



REPUBLIC OF KENYA



**Kinuthia & another v Big Step Enterprises Auctioneers & 2 others (Civil Appeal E1069 of 2024) [2025] KEHC 11380 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11380 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1069 OF 2024**

**AC MRIMA, J**

**JULY 31, 2025**

**BETWEEN**

**MUNGAI KINUTHIA ..... 1<sup>ST</sup> APPELLANT**

**MAUNDU MUSAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BIG STEP ENTERPRISES AUCTIONEERS ..... 1<sup>ST</sup> RESPONDENT**

**ISACK ALAM AILA ..... 2<sup>ND</sup> RESPONDENT**

**VINCENT OMONDI ONYANGO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. S.N Muchungi (RM) in Milimani Chief Magistrates Civil Case No. E1632 of 2021 delivered on 30<sup>th</sup> August 2024)*

**JUDGMENT**

**Background:**

1. Through an application by way of a Notice of Motion dated 2<sup>nd</sup> March 2024, Mungai Kinuthia and Maundu Musau, the Appellants herein, sought to have Big Step Enterprises Auctioneers, Isack Ilam Aila and Vincent Omondi Onyango, the Respondents herein, release Motor vehicle registration No. KBN 645A (hereinafter referred to as ‘the motor vehicle’) to them. They also sought a mandatory injunction to compel the said Respondents to furnish the Court with all documents of the sale of 8<sup>th</sup> March 2024, in respect of the said motor vehicle.
2. In its Ruling of 30<sup>th</sup> August 2024, the trial Court dismissed the application a result of which the Appellants instituted the instant appeal.



## The Appeal:

3. Through the Memorandum of Appeal dated 13<sup>th</sup> September 2024, the Appellants sought to set aside the findings of the trial Court on the following grounds: -
  1. The Learned magistrate erred in law in holding that the Sale by Auction conducted by the 1<sup>st</sup> Respondent on the 8<sup>th</sup> March 2024 was lawful.
  2. The Learned magistrate misdirected herself when she held that the advertisement in the newspaper daily circular on advertisement of the 25<sup>th</sup> March 2024 was a mistake.
  3. The Learned Magistrate erred and misdirected herself when she failed to consider the stay of execution entered into by the parties to the suit post judgment while delivering her ruling.
  4. The Learned magistrate erred in fact and in law in failing to acknowledge settlement of the entire decretal sum owed to the 3<sup>rd</sup> Respondent by the Appellants.
  5. The Learned magistrate caused a miscarriage of justice when she held that the 1<sup>st</sup> Respondent was not aware of the consent by the parties to the suit despite overwhelming evidence pointing to knowledge of the same.
  6. The learned magistrate erred and misdirected herself when she failed to consider the applicants submissions on points of fact and law raised.
  7. That the learned magistrate's decision was unjust, and was based on misguided points and wrong principles of law and has occasioned a miscarriage of justice.
4. In their written submissions dated 22<sup>nd</sup> March 2025, the Appellants stated that when judgment was entered against them in favour of the 3<sup>rd</sup> Respondent, the motor vehicle was attached in execution of the decretal sum. However, before sale was made, the Appellants approached the 3<sup>rd</sup> Respondent and agreed on a stay of execution of the decree for 21 days so as for the Appellants to make good the claim. They claimed that the 3<sup>rd</sup> Respondent contacted the 1<sup>st</sup> Respondent to ascertain the status of the motor vehicle who indicated that it had not sold it. That, on 14<sup>th</sup> March 2024, the Appellants executed a consent with the 3<sup>rd</sup> Respondents on the 21 days' stay of execution. The Appellants then submitted that the 3<sup>rd</sup> Respondent during the stay period advertised for sale of the motor vehicle through the Standard newspaper of 25<sup>th</sup> March 2024 for intended sale on 5<sup>th</sup> April 2024 and then purported to have sold the motor vehicle to the 2<sup>nd</sup> Respondent on 8<sup>th</sup> March 2024, but the sale was later overturned. The Appellants claimed that they eventually paid the decretal sum.
5. Based on the foregoing account of events, the Appellants submitted that the alleged sale of the motor vehicle was irregular since there were no bidding number obtained by the Auctioneers, the number of bids received and the number of the winning bid which are crucial indicators that would have confirmed that the bidding and eventual the sale took place. It further was their case that the Certificate of Sale and the Motor Vehicle Release Form did not have the 2<sup>nd</sup> Respondent's bidding number. The Appellants also submitted that the 3<sup>rd</sup> Respondent, the instructing principal, did not give orders to sell the motor vehicle after the consent on the stay was executed on 14<sup>th</sup> March 2024. As such, the 1<sup>st</sup> Respondent could not do more than what its principal had commanded. The Appellants further submitted that the fact that the 1<sup>st</sup> Respondent has not participated in the appeal was an indication of it having committed an irregularity. In the end, the Appellants submitted that since the sale was irregular and that they had since fully settled the claim, the only recourse would be to have the motor vehicle released to them unconditionally.



6. The Appellants drew support from *Belgo Holding Limited -vs- Kenya Urban Roads Authority* (2020) eKLR where the Court of Appeal observed thus: -

.... It is unacceptable that a Court should allow itself to be a party to an unlawful act by ignoring it and rather make an order to the benefit of the party wronged.

7. The Appellants further cited the decision in *Joseph Mbugua Gichaga -vs- Cooperative Bank of Kenya Ltd* (2005) eKLR where it was observed that: -

... A party cannot be allowed to maintain an advantageous position he has gained by flouting the law.

### **Responses:**

8. The 1<sup>st</sup> Respondent did not participate in the appeal whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the appeal through written submissions.

### **The 2<sup>nd</sup> Respondent's case:**

9. In its written submissions dated 1<sup>st</sup> April 2025, Isack Ilam Aila argued that he acquired legal and beneficial ownership of the motor vehicle having purchased it by public auction on 8<sup>th</sup> March 2024 in execution of the decree in the Nairobi [Milimani] Chief Magistrates Court Civil Case No. E1632 of 2021 [hereinafter referred to as 'the suit']. The 2<sup>nd</sup> Respondent submitted that it received formal authorization to execute the decree from the 3<sup>rd</sup> Respondent and the said instructions were never withdrawn.
10. It was its case that the 1<sup>st</sup> Respondent advertised the motor vehicle in the Star newspaper on 29<sup>th</sup> February 2024 setting the auction date for 8<sup>th</sup> March 2024. That he complied with the conditions of the auction by paying the non-refundable deposit of Kshs. 50,000/- and was declared the highest bidder for paying Kshs. 700,000/-. He asserted that he was issued with a Certificate of Sale and a release Order by the 1<sup>st</sup> Respondent on 26<sup>th</sup> March 2024. The 2<sup>nd</sup> Respondent explained that the error on the advertisement of 25<sup>th</sup> March 2025 for the sale of a vehicle was erroneous since it was in respect of a different motor vehicle, namely KCQ 112L and not the subject matter in this matter. He, therefore, asserted that the conduct of the public auction satisfied Section 21 of the *Auctioneers Act*.
11. In disputing the validity of the consent entered on 14<sup>th</sup> March 2024 by the Appellant and the 3<sup>rd</sup> Respondent, the 2<sup>nd</sup> Respondent submitted that it was between the 3<sup>rd</sup> Respondent's Advocates and the Appellant himself, instead of the 2<sup>nd</sup> Respondent's Advocates, a position he urged, was not tenable pursuant to Section 33 of the *Advocates Act* which forbids anyone not an Advocate from holding themselves out as such. He submitted that the Appellants could not execute a consent in his own name, while substantively having an Advocate on record.
12. Further to the foregoing, it was his case that the said consent was never adopted as an order of the Court, and that even if it was a valid consent, it had been overtaken by events since by 14<sup>th</sup> March 2023, when it was purportedly filed in Court, the 2<sup>nd</sup> Respondent had taken beneficial ownership of the motor vehicle as from the 8<sup>th</sup> March 2024. The 2<sup>nd</sup> Respondent submitted that contrary to the dictates of Section 107 of the *Evidence Act*, there was no proof of letter, e-mail or text by the 3<sup>rd</sup> Respondent communicating the withdrawal of instructions. In view of the foregoing failure, and the provision of Section 119 of the *Evidence Act*, this Court was invited to make an adverse inference against the 3<sup>rd</sup> Respondent.



13. The 2<sup>nd</sup> Respondent further submitted that should this Court find that there was any irregularity in the conduct of public auction, it should be considered a bona fide purchaser for value without notice. He claimed that he had no knowledge and involvement in the main suit. He drew support from the decision in *Susan K. Baur & Another -vs- Shahikant Shamji & 2 Others* (2017) eKLR where it was observed that: -

...a person suffering damage due to an irregular exercise of the power of sale will have his remedy in his damages as against the person exercising the said power.

14. In conclusion, the 2<sup>nd</sup> Respondent submitted that none of the grounds in the appeal was substantiated to warrant the interference of the ruling of the trial Court.

### **The 3<sup>rd</sup> Respondent's case:**

15. In its written submissions dated 22<sup>nd</sup> March 2025, Vincent Omondi Onyango, the decree holder, was in support of the appeal. He submitted that he informed the 1<sup>st</sup> Respondent of the consent it entered with the Appellants and directed him to halt the auction. That, pursuant to the consent he entered with the Appellants, he returned the Auctioneers cheque of Kshs. 367,637/- which was purported to be partial settlement of the decretal sum. He affirmed that the Appellants fully settled the decretal sum and urged the Auctioneers to return the motor vehicle to the Appellants but later learnt that the 1<sup>st</sup> Respondent had already sold the motor vehicle without his express instructions.

16. The 3<sup>rd</sup> Respondent submitted that having received the entire judgment sum, his interest in the matter had ceased and as such the Appellants and the 2<sup>nd</sup> Respondent ought to settle their issues.

### **Analysis:**

17. Having carefully considered the record, two issues arise for determination being: -

- i. The validity of the consent for stay of execution signed between the Appellants and the 3<sup>rd</sup> Respondent.
- ii. The lawfulness of the public auction.

18. This Court's role, as a first appellate Court, is well established. The Court of Appeal in *Susan Munyi -vs- Keshar Shiani* [2013] eKLR observed thus: -

... As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

19. Similarly, in *Abok James Odera t/a A. J. Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court set out the role of a first appellate Court in the following terms: -

... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.

20. With the foregoing guidelines, this Court will now consider the issues set out above: -

- (a) The validity of the consent for stay of execution signed between the Appellant and the 3<sup>rd</sup> Respondent:



21. This Court has taken the liberty to comb through the trial Court's file and the documents uploaded by the parties to the Judiciary's e-filing platform, known as the Case Tracking System (CTS). The instant consent is dated 14<sup>th</sup> March 2024. It requested the Executive Officer Milimani Law Courts to record the consent in the following terms: -
- a. Status quo to be maintained for a period of 21 days from the date of the consent to enable the 1<sup>st</sup> Defendant settle the entire decretal sum.
  - b. The 1<sup>st</sup> Defendant will meet the auctioneer costs together with storage charges to be agreed between the parties.
  - c. In default execution to ensue.
22. It is not readily discernible from the letter of consent whether the same was indeed received in Court. The physical copy of the consent letter has no visible Court stamp neither is the consent in the CTS. More importantly, since the 3<sup>rd</sup> Respondent's Advocates authored and had the letter executed after they had issued instructions to the 1<sup>st</sup> Respondent [Auctioneers] to execute the decree, then the said Advocates ought to have availed evidence indicating that it accordingly served the said consent letter upon adoption by the Court upon the Auctioneers. It seems that no such evidence is on record.
23. This Court is reminded of Sections 107, 108 and 109 of the Evidence Act which provide as follows, respectively: -
107. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.
  108. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
24. As was rightly observed by the trial Court, there was nothing before it to show that the alleged consent was entered into by the Appellants and the 3<sup>rd</sup> Respondent, adopted as an order of the Court and most importantly, communicated to the 1<sup>st</sup> Respondent to stop any further progress of execution. In any event, the consent had been overtaken by events since it was recorded 6 days after the sale by public auction.
25. In the premises, and in absence of a consent order giving tangible evidence instructing the 1<sup>st</sup> Respondent to halt the process, there was nothing stopping the 1<sup>st</sup> Respondent from executing the consent. Therefore, the consent was invalid and not binding upon the 1<sup>st</sup> Respondent on account of non-adoption by the trial Court and non-service.

**(b) The lawfulness of the public auction:**

26. Section 21 of the Auctioneers Act prescribes the procedure of effecting sale by auction as follows: -
21. Auction sales:
    - (1) The date, time and place of every sale by auction shall be advertised in the prescribed manner and such sale shall take place on the date, at the time and at the place so advertised.



- (2) Where any movable or immovable property is put up for sale by auction in lots, each lot shall prima facie be deemed to be the subject of a separate contract of sale.
  - (3) It shall be stated in the particulars or conditions of any sale by auction of any property whether such sale shall be subject to a reserve price or not or whether a right to bid is reserved.
27. The warrants of attachment were issued to the 1<sup>st</sup> Respondent on 22<sup>nd</sup> February 2024. For the Appellants to demonstrate the impropriety of the execution of the warrants of sale and the subsequent sale, they ought to have availed evidence of the Auctioneer's advertisement, the Certificate of sale, the impugned Gazette Notice showing discrepancy on the dates thereon and the date in the newspaper advertisement. However, no such evidence was availed before this Court. It is, therefore, difficult to ascertain any mistake as to the manner in which the motor vehicle was advertised on 25<sup>th</sup> March 2024 for sale on 5<sup>th</sup> May 2024.
28. Essentially, this Court now finds and hold that there is nothing to demonstrate that the public auction was not conducted in line with the law.

**Disposition:**

29. On the basis of the above discussion, there is no doubt that the appeal is unsustainable and the following final orders hereby issue: -
- (a) The appeal is hereby dismissed in its entirety.
  - (b) The order staying the execution of the ruling delivered on 30<sup>th</sup> August 2024 is hereby discharged.
  - (c) The motor vehicle registration No. KBN 654A held at Central Police Station shall be released to the 2<sup>nd</sup> Respondent herein, as the bona-fide purchaser, forthwith.
  - (d) The Appellants shall bear the costs of the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Asiyo, Learned Counsel for 3<sup>rd</sup> Respondent.

Amina/Michael – Court Assistants.

