



**AtanCHA v Okiro (Environment & Land Case 90 of 2016)  
[2023] KEELC 16347 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16347 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 90 OF 2016**

**M SILA, J**

**MARCH 21, 2023**

**BETWEEN**

**TOM ATANCHA ..... PLAINTIFF**

**AND**

**MARGARET NYANCHAMA MOSE OKIRO ..... DEFENDANT**

**RULING**

1. The application before me is that dated 21 February 2023 filed by the plaintiff/judgment debtor. The application seeks the following orders (corrected marginally as there are some obvious mistakes) :-
  - a. Spent (certification of urgency)
  - b. Spent (interim orders)
  - c. That the Honourable Court be pleased to set aside or raise the prohibitory order made herein on 8 December 2022 as well as all the consequential steps taken pursuant to that order.
  - d. That in the alternative to (c) above, this Honourable Court be pleased to extend the time for appealing against the formal orders of execution made herein by the Honourable Deputy Registrar starting with the prohibitory order of 8 December 2022 all the way to the order settling the terms of sale now scheduled for 22 March 2023.
  - e. That costs of this application be provided for.
2. The application is supported by the affidavit of the applicant and is opposed by the defendant/respondent.
3. To put matters into context, the applicant commenced this suit *vide* a plaint filed on 6 April 2016 against the respondent and one Mose Ukiru. He pleaded to be the registered proprietor of the land parcel Central Kitutu/Daraja Mbili/1724 (the suit property) which he pleaded was registered in his



name on 16 July 2008. He pleaded that the respondent had threatened to trespass into the suit property. In the plaint, he asked for orders for a declaration that he is the legal owner of the suit property, an order of eviction of the respondent, a permanent injunction against the respondent, general damages for trespass and/or conversion, costs and interest. It was his case that he purchased the suit property from the previous registered proprietor, one Ruby Anugrah Nyarangi, sometimes in the year 2007 and that he got title on 16 July 2008. He averred that when he bought the land there was already developed a house therein which he took possession and resided with his family. He alleged that the defendants had been visiting the land claiming to also have title to it.

4. The respondent's case was that she is the one who rightfully purchased the suit property from Ruby Anugrah Nyarangi through a sale agreement entered into on 11 September 2015. She averred to have purchased the suit property for Kshs. 5,000,000/=. She paid Kshs. 1,500,000/= and the balance of Kshs. 3,500,000/= was obtained by way of charging the property to Equity Bank Limited. She contended that the applicant was a tenant in the suit property alongside other tenants as the property had a main house, five double rooms, and three single rooms. Upon purchasing the suit property, she gave notice to the applicant but he declined to vacate. She pleaded that she was unable to get possession and was losing rent of Kshs. 44,000/= every month yet she was obligated to also pay off the loan. She asserted that the applicant's title was obtained through fraud. She lodged a counterclaim inter alia seeking mesne profits, punitive damages, and eviction of the applicant.
5. The matter was heard by Mutungi J who delivered judgment on 24 March 2017. He found that the applicant had forged the title that was in his hands. He dismissed the suit of the applicant and entered judgment for the respondent for mesne profits in the sum of Kshs. 46,000/= per month from December 2015 till vacant possession is delivered. The Honourable Judge also issued an order to permanently restrain the applicant from the suit land and awarded the respondent the costs of the suit.
6. On 5 September 2017, it was stated that the applicant has left the premises and parties entered into a consent whereby the applicant agreed to liquidate the decretal sum, then standing at Kshs. 1,650,000/=, in instalments. The first instalment of Kshs. 250,000/= was to be paid on or before 20 September 2017, the second instalment of Kshs. 250,000/= was to be paid on or before 1 October 2017, and the balance was to be paid in two equal instalments, the first to fall on or before 1 November 2017, and the other to fall on or before 1 December 2017. In default, execution was to issue. The costs of the suit were taxed by consent at Kshs. 1,400,000/= on 11 August 2017.
7. The money was not paid, and instead, what the applicant did was to file a series of applications to try and extract himself from the consent. Suffice it to say that his applications were all dismissed. The respondent did apply to have the applicant arrested and committed to civil jail. At some point the applicant appeared in court but subsequent attempts to have him arrested were not successful.
8. Through a letter dated 7 December 2022, the respondent's counsel, M/s Meroka & Company Advocates, wrote to the Deputy Registrar, abandoning execution by way of arrest, and advised the Deputy Registrar that the respondent has discovered that the applicant has a land parcel Nyaribari Chache/BB/Boburia/8996 (the attached property) registered in his name. The respondent now wished to have this property attached to satisfy the decree. On 8 December 2022, an order was issued prohibiting the applicant from dealing with the said property unless he satisfies the decree. It appears that no money was paid and the respondent appointed M/s Hegeons Auctioneers to attach and sell the said property in order to recover the monies in the decree. The auctioneer placed an advertisement in the newspapers advertising the attached property for sale, which sale is scheduled for 22 March 2023. It is then that this application was filed on 21 February 2023. It will be observed that the applicant seeks to set aside the prohibitory order and all the consequential steps taken thereafter and also wants extension of time to appeal the said orders.



9. The application is based on grounds inter alia that the attached property, though registered in name of the applicant, is held in trust for himself and his spouse; that the respondent is applying simultaneous methods of execution since he has also applied for his arrest; that what is sought to be executed is a decree allegedly passed on 17 May 2022 yet the only decree known to the applicant is that dated 24 March 2017; that the terms of sale were set simultaneously with the making of the prohibitory order on 8 December 2022; that the terms of sale were set without participation of the applicant thus making the same irregular; that the terms were set without the title being placed before the Deputy Registrar. The supporting affidavit more or less repeats the above.
10. The respondent filed a replying affidavit to oppose the motion. She avers that there is a valid judgment that has remained unexecuted because the applicant has been taking her in circles and used all means to avoid paying the decree. She has pointed to the numerous applications filed by the applicant all of which have been dismissed. She has stated that the applicant has frustrated efforts to have the decree executed by way of arrest. It is then that she appointed an investigator who informed her that the applicant owns the attached property. Through the letter dated 7 December 2022, she abandoned execution by way of arrest and applied to attach the property. A prohibitory order was then issued and she avers that it was served on 4 January 2023 upon the applicant at his residence in Nairobi, which he declined to receive, and directed service upon his advocates, which was done. She points out that the rules regarding sale of such property is in the Civil Procedure Rules and the Auctioneers' Rules of Sale. She avers that there are no objection proceedings filed by the spouse of the applicant. She admits an error in the date of decree noted but states that this does not materially affect the amount owing and does not prejudice any of his rights.
11. I invited both Mr. Malanga, learned counsel for the applicant, and Mr. Meroka, learned counsel for the respondent to file written submissions, which they both did, and I have taken them into account before arriving at my decision.
12. It is not in contention that there is judgment against the applicant. The applicant has not satisfied this judgment since the year 2017. Given that position, the respondent, as the judgment creditor, is at liberty to employ all methods of execution to satisfy the decree. One of the methods of execution is attachment of immovable property of the judgment debtor. Mr. Malanga submitted that the attachment is irregular because of the wrong date of the decree. I don't see any substance in this argument. The applicant is aware of the judgment of this court. He is also aware of the decree of this court which he states is that dated 17 May 2022. The fact that a wrong date of the decree is noted in the prohibition order is a mere error curable under Article 159 (2) (d) of *the constitution*. The wrong date does not change the fact that the applicant is yet to satisfy the judgment and decree passed herein and that is what matters. Counsel also submitted that there needs to be a formal application and cited Order 22 Rule 6 and 9. It is true that under Rule 6, one needs to apply for execution by filling and filing the Form No. 14 in Appendix A. It is also true that under Rule 9, such application is supposed to contain the particulars of the property. I have seen filed on 15 November 2022 an application in terms of Form No. 14 of Appendix A, seeking orders to have the decree satisfied by issue of warrant of attachment and sale of the land parcel Nyaribari Chache/BB/Boburia/8996. There is therefore no substance in the arguments of Mr. Malanga as the requisite application for attachment of this property was well made.
13. It is pursuant to this application that the court issued an order of prohibition of the attached property in terms of Rule 48 of the *Civil Procedure Rules*. That Rule provides as follows :-
  48. Attachment of immovable property [Order 22, rule 48.]



- (1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.
- (2) A copy of the order shall be affixed on a conspicuous part of the property.

14. I have seen that the order pursuant to the above Rule was signed on 8 December 2022. I see nothing wrong in the manner in which the property was attached and the prohibitory order was issued. The only small issue which I pointed out was the wrong date of the decree which to me is curable and I do cure it pursuant to Article 159 (2) (d) of *the Constitution*. The rest of the procedure employed in attaching the property Nyaribari Chache/BB/Boburia/8996 was proper. It follows that the property Nyaribari Chache/BB/Bobuira/8996 remains properly attached and is liable to be sold to satisfy the decree. I am not moved to set aside the prohibitory order. In fact, I do wish to emphasise that the land parcel Nyaribari Chache/BB/Boburia/8996 is so attached and is liable to be sold to satisfy the decree herein. The only issue I need to be satisfied is that the process of sale has been properly invoked.
15. Mr. Malanga submitted that there is no order of sale made pursuant to Rules 55 and 68 of Order 22. He also added that no warrants of attachment and sale have been issued to M/s Hegeons Auctioneers.
16. I will start with Rules 55 and 68 of Order 22. They provide as follows :-
  55. Power to order property attached to be sold and proceeds to be paid to person entitled  
Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.
  68. sale of immovable property  
Sale of immovable property in execution of decrees may be ordered by any court.
17. I really do not see anything in Rules 55 and 68 that may help the applicant. As I have mentioned, the Deputy Registrar did issue a prohibitory order over the subject property. The effect of an issue of a prohibitory order is that the property is now attached for purposes of satisfying a decree and no dealings should be entered over it. That prohibitory order is as good as a warrant of attachment and is in fact the equivalent of a warrant of attachment for immovable property. That by itself, in my opinion, is sufficient statement that the court has allowed that property to be attached and to be sold in order to satisfy the decree. Once a decree holder is at that stage, I do not see any other need for an application to sell the property unless the court has directed that an application for sale first be made. It will in fact be seen that both Rules 55 and 68 are not couched in mandatory terms as the word ‘may’ is employed. Unless the court has directed that an application for sale be made, or if the litigant wishes to make such application so as to clear any doubts regarding its attachment and sale, I would think that at this stage the judgment creditor is good to go with the process of disposal of the attached property so long as the prohibitory order is served. It is of course service of this order which will make the judgment debtor aware of the attachment of the property and if he intends to file any application to stem the process of sale, he is perfectly entitled to do so, giving reasons, and the court will make an assessment of the same. If there is any doubt regarding the issue of the order to sell pursuant to Rules 55 and 68, I will dispel them by making the order, which is hereby made, that the attached property may be sold in order to satisfy the decree herein.



18. Under Rule 56, a court appoints a person to conduct the sale. That Rule provides as follows :-

56. Sale, by whom conducted and how made

- (1) Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf, and shall be made by public auction in the manner prescribed.
- (2) Any court executing a decree may make orders relating to the payment of the charges for attaching the property or conducting the sale of the property and for the enforcement of such payment.

19. From the above, it is seen that sale of attached property shall be conducted by an officer of the court or other a person appointed by court and shall be by public auction. Performance of Rule 56 above, i.e appointment of the person to conduct the sale, is ordinarily done through issuance of warrants of sale. Warrants of attachment and sale are also elaborated in the Auctioneers' Rules, 1997, made under the Auctioneers Act, Act No. 5 of 1996. Rule 11 of the Auctioneers' Rules provides as follows:

11. Contents of court warrant or letter of instruction

- (1) A court warrant or letter of instruction shall include, in the case of—
  - (a) movable property—
    - (i) the decretal amount, date of decree, date of return to court or where there is no decree, the exact amount to be recovered as at a date not later than the date of the letter of instruction plus the estimated daily or monthly interest or rent to accrue thereafter;
    - (ii) the person amongst whom the decree is to be executed;
    - (iii) the exact location of goods;
    - (iv) the person to point out the goods;
    - (v) where ascertainable, a list of the goods to be attached or repossessed;
    - (vi) where appropriate, reserve prices or where there are to be no reserves prices, a record of the reasons for not selling subject to such reserve prices;
  - (b) immovable property—
    - (i) as in (i) to (v) in paragraph (a);
    - (ii) the land reference number, file number, plot number, or flat number, as the case may be;
    - (iii) the area in hectares or in square metres;
    - (iv) the user and any restrictions by statute or otherwise on the disposition of the property or any interest in it;
    - (v) the tenure and in the case of leasehold, particulars of the landlord and the annual land rent;



- (vi) the location, and in the case of land situated within a township or municipality, the amount of the most recently available annual site value tax;
- (vii) on accurate description of improvements and developments;
- (viii) the names, and addresses of encumbrancers on the title together with — (aa) the estimated amount due to any encumbrancer; and (bb) the estimated amount of arrears of land rent rates and taxes;
- (ix) the names addresses and titles of any persons in possession of the property to be sold or any part of it;
- (x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

20. Once warrants are issued to the auctioneer, he is expected to issue a notice that he proposes to sell the property. That is the notice issued under Rule 57 of the *Civil Procedure Rules*, and is known as the notification of sale. The notification of sale provides for the time and sale of the property. The auctioneer or person authorized to sell also issues a public notice of the sale and an advertisement for it pursuant to Rule 57 (1). In essence, what Rule 57 provides is for notice to the judgment debtor informing him of the sale and also notice to the public informing them of the sale. Under Rule 58, where the property being sold is immovable property, unless with the consent of the judgment debtor, the notice should be one that is of at least 30 days.

21. It is wise to tie Rule 57 and 58 of the *Civil Procedure Rules* with the Rule 15 of the Auctioneers' Rules which also provides some guidelines on sale. It is drawn as follows :-

15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
- (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

22. The above reiterates the notification of sale, which I have already addressed. What it adds, and which is a little different from Rule 58 of the *Civil Procedure Rules* is a 45 days' period of redemption for sale of immovable property. It will be recalled that Rule 58 of the *Civil Procedure Rules* provides for a period of not less than 30 days. There is a bit of a conflict here, but so that the judgment debtor is given



- the benefit of redemption, I would say that it is prudent that he be allowed the full 45 days' period to redeem before the property is advertised for sale. Notice for advertisement as seen in Rule 15 (e) above is of at least 14 days before the sale.
23. In our case, there is a notification for sale that was issued on 7 December 2022 by the Auctioneer. It is not very clear to me whether it was served, when and where, for I do not have an affidavit of service. I am aware that the respondent stated that it was served on 4 January 2023, but it is one thing stating and it is another proving, that the same was served. I expected to see a sworn affidavit of service from the auctioneer where he makes clear when the notification of sale and the public notices were served. Regretfully I have none.
24. But more importantly, has the auctioneer been appointed by issue of warrant of sale to him pursuant to Rule 56 of the *Civil Procedure Rules* and Rule 11 of the Auctioneers' Rules? I have perused the file but I have not seen any warrants issued for the attachment of the property herein. Prior to delivery of this ruling, I asked Mr. Meroka, learned counsel for the respondent, to confirm whether indeed warrants of sale were issued and he confirmed that no warrants of sale were issued. His position was that the prohibitory order issued under Rule 48 of the *Civil Procedure Rules* was sufficient and the decree holder did not need to obtain warrants of sale.
25. I am not convinced. In the letter of 7 December 2022, the respondent's counsel did apply for issuance of warrants, but of course so far, no warrants for sale have issued. It is necessary for there to be warrants of sale before attached property can be sold. It is the warrants which actually appoint the auctioneer or court broker who is supposed to execute the same and it is the warrants which give the go ahead for the sale. Without such warrant, there would be no auctioneer appointed by court to sell. As it is, this court has not issued any warrants, or other appropriate letter, appointing M/s Hegeons Auctioneers to execute the decree herein. I do not see how an auctioneer who is devoid of warrants can proceed to advertise property for sale. One must first be appointed by court otherwise anybody can proceed to sell attached property. In fact, chaos can reign, as two or more auctioneers can as well proceed to put up the property for sale, and there would be no way of distinguishing which of the two, or multiple sales should proceed. That is why there must first be issued warrants of sale, before a property can be put up for sale, for this confirms which auctioneer has been appointed and is authorized to execute the decree. It is upon receipt of the warrants of sale that the auctioneer so appointed will prepare the notification of sale and proceed as directed in the Auctioneers' Rules to dispose of the property to satisfy the decree. No auctioneer can proceed without first being appointed by the court to embark on execution and this can only be through extraction of warrants or such other appropriate letter of instruction from court.
26. In as much as it would appear that the applicant has been evading satisfying the decree herein, I think he deserves to be accorded due process. It is solely on the basis of the fact that there are no warrants of sale issued that I will order the intended sale not to proceed as scheduled on 22 March 2023.
27. I have not forgotten that there was contention that this is trust property so it should not be attached. I do not find the contention that this is trust property proven. If it was trust property, then you would expect an objection application but none has been filed. I have also not seen any encumbrance in the register of the attached property. I see no need of saying more on that point.
28. I will set aside the intended sale set for 22 March 2023 for want of proof of a letter of instruction to sell either through issue of warrants of sale or other letter of instruction from the court. I will direct the respondent to make an application for issuance of warrants of sale of the attached property and in that application specify the auctioneer or court broker who is proposed to execute the said warrants so that the court may be guided on whom to appoint if it is minded to appoint one. That application should also make clear the amount of money currently outstanding under the decree and the breakdown



thereof. Upon issue of the warrants, or other appropriate letter of instruction to sell, the steps for execution of the warrants in relation to the sale for immovable property to be followed as provided in both the *Civil Procedure Rules* and the *Auctioneers' Act*. Any requisite notices that need to be served must be served and there must be filed an affidavit of service to demonstrate that such notices have been duly served.

29. It is also my view, that since we are dealing with immovable property, it is appropriate that the property first be valued before it may be sold. I therefore issue an order to the Kisii County Government Valuer to proceed and value the subject property forthwith and no later than 14 days from service of the order and to file a valuation report within 7 days thereafter. The decree holder to extract and serve the order for valuation upon the valuer and the applicant is hereby ordered to cooperate and ensure access for the valuer into the premises for purposes of valuation. The costs of the valuation, for the moment, be shouldered by the decree holder and be recoverable from the applicant from the proceeds of sale, or if the applicant redeems the property, the same be deemed as part of the costs of the respondent.
30. For the avoidance of doubt this court has not lifted the prohibitory order placed on the property Nyaribari Chache/BB/Boburia/8996 and the prohibitory order remains. In essence the property Nyaribari Chache/BB/Boburia 8996 remains attached in satisfaction of the decree herein and what it awaits is formal issue of warrants of sale and the proper steps to be followed towards the sale of the property upon filing of the valuation report. The applicant is therefore barred from entering into any dealings over the property Nyaribari Chache/BB/Boburia/8996. It is property attached in satisfaction of the amounts pending under the decree herein, and will be sold to satisfy the decree, unless the decree is otherwise confirmed to be fully satisfied by the decree holder.
31. The applicant has partly succeeded, in that he has demonstrated that no warrants had issued, but since the applicant is yet to comply with the decree, I do not think he deserves costs. I therefore make no orders as to the costs of this application. The advertising costs and auctioneers' costs on the aborted sale will regretfully be borne by the judgment creditor since the sale was premature for want of warrants of sale or such other letter of instruction to sell. The judgment creditor is however at liberty to make an application to be awarded any costs that she shouldered towards investigations, so as to identify the attached property, and any other costs that she may have incurred towards executing the decree and which are not covered in the already taxed costs.
32. Orders accordingly.

**DATED AND DELIVERED THIS 21 DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

