



**Stanley Mugacha t/a Galaxy Auctioneers v KHS East Africa Limited & another (Civil Appeal E347 of 2020) [2024] KEHC 1838 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1838 (KLR)

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

**CIVIL**

**CIVIL APPEAL E347 OF 2020**

**DAS MAJANJA, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**STANLEY MUGACHA T/A GALAXY AUCTIONEERS ..... APPELLANT**

**AND**

**KHS EAST AFRICA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MADISON INSURANCE CO. KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. I. Orange, SPM dated 22nd May 2020 at the Nairobi Magistrates Court, Milimani in Civil Case No. 4175 of 2016)*

**JUDGMENT**

1. This is an appeal for the ruling of the trial court dated May 22, 2020 (“the Ruling”) dismissing the Appellant’s application dated 25.10.2019 seeking a determination as to who between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was responsible for payment of his costs. The Appellant’s application was heard together with the 2<sup>nd</sup> Respondent’s application seeking stay of execution of the judgment pending appeal and declaration that the proclamation and attachment of its assets on September 23, 2019 was irregular, unprocedural and illegal.
2. In the Ruling, the trial magistrate allowed the 2<sup>nd</sup> Respondent’s application, granted an order of stay of execution pending appeal on condition that the decretal sum be deposited in court within 21 days. The court dismissed the Appellant’s application on the ground that it was filed by a party not joined to the proceedings thus precipitating this appeal by the Appellant.
3. The appeal is grounded on the Memorandum of Appeal dated December 7, 2020. The Appellant prays that the court allow the appeal and determine the party to pay his charges. Although the Appellant has raised 5 grounds of appeal, the Appellant has framed two issue for determination. First, whether



the Appellant ought to have filed separate proceedings apart from the suit he was instructed to execute for determination of his charges and second, which of the Respondents should pay his charges. The parties have filed written submissions which I have considered.

4. Before I deal with the substance of the appeal, a brief outline of the undisputed facts is appropriate. On August 30, 2019, the trial rendered judgment in favour 1<sup>st</sup> Respondent against the 2<sup>nd</sup> Respondent for USD 42,000.00. Upon delivery of judgment, the court ordered stay of execution for 30 days. Thereafter, the 1<sup>st</sup> Respondent applied for execution of the decree. By a letter dated 19.09.2019, the 1<sup>st</sup> Respondent applied for warrants of attachment and sale to be issued to the Appellant. The court issued warrants of attachment and sale on September 20, 2019. Thereafter, the Appellant proclaimed the 2<sup>nd</sup> Respondent's assets on September 23, 2019. In response to the proclamation, the 2<sup>nd</sup> Respondent, by a letter dated 03.10.2019 undertook to pay the Appellant Kshs. 201,975.00 by cheque on the next day. On October 4, 2019, the Appellant collected from the 1<sup>st</sup> Respondent two cheques in its favour on account of the costs as undertaken. In the meantime, the 2<sup>nd</sup> Respondent filed its application for stay of execution on October 4, 2019 whereupon the court issued an order of stay execution pending the hearing and determination of the application.
5. From the Ruling, the trial magistrate dismissed the Appellant's application on the ground that it had been filed by a party who had not been joined to the suit. Despite the parties submitting extensively on the issue whether the Appellant was a proper party, the trial magistrate did not engage with the submission nor give reasons for coming to the conclusion that the Appellant was non suited. I also note that the 2<sup>nd</sup> Respondent's application included other prayers apart from the plea for stay of execution pending the hearing and determination of the appeal. More important and germane to this appeal is that the 2<sup>nd</sup> Respondent had prayed for a declaration that the execution be declared irregular, unprocedural and unlawful and that the 1<sup>st</sup> Respondent and its agent be ordered to pay the costs. By allowing the application, the trial magistrate in effect determined the Appellant's application. The trial magistrate did not set out any reasons for the allowing the application in its entirety.
6. It is trite law that a court must give reasons for its decision (see [Saj Ceramic Limited v Robinson Mongare](#) [2015]eKLR). That notwithstanding, this court exercising appellate jurisdiction had the power to consider the application and make its findings.
7. Whether or not the Appellant is entitled to costs depends on the propriety of the execution. This is the central issue the trial court ought to have determined. The issue of execution could not be determined in any other proceeding other than in the suit as provided for by section 34 of the [Civil Procedure Act](#) (chapter 21 of the Laws of Kenya) which states that:
  - 34(1) All questions arising between the parties to the suit in which the decree was passes, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
  - (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary order payment or any additional court fees.
  - (3) Where a question arises as to whether any person is or is not a representative of a party, such questions shall, for purposes of this section be determined by the court.
8. I hold that the court had jurisdiction to determine the issue of propriety of the execution including the question of who was to pay costs of the suit. On the issue of the lawfulness or otherwise of the



execution, there is no dispute that when the trial court rendered judgment on 30.08.2019, it also ordered a stay of execution for 30 days from that date. This means that there would be a stay of execution in force until September 29, 2019. The 1<sup>st</sup> Respondent could not execute the decree before that date hence it is beyond peradventure that proclamation issued by the Appellant on September 23, 2019 while the order of stay was still in place was in the circumstance unprocedural, irregular and unlawful.

9. Having resolved the issue of propriety of the execution it follows that the 2<sup>nd</sup> Respondent cannot be ordered to pay the Appellant's costs. The issue of such Appellant's fees remains between it and its principal, the 1<sup>st</sup> Respondent, who instructed it to proceed with execution.
10. For reasons I have set out, the appeal is dismissed but with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Makumi instructed by J. Makumi and Co. Advocates for the Appellant.

Mr Onyancha instructed by MJD Associates Advocates for the 1<sup>st</sup> Respondent.

Mr Mugambi instructed by Muthoga, Gaturu and Company Advocates for the 2<sup>nd</sup> Respondent.

