



**Emolot v Nyachoti t/a Minimax Auctioneers (Civil Appeal  
E136 of 2022) [2024] KEHC 5249 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5249 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E136 OF 2022  
RPV WENDOH, J  
APRIL 25, 2024**

**BETWEEN**

**MICHAEL NICKSON EMOLOT ..... APPELLANT**

**AND**

**JOSEPHAT NYACHOTI T/A MINIMAX AUCTIONEERS ..... RESPONDENT**

*(An appeal from the ruling of the Misc. App. No. 20 of 2022 at Rongo  
by Hon. R.K. Langat (PM) dated and delivered on 27/10/2022)*

**JUDGMENT**

- 1 Michael Nickson Emolot (the appellant) commenced this appeal against the ruling and order of Hon. R.K. Langat dated and delivered on 27/10/2022.
- 2 Before the trial court, Minimax Auctioneers (the respondent) filed an *ex parte* application dated 15/8/2022 seeking orders to repossess motor vehicle registration number KCX 190R (suit motor vehicle) upon receiving instructions from one Abdiraham Kalla Alio. The respondent's application was allowed and the learned magistrate issued orders dated 28/3/2022.
- 3 The orders by the learned Magistrate allowed the respondent to proceed with the repossession and sale of the suit motor vehicle with the assistance of the OCS Kisii Central Police Station.
- 4 Aggrieved, the appellant filed an application dated 22/9/2022 seeking among others, stay of execution and/or to set aside, annul, vary all the *ex parte* proceedings entered against the appellant on 28/3/2022 together with all the consequential orders, the appellant be granted leave to file his replying affidavit, the court to recall, a null, set aside, vary and/or cancel the proclamation of attachment of movable property issued to the respondent and the Respondent be ordered to release unconditionally the suit motor vehicle and the same be taken to Rongo Police Station for safe keeping.



- 5 The respondent opposed the application by filing grounds of opposition dated 3/10/2019 stating that the application is bad in law and amounts to an abuse of the court process. The respondent further filed a preliminary objection dated 3/10/2022 and raised the issue that the trial court lacked jurisdiction and it was functus officio.
- 6 In his findings, the trial Magistrate held that the application filed by the respondent was brought under the provisions of Rules 9 (1) (2) and (14) of the Auctioneers Rules. The orders being sought by the respondent were merely to assist him facilitate an ongoing execution process and it was not necessary that the application be served upon the appellant. To support this proposition, the learned Magistrate relied on the provisions of Rule 9 of the Auctioneer Rules. The trial court also found that it cannot sit to admit evidence since the application before it was a miscellaneous application as opposed to a suit. On that basis, the court found that it did not have jurisdiction to entertain the appellant's application and dismissed it with costs.
- 7 Aggrieved, the appellant commenced this appeal based on 9 grounds of appeal which can be condensed into the following: -
- a. The learned magistrate misdirected himself when he purported to consider and issue an interim ruling in the middle of hearing the application dated 22/9/2022 which ruling substantially jeopardised and pre - empted the determination of the application that was yet to be heard;
  - b. The learned magistrate erred in law and in fact by concluding that the provision under which the application was brought had been amended;
  - c. The trial court erred in failing to be guided by the law and procedure in determining the matter and issuing his ruling dated 27/1/2022 and therefore arriving at a wrong conclusion;
  - d. The trial court erred in law and in fact by failing to dismiss the respondent's preliminary objection with costs to the appellant.
- 8 The appellant prayed that the decision and order of the learned trial magistrate dated 27/10/2022 be set aside and/or quashed, that this court be pleased to substitute an order dismissing the respondent's preliminary objection in the subordinate court vide the original Rongo Misc. Civil Application No. 20 of 2022, that the court be pleased to substitute an order allowing the appellant's application dated 22/9/2022, costs be borne by the respondent and any other order the court shall deem fit and expedient.
- 9 Directions on the appeal were taken that the appeal be canvassed through written submissions and it is only the appellant who filed written submissions dated 3/11/2023. The appellant submitted that the respondent did not adhere to Rule 12 of the Auctioneers Practice Rules on attachment; that there was no order granted to the respondent for sale of the suit motor vehicle as the section of the law which the respondent relied on relates to attachment and sale of property after judgement.
- 10 The appellant further submitted that the respondent did not provide any order from the court effecting the transfer to a third party as a mere certificate of sale is not proof of sale and therefore the whole process did not meet the threshold under Rule 17 (5) of the Auctioneers Rules. It was submitted that the learned magistrate determined the application dated 15/3/2022 without hearing the parties; that the orders made on 15/3/2022 were final in nature as it breached the appellant's proprietary interest as the registered owner of the suit motor vehicle.
- 11 On whether the court should allow the application dated 22/9/2022 and dismiss the preliminary objection dated 3/10/2019, it was submitted that the appellant filed the application dated 22/9/2022 to reinstate the application dated 15/3/2022 to enable it to respond; that the court dismissed the



- appellant's application and relied on the grounds raised in the preliminary objection dated 3/10/2019 and this was a misdirection on the part of the court; that the appellant had a right to be heard especially if one's property is due to be sold; that the respondent did not explain what gave them the right to attach the appellant's suit motor vehicle without a valid court order.
- 12 This court was urged to allow the appellant an opportunity to defend himself in the application dated 15/3/2022 which would in fact be defending his constitutional rights under Article 50 (1) of the Constitution. The appellant further urged that this court finds merit in the appeal and allow the same as prayed.
- 13 I have considered the memorandum of appeal, the trial court's record and the submissions by the appellant. I shall consider if the appeal raises arguable issues which are merited.
- 14 This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
- 15 In this court's ruling of 27/4/2023, I found that there is nothing to stay since the subject motor vehicle had already been sold. I am now left to grapple with the propriety of the trial court's decision when it issued ex parte orders to the respondent to proceed with the sale of the suit motor vehicle.
- 16 It is not disputed from the record that the respondent filed an application dated 15/3/2022 seeking orders to attach the suit motor vehicle under instructions from one Abdiraham Kalla Alio. The grounds upon which respondent stated that he had received the instructions was due to an alleged non-payment of Kshs. 685,000/= by the appellant to one Abdiraham Kalla Alio. The appellant denied that there existed any contract entered with the respondent giving him authority to attach the suit motor vehicle for recovery of a debt.
- 17 The learned magistrate relied on the provisions of Rules 9 (1) and (2) and (14) of the Auctioneers Rules to issue the orders dated 28/3/2022 allowing the respondent to repossess the suit motor vehicle.
- 18 An auctioneer can execute instructions under two circumstances: i) through warrants of court and ii) through letters of instruction from third parties including distress for rent and repossession. This is the law under Rule 5 (1) and (2) of the Auctioneer Rules which provides: -
1. This Part shall apply to the attachment and sale of movable and immovable property under warrants of court and letters of instruction from third parties, including distress for rent and repossession, unless—
    - a. otherwise provided by any other written law; or
    - b. the court otherwise directs under the Civil Procedure Rules (Cap. 21), Sub. Leg.).
      1. A letter of instruction under subrule (1) shall be in Sale Form 1 set out in the Schedule.
- 19 Indeed, Rules 9 (1) and (2) of the Auctioneer Rules provides for police assistance where the auctioneer believes that he may need to break into a premises to seize goods and where there is a potential risk of breach of peace. Sub Rule (2) provides that the motion under this Rule shall be by way of a miscellaneous application and may be heard ex parte. Therefore, the learned magistrate was correct in finding that the said orders were properly issued to the respondent.



- 20 I have perused the application dated 15/3/2022 filed by the respondent. The application sought to recover some Kshs. 685,000/=. However, upon perusing the supporting affidavit of the respondent, there is no evidence even in the form of an agreement adduced to demonstrate how the alleged Kshs. 685,000/= was owed to Abdiraham Kalla Alio by the appellant.
- 21 In my opinion, the learned magistrate should have delved further to inquire how the alleged debt arose to warrant orders for the attachment. Certainly, this was a ground upon which the appellant sought to challenge the issuance of the ex parte order. The appellant further challenged the issuance of the ex parte order on the basis that he was ordinarily a resident of Kisii and that is why the respondent was seeking the assistance of the OCS Kisii Central Police Station to provide him with security. Thus, the Rongo Magistrate's Court did not have jurisdiction to entertain the application.
- 22 In addition to the foregone, the annexure in the draft further affidavit dated 07/1/2023 shows that the suit motor vehicle was being held jointly by the appellant and Momentum Credit Limited. The learned magistrate should have interrogated all these facts and at least hear the parties since this was an asset which after its disposal would occasion irreparable loss to the appellant. It could be that the respondent sought to obtain the warrants through concealment of facts.
- 23 It is the finding of this court that the ruling and subsequent orders of the Hon. R.K. Langat (PM) dated and delivered on 27/10/2022 in Civil Misc. Application No. 20 of 2022 were not based on sound legal principles and it calls for this court's interference.
- 24 The appeal is merited and allowed to the effect that Orders of 27/10/2022 are hereby set aside as prayed with costs to the appellant.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 25<sup>TH</sup> DAY OF APRIL, 2024**

**R. WENDOH**  
**JUDGE**

