



REPUBLIC OF KENYA



KENYA LAW
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**David & 2 others v Bakaya (Civil Appeal E200 of 2022)
[2024] KEHC 8304 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E200 OF 2022**

REA OUGO, J

JUNE 27, 2024

BETWEEN

ONGAGA NYAMBUOGI DAVID 1ST APPELLANT

LATEMO 22 TRAVELLERS SACCO 2ND APPELLANT

SAMUEL KAROKI 3RD APPELLANT

AND

PAUL WAFULA BAKAYA RESPONDENT

*(Being an appeal against the judgment and decree delivered by the
honorable Keyne G Odhiambo/Adjudicator in Nairobi Small Claims
Court civil cause no.425 of 2021 on the 23rd day of March 2022)*

JUDGMENT

1. This appeal emanates from two applications dated 17/02/2022 and 25/02/2022. The first application dated 17/02/2022 was seeking orders for the immediate release of motor vehicle KBV 031A, that the proclamation and notice of sale dated 19/02/2022 be lifted as well as seeking time to comply with orders issued on 25/11/2022 where they were required to pay throw away costs of Kshs.5,000 and file their response of defence.
2. In the second application dated 25/02/2022, the appellants sought orders for cancellation of the transfer of motor vehicle registration number KBV 031A and the unconditional release of the said vehicle.
3. The background of this case is that the respondent herein lodged a suit in the small claims court in Nairobi seeking damages from the appellant for injuries caused by the appellant's vehicle in an accident. The appellants failed to file their response/defence and the court proceeded to give an interlocutory judgment dated 27th July 2021.



4. The appellants moved the court vide a notice of motion on the 14th of October 2021 seeking the court to set aside the ex parte judgment and stay the execution to allow them to file a defence. The trial court on 25/11/2021 granted orders that the appellants file their defense within 7 days and pay throw-away costs of Kshs 5,000/-, failure to which the order vacating the expert judgment shall automatically lapse without further reference to the court. The matter came up for mention on 1/12/2021 to confirm compliance and the subordinate court noted that the appellants and their counsel were absent and had not complied with the orders of the court and therefore the court reinstated the ex parte judgment entered on 27th July 2021.
5. On 23/3/2022 the court dismissed the applications dated 17/2/2022 and 25/2/2022 citing that the orders sought have been overtaken by events as the vehicle has already been auctioned. The appellants filed a memorandum of appeal dated 29th March 2022 seeking to appeal the decision of the court. The appeal was premised on the following grounds:
 1. The learned adjudicators ruling was unjust, against the weight of the evidence adduced, and relied on the wrong principles of law thereby occasioning a grave miscarriage of justice to the appellants
 2. The learned adjudicator erred in law and misdirected himself when failing to find that the entire execution process pursuant to warrants of attachment extracted and issued on 26th January 2022 was flawed and tainted for failing to adhere to the prescribed law and procedure and therefore illegal and procedural.
 3. The learned magistrate erred in law in dismissing the appellants/applicants' applications dated 17th February 2022 and 25th February 2022 and thus denying the appellants the well protected right to a fair hearing and the right to defend the claim against them as envisioned in *the constitution* of Kenya, 2010.
6. The appellants sought among other orders that the appeal be allowed and that the orders issued on 23rd March 2022 be set aside and the suit reinstated. Additionally, the appellants sought to have the orders of 25th November 2021 be reinstated and the time within which to comply be enlarged, and thereafter the appellants be deemed to have complied within time. Finally, the appellants sought orders that the entire execution proceedings and sale of the appellants' motor vehicle registration number KBV 031A be declared irregular, unprocedural, illegal, null, and void and the warrants of attachment be recalled and cancelled.
7. The appellants in their written submission raised only one issue for determination which is that the respondent failed to note that the entire process of execution was irregular for the reason that the warrants of attachment and sale as well as the proclamation were not duly served upon the appellants.
8. The appellants cited Rule 12(1)(b) of the *Auctioneers Rules* which provides that "upon receipt of warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock:
 - b) prepare a proclamation in sale form 2 of the schedule indicating the value of specific items and the condition of each item such inventory 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 and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect



- c) In writing, give to the owner of the goods seven days notice in sale form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or a letter of instruction.”
9. The appellants relied on the case of *National Industrial Credit Bank Limited vs S.K Ndengwa Auctioneer* [2005] where in the Court of Appeal outlined the prescribed procedure in line with Rule 12 of the *Auctioneers’ Rules*. The appellants specifically stated that the auctioneers failed/or refused to serve the warrants as required by the law but proceeded to attach the appellant’s motor vehicle registration KBV 031 A. The appellants only became aware of the warrants and notice of sale when the motor vehicle was being attached.
 10. The appellants also relied on the case of *Lakeland Motors Limited vs Harbajhan Singh Sembi* (1998) eKLR and the case of *Hughes Limited vs Mohamed Kasam* (2008) eKLR where the court in both instances emphasized that the flagrant disregard of Rule 12(b) of the *Auctioneers’ Rules* smacks gross irregularity in the execution process and that it would be an abuse of the court process were the court to countenance such execution. The appellants urged the court to find that the entire execution process was tainted with irregularity hence this appeal should be allowed.
 11. The respondent in his written submission raised only two issues for determination; that the trial magistrate did not make an error in dismissing the appellant’s applications dated 17th and 25th of February 2022 and that the appeal was grounded on matters of fact and not law.
 12. On the first ground, the respondent invited the court to find that the appellants failed to comply with the timelines and automatically the default judgment of 27th July 2021 reverted and the respondent proceeded to execute the judgment. The respondent stated that the appellants were seeking an extension of time for compliance with orders which had already lapsed more than two months prior.
 13. The respondent cited the case of *Makueni HCCA 48 Of 2018 CIC General Insurance Co.Ltd v Phyllis Mbula* [2019] eKLR where the court held that an order sought to be enlarged lapsed long time and the court cannot enlarge a lapsed order. On such basis, the respondent urged the court to find that the judge applied the right principles of law as it could not enlarge the time for orders that have since lapsed.
 14. On the second ground, the respondent cited section 38(1) of the *Small Claims Court Act* which provides that only appeals on matters of law may be lodged to the High Court. The respondent stated that the issue of execution was a matter of fact and not law and as such should be struck off.
 15. The respondent further submitted that the ruling on 23rd March 2022 was made while the execution had already happened and therefore overtaken by events. The respondent finally submitted that if indeed the process was flawed, the appellants should use the available avenues to take proper action against the instructed auctioneers which action to date has not been taken. The respondents rested their case by urging the appeal to be dismissed with costs to the respondent.

Analysis And Determination

16. Having considered the submissions of both parties and the evidence adduced by them and their pleadings, I find only one issue for determination: whether the auction of vehicle number KBV031A was done lawfully and procedurally by the respondent and the auctioneers. Rule 12(1) (b) and (c) of the *Auctioneers Rules* provides that an inventory of the goods and their conditions as well as value and specification should be prepared and signed by the owner of the goods. Additionally, the owner of the goods should be given a 7-day notice period to try and redeem the goods if possible.



17. The jurisprudence of the court has always been that such rules do not exist in vain and are rather meant to ensure that the entire process is procedural and done lawfully. The court in the case of *Lakeland Motors Limited vs. Harbhajan Singh Sembi* Civil Application No. Nai 24 Of 1998 (11/98UR) [1998] eKLR stated that disregard of these said rules amounts to abuse of court process and should not be condoned by the court.
18. The appellants have demonstrated in their submissions that the respondent and the auctioneers did not give him the notice nor were they given the proclamation form to sign. The appellants only realized that their vehicle was up for sale when it was being attached by the auctioneers. This has not been sufficiently denied by the respondent who tendered no evidence to show that they followed the right procedure. The respondent has invited the court to find that the vehicle has already been auctioned and therefore the application is overtaken by events hence the court should disregard it. However, the court cannot entertain unlawful and unprocedural acts while taking shelter under the assertion that it has been overtaken by events.
19. In the case of *Hughes Limited vs Mohamed Kasam* (2008) eKLR the court stated that flagrant disregard and abuse of the auctioneering rules smacks gross irregularity and the court cannot countenance such an execution since it constitutes an abuse of court process. In this particular case, I am inclined to hold that the execution was done irregularly and therefore constitutes an abuse of the court process. I therefore find the entire execution process unprocedural, irregular, and unlawful.
20. However, the subject matter of the auction vehicle number KBV 031A has already passed to an innocent buyer who should not be punished for actions done by third parties. I therefore do not find merit in cancelling the entire execution process and recalling the said vehicle. The appellants have sought damages against the auctioneer for irregularly disposing off their vehicle.
21. The respondent also raised the issue concerning the orders of 25/11/2021 being reinstated as per some of the orders sought by the appellants. The order lapsed 7 days from 25/11/2021 and the request to extend the order in the applications dated 22/2/2022 was vexatious as it would not bear any fruits. In the *CIC General Insurance Co. Ltd v Phyllis Mbula* [2019] eKLR the court cited with approval the case of *NSSF vs John Ochieng Opiyo* (2006) eKLR stated that no law known which can be invoked to validate an order that has died/lapsed/expired. In this case, the appellants are seeking and asking the court to enlarge orders that ceased to exist. In my view, I agree with the trial court that such orders cannot be elongated nor validated.
22. The upshot is that the appeal partly succeeds. The court finds merit in the issue of the execution process being unprocedural and irregular. However, the court dismisses the other grounds of the appeal on the basis that the court does not find merit in them. Each party shall meet their respective costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT BUNGOMA THIS 27TH DAY OF JUNE 2024

R.E. OUGO

JUDGE

In the presence of:

Appellant- Absent

Respondent – Absent

Wilkister / Diana - C/A

