goods was already done in CMCC 1712 of 2019 and the said suit did not relate to the purpose for which the application, the subject matter of this appeal, was made.
 10. It was the Respondent's submission that no objection proceedings had been instituted, in regard to the attached goods, to challenge the ownership of the attached goods and the Appellant could not raise such an objection on behalf of any purported third owner as he was not the champion of the Objector's rights.
 11. This being the first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to re-evaluate and re-examine the lower court record and the evidence before it and



- arrive at its own independent conclusion [See *Selle v Associated Motor Boat Company Ltd* (1968) EA 123; *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR].
12. Upon consideration of the Record of Appeal and the parties' submissions there is a preliminary issue for determination, that is whether the application before the trial Court was sub-judice. The issue of sub judice is a matter of law which has the effect of disposing the Appeal.
 13. Section 6 of the *Civil Procedure Act* provides for the principle of sub judice as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
 14. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others* (Supra) the Supreme Court held that for the doctrine of sub-judice to stand, the following must be established:
 - a. There is more than one suit filed consecutively over the same subject matter;
 - b. One suit was instituted before the other;
 - c. Both suits are pending in the same court or any other court having jurisdiction; and
 - d. The suits are between the same parties or their representatives.
 15. In the present case the Appellant contends that the Application before the trial Court was sub judice because two similar applications are pending determination in the trial Court. On the other hand, the Respondent submits that the application was not sub judice and no evidence of other similar pending applications was tendered.
 16. A perusal of the record of appeal shows that two applications dated 28th September, 2022 and 1st November, 2022 were consecutively filed by the Respondent under certificate of urgency in the main suit CMCC 1716 of 2019. Both applications sought orders for police assistance to enable removal of attached goods. The applications are similar word to word as the miscellaneous application the subject of the present appeal. In both instances the Court declined to certify the matter as urgent and instead gave directions that the same be fixed for hearing at the registry.
 17. Thereafter, through a certificate of urgency dated 13th April 2023 the Respondent sought to have the Application dated 1st November, 2022 placed before a Magistrate for hearing. The Court declined the application and directed the Respondent to move the court for a hearing date from the registry.
 18. It is not clear why instead of moving the Court for such hearing date, the Respondent chose to instead file a miscellaneous application where the facts and reliefs sought are wholly similar to the earlier applications. There is nothing on record to show that the applications dated 28th September and 1st November, 2022 were ever prosecuted, determined or withdrawn thus in the absence of such information the presumption is that the same must be pending.
 19. Therefore, applying the principles established by the Supreme Court in *Kenya Human Rights Commission case* (supra) the application dated 18th April 2023, subject of this appeal, was sub-judice and in contravention of Section 6 of the *Civil Procedure Act*.



20. The learned magistrate erred in not considering whether the application was indeed sub judice and sustaining the same while there were two similar applications pending that had been filed earlier.
21. The foregoing determination is enough to conclude the Appeal. Accordingly, the court makes the following orders:
 - a. The appellant's appeal is allowed with costs.
 - b. The trial court's ruling and order delivered on 20th June, 2023 the subject of the appeal herein is set aside.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF FEBRUARY 2025

For Applicants:

For Respondent:

Court Assistant:

