



**Saicare Enterprises Limited v Mana Pharmacy & another; Mbusera
Auctioneers (Interested Party) (Commercial Case E044 of 2019)
[2024] KEHC 12038 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E044 OF 2019
JWW MONG'ARE, J
OCTOBER 4, 2024**

BETWEEN

SAICARE ENTERPRISES LIMITED PLAINTIFF

AND

MANA PHARMACY 1ST DEFENDANT

SAMUEL OULULA WANGURA 2ND DEFENDANT

AND

MBUSERA AUCTIONEERS INTERESTED PARTY

RULING

Introduction and Background

- On 22nd November 2020, the court delivered judgment in this matter where judgment was entered for the Plaintiff against the Defendants for the sum of Kshs. 22,719,936.26/=, special damages of Kshs. 18,000.00/=, costs of the suit and interest. The Plaintiff then instructed the Interested Party (“the Auctioneer”) to begin execution of the Judgment and decree issued herein. The Auctioneer obtained Warrants of Attachment and sale of the moveable property of the Defendants and acting on the said warrants, she proceeded to the Defendants’ premises and proclaimed an assorted number of their moveable property as per the Proclamation Notices dated the 27th June 2022 (“the Proclamation Notices”). Upon the expiry of the period under the Proclamation Notices, the Auctioneer returned to the Defendants’ premises where she carted away goods and prepared a Notification of sale dated the 5th October, 2022 and on 10th July 2023 the Auctioneer conducted a public auction where they sold the said goods.



2. The aforementioned events have prompted both parties to file two applications for the court's determination. The first application is the Notice of Motion dated 14th July 2023 made under Article 50(1) of the Constitution, sections 1A, 1B, 3A 63(e) of the Civil Procedure Act(Chapter 21 of the Laws of Kenya) and Order 2 Rule 6(1), Order 2 Rules 13, Order 2 Rule 15(1)(b), (c) and (d), and Order 51 Rule 1 of the Civil Procedure Rules, 2010 where the Defendants seek the following orders:
 1. Spent*
 2. Spent*
 3. Spent*
 4. That Honourable Court be pleased to issues an order directing the Respondent and the interested party to release the Applicants' goods not listed in the proclamation dated 27th June, 2022 comprising the following:
 - a. Four laptops worth Kshs. 120,000/=
 - b. Two printers worth Kshs. 100,000/=
 - c. Four I.C.U Ventilators worth Kshs. 20,000,000/=
 - d. Two desktop computers worth Kshs. 80,000/=
 - e. Four patient monitors worth Kshs. 3,000,000/=
 - f. Two E.C.G machines worth Kshs. 1,200,000/=
 - g. Two defibrillators worth Kshs. 1,000,000/=
 5. That costs of this application to the Applicants.
3. The application is supported by the grounds on its face and the supporting affidavit of the 2nd Defendant sworn on 14th July 2023. It is opposed by the Plaintiff and the Auctioneer through the latter's replying affidavit sworn by its proprietor, Rosemary Mbuthia on 18th July 2023. The second application is the Notice of Motion dated 7th September 2023 made under Article 48 and 159 of the Constitution, sections 38 and 44 of the Civil Procedure Act and Order 22 Rules 7, 48 and 55 of the Civil Procedure Rules where the Plaintiff seeks the following orders:
 1. Spent*
 2. Spent*
 3. Spent*
 4. That upon inter partes hearing of this application, this Honourable Court be pleased to issue a prohibition order prohibiting the 2nd Judgment Debtor/Respondent from transferring, leasing or charging the property identifiable as ELD/Mun/block 14/1112 situated in Uasin Gishu County and registered in the name of the 2nd Judgment Debtor /Respondent herein and Nancy Chepkoech Rono, and all persons be prohibited from taking any benefit from any purported transfer, lease or charge.
 5. That upon inter-partes hearing of this application, this Honourable Court be pleased to make an Order directing the Uasin Gishu County Surveyor and the Land Registrar Eldoret, to sever off the joint interest of the 2nd Judgement Debtor/Respondent from land parcel LR Nos. ELD/Mun/Block 14/1112, issue a new certificate of title/lease and the same be advertised and



sold by public auction to recover the total outstanding decretal sum of Kshs. 30,919,564.91/= together with further accrued interest and costs until payment in full, upon settlement of the terms of sale by the Deputy Registrar.

6. That the costs of surveying, valuation, subdivision, issuance of new certificate of lease/title deed and Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein.
7. That costs of this application be borne by the Respondents.
4. The application is supported by the grounds on its face and the supporting affidavit of Minaxi Bhupendra Bhatia, a director of the Plaintiff sworn on 7th September 2023 and the same is opposed by the Defendants through the replying affidavit sworn on 15th November 2023 by the 2nd Defendant. The parties have also supplemented their arguments and positions by way of written and oral submissions by their respective counsel which I will make relevant references to in my analysis and determination later on in this Opinion.

The Defendants' Application

5. The Defendants state that the Auctioneers took their goods not listed in the Proclamation Notice and that the goods comprise of: Four laptops worth Kshs.120,000.00/=, Two printers worth Kshs. 100,000.00/=, Four I.C.U Ventilators worth Kshs. 20,000,000.00/=, Two desktop computers worth Kshs.80,000.00/=, Four patient monitors worth Kshs. 3,000,000.00/=, Two E.C.G machines worth Kshs. 1,200,000.00/= and Two defibrillators worth Kshs.1,000,000.00/=. That these items are the Defendants' tools of trade hence the Plaintiff's and the Auctioneers' act of carting them away denies the 2nd Defendant his right to earn a living.
6. The Defendants restate that the act of taking away goods that are not contained in the Proclamation Notice and goods that comprise of their tools of trade is a breach of the law that calls for the court intervention. They claim that they shall suffer irreparable damage unless the Court intervenes with utmost urgency and that it is in the interest of justice and fairness that the orders sought herein be granted.

The Plaintiff's and Auctioneers' Reply

7. The Auctioneer states that at no point did she cart away any goods that were never proclaimed and every item that was carted away had been duly proclaimed as required by law. She states that she is a stranger to the items listed by the Defendants in their application as having been carted away without being proclaimed as that would have been in contravention of the law. The Auctioneer contends that at all material times while conducting her duty as an auctioneer and officer of the court, she did so in accordance with all the enabling provisions of the law including the *Auctioneers Act* as well as the *Auctioneers Rules*. As such, the Plaintiff and the Auctioneer contend that hat the Defendants' application is totally misguided, unmerited and an abuse of the court's process as the same is unsubstantiated and only meant to frustrate the Plaintiff as the Decree Holder in its quest to realize the fruits of the Judgement of the court.

The Plaintiff's Application

8. The Plaintiff states that the auctioneer was only able to proclaim, attach and sale goods that only fetched Kshs. 1,582,748.00/=, leaving a balance of Kshs.30,919,564.91/= still outstanding, which amount continues to attract interest. The Plaintiff now seeks to substitute that mode of execution with attachment and sale of the Defendants' immovable properties and that to-date, they have not paid a



penny towards settlement of the said balance of the decretal amount. The Plaintiff avers that upon conducting a search at the Eldoret Land Registry, it identified Land Reference Number ELD/Mun/Block 14/1112, measuring approximately 0.3748HA, being registered in the joint names of the 2nd Defendant and Nancy Chepkoech Rono. The Plaintiff is apprehensive that the subject property may be transferred, charged or alienated in order to frustrate the execution of the decree and this application will be rendered nugatory in such event. It asserts that it is entitled to attach and sell the 2nd Defendant's joint interest in the subject property after severance under the supervision and directions of this Court in order to recover the outstanding decretal sum together with accrued interest thereon.

9. As such, the Plaintiff states that it will be in the interests of justice to grant the prayers sought herein.

The Defendants' Reply

10. In response, the Defendants depone that the ownership of Land Reference Number ELD/Mun/Block 14/1112 is in dispute and subject of court proceedings in Eldoret CMCC E & L No. E090 of 2021 but that without prejudice, the Defendants state that the property is jointly owned and not commonly owned hence it would be impossible to point out with certainty the portion owned by the Respondent and hive off such portion. That in jointly owned property, every co-owner is presumed to equally own every part of the property without pointing out any specific area owned by each co-owner, hence no joint owner may lay claim to a specific area of the property and the same cannot be subdivided in favour of either. They state that the Plaintiff's apprehension is unfounded as there is a prohibition/caution/restrictions registered on the title of the subject property as indicated in the certificate of search annexed to the Plaintiff's deposition.
11. Further to the foregoing, the Defendants state that it is abundantly clear that following the obtaining ownership question, they cannot transact in the subject property without the consent of the other purported owner as clearly captured in the certificate of search produced by the Plaintiff. That notwithstanding the pendency of ownership question in Eldoret CMCC E&L No. E090 of 2021, the Court lacks the geographical jurisdiction to grant the orders sought in the instant application as the property is situate in Eldoret. The Defendants thus urge the court to down its tools and dismiss the instant application for want of geographical jurisdiction to grant the orders sought and that in the event the Court had geographical jurisdiction, given that the ownership of the subject property is subject of another court and noting that the Court is not seized of the question of ownership, the question of ownership has to be resolved by the other court before this Court could be invited to grant the orders sought.

Analysis and Determination

12. I have carefully considered the applications and the responses and the rival written submissions thereto. Before determining the substance of the applications, I note that the Defendants challenged the geographical jurisdiction of the court to determine the Plaintiff's application on the ground that the subject property is situated in Eldoret. However, I will dismiss this objection as the the High Court is not limited by territorial jurisdiction and there is nothing that has been invoked in this matter, that limits the court's jurisdiction by reference to the location of the subject matter within Kenya (See [Iivraj v Ramzan](#) (Commercial Arbitration Cause E038 of 2023) [2023] KEHC 24066 (KLR) (Commercial and Tax) (27 October 2023) (Ruling))
13. Turning to the merits of the applications, I propose to first deal with that Defendants' application that seeks the release of goods allegedly not listed in the Proclaimed Notice. The Auctioneer denied carting away goods that were not listed in the Proclamation Notice and I agree with the Plaintiff's submission that the determination of the correct and factual position is a matter of evidence, which



the Defendants, as the alleged, are expected to surmount and prove in line with section 107 (1) and (2) of the *Evidence Act* which provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”. section 112 of the *Evidence Act* also states that, “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

14. I have gone through the Defendants’ deposition and I do not find any annexure of evidence to demonstrate that the Auctioneer carted away the said goods listed by the Defendants in their application. Save for the Proclamation Notice which contains totally different items than those listed by the Defendants in the application, I find that there is no evidence that any other items other than those listed in the Proclaimed Notice were carted away and sold by the Auctioneer. The Defendants’ allegations remain threadbare and lack proof for the court to find that the Auctioneer carted away non-listed items in the Proclamation Notices. As such, the court cannot grant the prayers sought by the Defendants in its application and therefore the same is hereby dismissed for lack of merit.
15. Turning to the Plaintiff’s application that seeks the severance of the property Land Reference Number ELD/Mun/Block 14/1112 so that the 2nd Defendant’s share can be sold in execution of the decree. The 2nd Defendant deponed that the property is subject of an ownership dispute pending before the court in Eldoret CMCC E&L No. E090 of 2021 and from the plaint annexed, the 2nd Defendant is seeking a declaration that the said Nancy Chepkoech Rono is not a legitimate co-owner of the property and it seeks an order directing the Land Registrar to strike her name from the title deed. I am inclined to agree with the Defendants that the orders sought herein by the Plaintiff appear to be premature, in light of the pending determination above. I think it will be untidy for this court to order a severance of the joint ownership when there is a suit in another court in respect of the same. Further, I am of the view that the Environment and Land Court or gazetted magistrates appointed pursuant to section 26(3) of the *Environment and Land Court Act* have the requisite jurisdiction to entertain, among others, a dispute on the severance of a joint tenancy and order such a severance (See *NSG v SCG* NRB ELCC No. 30 of 2005(O.S) [2019] eKLR)]
16. For the above reasons of jurisdiction and the pending court case, I would be hesitant to order a severance of title of the subject property as prayed by the Plaintiff.

Conclusion and Disposition

17. In conclusion and in the foregoing, it is my finding that both applications have no merit and the said applications are hereby dismissed but with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF OCTOBER 2024

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

1. Mr. Bulowa holding brief for Mr. Bryan Kahemba for the Decree Holder.
2. N/A for the Judgment Debtor.
3. Amos - Court Assistant

