



REPUBLIC OF KENYA



**Njuguna v Ndungu; Startruck Auctioneers Investment Ltd (Interested Party)
(Civil Appeal E229 of 2022) [2024] KEHC 7726 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E229 OF 2022**

**H NAMISI, J
JUNE 28, 2024**

BETWEEN

JOSEPH MUTUNGA NJUGUNA APPELLANT

AND

NANCY MUKAMI NDUNGU RESPONDENT

AND

STARTRUCK AUCTIONEERS INVESTMENT LTD INTERESTED PARTY

RULING

Introduction

1. The Appellant/Applicant filed a Notice of Motion dated 22nd June 2023 seeking the following orders:
 - i. That the Honourable Court be pleased to certify the Application urgent;
 - ii. That service be dispensed with in the first instance;
 - iii. That temporary stay of further execution of the judgment delivered on 5th September 2022 in Thika CMCC No 150 of 2020 be granted pending the hearing and determination of this application;
 - iv. That this court be pleased to grant a stay of further execution of the judgment delivered on 5th September 2022 pending hearing and determination of the Appeal herein;
 - v. That the attachment of the Appellant's motor vehicle registration number KBV 723F Mitsubishi Running by the Respondent's Agents M/s Chador Auctioneers be declared illegal for want of service of the proclamation;
 - vi. That the auctioneers charges be borne by the Respondent;



- vii. That the Respondent be condemned to pay damages to the Appellant for loss of use of the vehicle calculated at Kshs 20,000/= daily from 24th November 2022 until the vehicle is released;
 - viii. That the Appellant's insurer be allowed to deposit the decretal amount in an interest bearing account in the joint names of the law firm for the Respondent and the law firm for the Appellant pending the hearing and determination of the said Appeals being security for the due performance of the decree;
 - ix. That upon deposit of the decretal sum, motor vehicle registration number KBV 723F be forthwith unconditionally released to the Appellant/Applicant;
 - x. That interim orders be granted in terms of prayers 3, 8 and 9 pending the hearing of this application inter partes;
 - xi. That the costs of this application be provided for.
2. The Application is supported by the grounds on the face of the application as well as the Affidavit sworn by Eddah Ngichave Simiyu, Counsel for the Appellant, on 22nd June 2023. The Applicant filed submissions dated 18th September 2023.
 3. The gist of the Application is that judgement was entered against the Appellant in Thika CMCC No 150 of 2020 to the tune of Kshs 2,014,932, which amount the Appellant and his insurer, M/s CIC Insurance Limited, considered excessive. The Appellant filed an application for stay pending appeal in the lower court, but while the same was awaiting hearing, the Appellant's motor vehicle was attached on 24th November 2022 by Chador Auctioneers.
 4. In response thereto, the Respondent filed an Affidavit sworn on 19th September 2023, denying the allegations by the Applicant/Appellant. Additionally, the Respondent filed written submissions dated 18th September 2023.
 5. As per the Appellant's submissions, prayers 1, 2, 3, 4, 8, 9, 10 and 11 of the Application are spent, leaving this Court to consider prayers 5, 6 and 7. In essence, the issues for determination, as summarized by the Appellant, are:
 - i. Whether the proclamation and subsequent attachment (of the motor vehicle) were illegal?
 - ii. Who should bear the auctioneers' charges?
 - iii. Whether the applicant has proved his case on loss of user KBV 723F since the same was proclaimed.

Analysis

6. The Applicant has, at paragraph 8 of the Supporting Affidavit, averred that the proclamation carried out by Chador Auctioneers on 24th November 2022 was illegal. The Applicant does not go further to substantiate the illegality of the proclamation. It is in the written submissions dated 21st February 2024 that one gets a glimpse of the alleged illegality. The Applicant submitted that the proclamation was not served upon the Applicant personally, but rather was served upon the Applicant's driver, agent and/or employee, which fact was admitted by the Respondent at paragraph 8 of the Replying Affidavit.
7. The Applicant further submitted that as per the *Auctioneers Act*, Cap 526 of the Laws of Kenya, Rule 12 (1)(b) of the *Auctioneers Rules* provides that the proclamation indicating the value of the specific items and their condition ought to be signed by the owner of the goods or an adult person residing or



working at the premises where the goods are attached or repossessed. (Emphasis mine). Rule 12 (1) (g) provides for the removal of the goods under proclamation upon expiry of the grace period.

8. On the issue of loss of user since the motor vehicle was proclaimed, the same is contained at paragraph 10 of the Supporting Affidavit, where the deponent avers as follows:

That the said motor vehicle in the custody of the Auctioneers and the Appellant has informed me which I verily believe to be true that he was not served with the Proclamation and is claiming Kshs 20,000 on loss of the use of his vehicle, information which has deponed in his affidavit in support of this Application.

9. Notably, there is only one Affidavit on record in support of this Application and the same is deponed by Eddah Ngichave Simiyu on 22nd June 2023. Therefore, the Court has not had the benefit of examining any other evidence save for that presented by Eddah N. Simiyu in the aforementioned Affidavit. Nothing has been presented before this Court to demonstrate the said loss or even how the same was calculated to be kshs 20,000 daily.
10. Suffice it to say that there is nothing before this Court to suggest that the proclamation was illegal or that there was loss of user of the motor vehicle amounting to Kshs 20,000.
11. It is not lost on this Court that the Affidavit in support of the Application is sworn by Counsel for the Applicant and that the same contains contentious issues. Order 19 rule 3(1) of the [Civil Procedure Rules, 2010](#) provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

12. Further, Rule 9 of the [Advocates \(Practice\) Rules](#) states that:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

13. These Rules are intended to keep the Advocate from descending into the arena of the dispute between his clients and the adverse party. It is not always improper for an Advocate to depone on matters confined to facts that he can prove from his own knowledge. In this instance, however, Counsel for the Applicant has deponed on matters that she is incapable of proving from her knowledge, without necessitating her cross examination, such as the loss of user by the Applicant and whether or not there was proper service of the Proclamation upon the Applicant or his agent or employee. Noting that these contentious issues are the crux of the application, I find that it was not proper for Counsel for the Applicant to have sworn the Supporting Affidavit on behalf of her client.



14. The Court of Appeal expressed this concept in *Hakika Transporters Services Ltd v Albert Chulab Wamimitaire* [2016] eKLR, citing its decision in *Salama Beach Ltd v Mario Rossi*, CA No 10 of 2015:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Muniyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v Ali & 2 others*, CA. No 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

15. On the issue of costs of the Auctioneers, Rule 7 of the *Auctioneers Rules* is very clear as to who shall bear the costs. It provides that a debtor shall pay the charges of the auctioneer unless the debtor cannot be found, he has no goods upon which execution can be levied or the sale proceeds are insufficient to cover the charges.

Disposition

16. In view of the foregoing, there is no evidence that has been placed before this Court to substantiate the merit of the Application. The Application, therefore, lacks merit and is hereby dismissed. Costs in the cause.

DATED AND DELIVERED AT KIAMBU THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform In the presence of:

Ms. Maina for Respondent

Ms. Simiyu for Appellant

