



Walumbe & 2 others (Suing as the Administrators of the Estate of Eric Sifuna Walumbe - Deceased) v Mwaniki & another; Kanyoro (Objector) (Civil Appeal 332 of 2012) [2023] KEHC 21193 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 332 OF 2012
MW MUIGAI, J
JULY 31, 2023**

BETWEEN

**JANET CHONGE WALUMBE 1ST PLAINTIFF
JANET NASIMIYU 2ND PLAINTIFF
FRANCIS CHARLES WECHULI 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF ERIC SIFUNA
WALUMBE - DECEASED**

AND

**JULIUS MWANIKI 1ST DEFENDANT
JOSEPH MUENO 2ND DEFENDANT**

AND

ALICE NYAWIRA KANYORO OBJECTOR

RULING

1. There are two Notice of Motion Applications on 14.12.2022 filed by the Objector and the 1st Defendant respectively for determination.

Objector's Application Dated 14.12.2022.

2. The Application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 Rule 51 & 52, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Rule 10 of the Auctioneering Rules seeking the following orders;
 - i. Spent.



- ii. The Honourable court be pleased to enjoin the objector in the proceedings herein.
 - iii. Spent.
 - iv. The Honourable court be pleased to lift the undated proclamation issued on 13th December 2022 and the warrants of attachment thereof.
 - v. Costs of this Application be borne by the Plaintiffs.
3. The same is supported by the Affidavit of Alice Nyawira Kanyoro deposed on 14.12.2022 in which it was stated that she is the legal wife of the 1st Defendant with 50% beneficial interest on all the properties duly registered in his name. On 13.12.2022, the Honourable court be pleased to he was served with a proclamation notice from Warren Auctioneers, she was never served with the warrants of attachment or warrants of sale of property and that is when she learnt of this suit . She was shocked as she was privy to the fact that registration number KBN 447 Q was sold to the 1st Defendant on 11.07.2011 at a consideration on Kshs 1,900,000 who took possession after paying a deposit of Kshs. 570,000 but has never cleared the balance and attempts to pursue the same have been futile.
4. The Objector contends that the 1st Defendant was never served with the summons to enter appearance and pleadings and is a stranger in these proceedings. Further, that the 1st Defendant was never notified that judgment was delivered and he was not visited by the Auctioneer. She deposed that the proclaimed goods were jointly owned with the 1st defendant as part of their matrimonial property. That the motor vehicle registration number KDB 530R Toyota Vanguard that she uses to travel to work in Muranga daily was wrongly attached and is still registered in the name of Seven L General Trading Limited, not the 1st Defendant.
5. She stated that other household goods were also attached and that the Plaintiff has never issued any demand or notice to the 1st Defendant as is the rule of procedure for payment and neither has he declined to settle the decree so as to warrant the aggressive and malicious actions by the Plaintiff. The objector was apprehensive that the intentional failure to value the items without a basis was based on an ulterior motive of the Plaintiff to sell the same at throw away price to the detriment of the 1st Defendant and the objector. Further, that the law prevents proclaiming and attaching the tools and implements of trade by section 44 of the [Civil Procedure Act](#).

1st Defendant's Application Dated 14.12.2022.

6. The second Application was brought Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 9 Rule 9(a) and 10, Order 22 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. The Honourable court be pleased to set aside the entire judgment entered herein and all consequential orders issued thereof against the 1st Defendant/ Applicant herein.



- v. The 1st Defendant/ Applicant herein be granted leave to file their statement ex-debito justitiae
7. The same is supported by the Affidavit of Julius Mwanini in which he stated that he was never served with the summons to enter appearance, pleadings and/or any notice to attend court for hearing or otherwise therefore contended that he was a complete stranger to the proceedings and did not file any defence. He contended that he was not the beneficial owner of motor vehicle registration number KBN 447 Q as he sold it to the 2nd Defendant at Kshs 1,900,000 and received Kshs. 570,000 as deposit upon execution of the sale agreement on 11.7.2011 but the 2nd Defendant has never cleared the balance and attempts to pursue the same have been futile. The 2nd Defendant took possession of the motor vehicle and therefore he was shocked when his wife was ambushed by auctioneers at his matrimonial home who proclaimed and later attached some goods. He claims that he will suffer imminent and irreparable loss if the execution is not stayed and the auctioneer proceeds to attach and sell the proclaimed goods. The application herein is made without delay and it is indicated that the 1st Defendant is desirous of filing a defence.

Replying Affidavit.

8. The Plaintiff, Janet Chonge Walumbe filed a replying affidavit on 23.2.2023 in which it was deposed that the objector does not have authority to speak on behalf of the 1st Defendant. That the claim that she is entitled to 50% beneficial interest for allegedly being the 1st Defendant's wife is a matter that requires high standard of proof which has not been presented before the court.
9. Further, that she has not attached the alleged undated proclamation notice served upon her and it was within her knowledge that the auctioneer did not have instructions to serve the proclamation notice. The Objector was never a party to these proceedings and was not entitled to be served with any pleadings. That she seems to be objecting on behalf of the 1st Defendant when she has no locus to do so.
10. The Plaintiff contended that at the time of filing the suit, the 1st and 2nd Defendant were the beneficial owners of the motor vehicle KBN 447 Q as per the records and the Objector has not produced any documents to the contrary. The defendants were represented by the firm of Kinyanjui Njuguna & Company Advocates and if the subject motor vehicle had changed ownership, the said firm ought to have been brought this to the attention of the court.
11. Further, Invesco Insurance being the insurer were aware and even attempted out of court settlement of the matter and since the matter was not settled, it proceeded to full trial. The 1st Defendant was represented from the time of this proceedings to its conclusion and cannot claim that he was not served specifically coming from the mouth of the objector which is non consequential.
12. The Plaintiff stated that at the time of proclamation, the 1st Defendant was in possession of motor vehicle KDB 530R. In addition, the Objector seems to indicate that the 2nd Defendant has allegedly breached the agreement and therefore the ownership of the subject motor vehicle was still disputed. The objector has not demonstrated any direct, indirect or remote relation with the attached properties to justify the objection proceedings nor has she stated which tools or implements of tool of trade were affected the proclamation. She did not state which profession or trade she was engaged in. The court was urged to dismiss the application as it was an abuse of the court process.
13. The applications were canvassed by way of written submissions.



Objector's Submissions

14. The Objector submitted on one ground, as to whether the Plaintiff/ Respondent has attached items not fully owned by the 1st Defendant, It was submitted while citing section 6 & 9 of the *Matrimonial Property Act*, 2013 the Objector has made enough contributions in their matrimonial property, she is in gainful employment where she earns and provides for her family and commutes to work in Murang'a for gain. That the Objector/Applicant was not a party to the proceedings and her property should not be used to satisfy the decree herein.
15. The Objector submitted that she was the beneficial owner of motor vehicle registration number KDB 530 R however the registered owner was Seven L General Trading Limited. That she had met the threshold as she is not a party to the proceedings that the decree holder has indeed proclaimed her properties and she has equitable interest in the properties.
16. Reliance was placed on the case of Michael Kwena vs Raza Properties Limited & Another [2008] e KLR, Electrowatts Limited vs Countryside Suppliers Limited & Another ; Mary W. Kamau (objector) [2021] Eklr, Jared Mwangwaro Bundi & Another vs Primarosa Flowers Limited (2018) e KLR, Dubai Bank (K) Limited vs Comes-cons Africa Limited and Impak Holdings Company Limited and Arun C. Sharma vs Ashana Raikundalia T/A Raikundalia & Co advocates & 4 others [2014] e KLR, Odhiambo Owiti & Company Advocates vs Dominion Farms Limited; Sukari Industries Limited (objector) [2021] eKLR.

1stDefendant's Submissions.

17. The Applicant submitted on two issues. As regards whether the Applicant should be granted stay of execution, It was submitted that the Applicant having not been heard in the initial suit stands to suffer irreparable damages as he will be condemned unheard. Placed reliance on the case of Tabro Transporters Limited vs Absalom Dom Lumbasi [2012] eKLR.
18. On substantial loss, it was submitted that the Applicant stands to lose household goods, furniture and upon attachment, the auctioneer will eventually sell the same condemning the applicant unheard as he was not served with summons to enter appearance and the plaint. It was contended that having sold and given possession to the 2nd Defendant, he had no interest in the vehicle at the time of the accident. The motor vehicle was insured by the 2nd Defendant and his preferred insurer. He supported this position by citing the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR , G.N. Muema P/A (sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] e KLR and relying on Article 50 of *the Constitution* of Kenya, 2010.
19. The Applicant submitted that he would not be in a position to provide any security for costs as he was no longer the beneficial and bonafide owner of the motor vehicle at the time of the accident. Further, that he should not be apportioned any liability as to the accident.
20. The Applicant opined that the application has been made without unreasonable delay as he learnt of the suit on 10.12.2022 and filed the instant application on 14.12.2022
21. Secondly, as to whether the court should set aside the judgment delivered on 22.01.2019, it was submitted that the court was empowered to set aside judgment for default of appearance and defence under order 10 Rule 11 of the Civil Procedure Rules, 2010. He contended that he was not served with summons to enter appearance and this did not know of the suit. This submission was supported by the case of James Kanyita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR, Mwala vs Kenya Bureau of Standards e KLR [2001] 1 EA 148, Philip Kiptoo Chemwolo and Mumias Sugar



Company Limited vs Augustine Kubede (1982-1988) KAR, Jomo Kenyatta University of Agriculture and Technology vs Musa Ezekiel Oebal (2014) e KLR, Rayat Trading Company Limited vs Bank of Baroda & Tetezi House Limited [2018] e KLR, Ridge vs Baldin (1863) 2 ALL ER 66 and Equatorial Commercial Bank Limited vs Mohan Sons (K) Limited (2012) eKLR.

Plaintiff's Submissions.

22. The Plaintiff raised one issue, whether the objector has established her legal and/or equitable interest in the proclaimed goods or items. In addition to the averments in the Replying affidavit, it was submitted that the Objector has not annexed the log book for motor vehicle registration number KDB 530R in her name and has not established her relationship with the company Seven L General Trading Limited.
23. It was submitted that the attached good does not fall within the ambit of section 44 of the [Civil Procedure Act](#) since the objector has not demonstrated which goods or items are specifically her tools or implements of trade which will affect her performance of her profession as a teacher. At the time of instituting the suit, the motor vehicle was in the name of the 1st Defendant and the police abstract indicates the 2nd Defendant as the beneficial owner.
24. It was submitted that the subject motor vehicle was found in the compound of the 1st Defendant and the 1st Defendant has not appeared before the court to challenge the attachment. There was no substantive ground put before the court to stop the process.

Determination

25. I have considered both applications, the response thereto, the submissions of the parties and the court record. The issues for determination are;
 - a. Whether the Objector should be enjoined in this suit.
 - b. Whether the Objector has locus standi to respond to the issue of service
 - c. Whether the judgment dated 22.01.2019 should be set aside and all consequential orders issued thereof against the 1st Defendant/Applicant herein and leave to the 1st Defendant to file statement ex-debito justitiae.
 - d. Whether the proclamation and warrants of attachment thereof issued on 13th December 2022 should be lifted.

Whether the Objector should be enjoined in this suit

26. The Objector contends that she is the wife of the 1st Defendant with 50% beneficial interest on all the properties duly registered in his name and the proclamation notice has attached their matrimonial property. That the motor vehicle registration number KDB 530R Toyota Vanguard that she uses to travel to work in Muranga daily was wrongly attached.
27. It was held in the case of Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] Eklr, that: -

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”



28. In *Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector)* [2019] eKLR, the Court held: -

“The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached.”

29. In *Michael Kwena v Raza Properties Limited & Another* [2008] eKLR, the court held: -

“In a situation of man and wife, a situation that this court, has judicial notice of as a result of the discharge of duties in relation to disputes relating to man and wife property rights, the right to contribution to acquisition either directly or indirectly is almost unquestionable. Household goods are meant to be for the use of the entire family. It is therefore difficult to put a clear distinguishing line as between what belongs to the husband as opposed to what belongs to the wife. The assumption usually is that there is common usage for all the family of all the households, thus making difficult to make a clear and precise decision as to what belongs to the wife as opposed to the husband.

As observed by Ringera Judge, as he then was, the person who could be called upon to shed some light on the ownership, are the shop keepers from whom the goods were purchased. But as observed, it is not a normal practice for courts to call shop keepers to prove such purchases. The decision of who owns the households will therefore depend on whether the objector has demonstrated ability to acquire. In this courts’ opinion, the objector herein has demonstrated such an ability by virtue of her being in gainful employment and by her being a family member. The objection against the attachment of the household goods is therefore upheld.”

30. In *MHW v Thomas Ogutta Ongori; AHH (Objector)* [2019] eKLR, the Court observed: -

“The Applicant also produced receipts to prove that she had actually purchased a Hot Point fridge, assorted gas cylinders, an LG 21” TV set and assorted shop commodities including bales of wheat and maize flour. Even though she did not avail any evidence to prove that she had purchased the sofa set, coffee table, gas cooker/cylinder and floor carpet listed in the proclamation, I am prepared to find, which I hereby do, that these were her household goods since her averment that she had stopped living in the same house with the judgment debtor since year 2011 was not controverted by the respondent.”

31. I note that from the log book registered on 2.2.2021, the said motor vehicle is registered in the name of Seven L General Trading Limited, not the 1st Defendant nor the objector. Nothing has been put forward to aid the court in understanding the relationship between the objector and motor vehicle registration number KDB 530R Toyota Vanguard.

32. From the Objectors Application, there is a sale agreement attached dated 11.07.2011 between the 2 defendants, in which it is indicated that the motor vehicle has been sold for Kshs 1,900,000 and a deposit of Kshs 570,000 has been paid which the objector and the 1st defendant admit. The same agreement indicates that the log book is in the possession of the 1st Defendant to date since the full purchase price has not been paid. Why then didn’t he produce the same?



33. As regards the issue of matrimonial property being attached. This is unfortunately not the forum to determine if the objector and the 1st Defendant were married or whether or not the said property are matrimonial property. There is no marriage certificate for example to even show that prima facie that there is an existing marriage. She did not attach any receipts as proof of having purchased any of the attached properties. The objector is thus a stranger in these proceedings.
34. This court finds that the threshold for enjoining the objector has not been met and thus refused to grant the said orders.

Whether the Objector has locus standi to respond to the issue of service

35. From the application, it appears that the Objector has purported to raise an issue of service and responded to it. It is not clear in what capacity she is doing this as no authority to swear has been filed and the 1st Defendant from his supporting affidavit seems to be of sound mind and able to handle his issues personally. In the absence of any authority, I find that the Objector has no locus to respond to the issues in this matter on behalf of the 1st Defendant. She is not a party to the main suit and cannot be the one to answer to certain issues especially that of pleadings.

Whether the judgment dated 22.01.2019 should be set aside and all consequential orders issued thereof against the 1st Defendant/Applicant herein.

36. The 1st Defendant contends that he was not served with the summons to enter appearance, pleadings and/or any notice to attend court for hearing or otherwise therefore contended that he was a complete stranger to the proceedings and did not file any defence. However, from the record, the firm of Kinyanjui Njuguna came on record via a memorandum of Appearance dated 22.10.2012 for the “Defendants” and filed a statement of defence on 24.10.2012.
37. Subsequently on 17.2.2016, a consent was entered by Mr. Wahome for the defendants and Mrs Cheron for the Plaintiffs that judgment be entered against for the plaintiffs against the defendant’s jointly and severally on liability in the ratio of 10:90 with the defence taking 90% and that the matter proceeded to hearing for assessment of damages.
38. The said Mr. Wahome participated in the hearing and cross examined the witnesses. Submissions were filed on behalf of the 1st and 2nd Defendants on 6.04.2016.
39. The 1st Defendant purports to have only become aware of the matter when the auctioneers showed up at his home. He has however not responded to the issue being represented by the firm of Kinyanjui Njuguna.
40. In the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR the court stated that;

In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed.
41. The issue of regular judgment was addressed in the case Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148, where the court stated;

“ to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in



deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but *ex debito justitiae* for a court should never countenance an irregular judgment on its record.”

42. Further, the Court of Appeal observed in *James Kanyiita Nderitu & Another [2016] eKLR*, there is little option for a court but to set aside a regular judgment. The Court stated as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another -vs- Shah (1968) EA 98*, *Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75*, *Chemwolo & Another -vs- Kubende (1986) KLR 492* and *CMC Holdings -vs- Nzioka [2004] I KLR 173*.

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

43. There is no evidence of service of summons from my perusal of the record. However the fact remains that the Defendants entered appearance, filed a defence, participated in the hearing after entering a consent and were represented at the time of judgment delivery. All these facts have not been denied.

44. The issue of failure to be served with summons but entering appearance was discussed by Aburili J in the case of *Paulina Wanza Maingi v Diamond Trust Bank Limited & another [2015] eKLR* where she said as follows;

“35. In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, and the 1st defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, and six years having elapsed



since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit. Albeit the 1st defendant alleges that its key witnesses left employment and that it shall be prejudiced by the delay, this court notes that the 1st defendant has not sought for dismissal of this suit for want of prosecution as is required under Order 17 rule 35 of the Civil Procedure Rules. They have invoked very specific provisions of the law and it would be unfair and unjust if this court were to dismiss this suit for delay in its prosecution when no such application is before it for determination and or when the court has not heard the parties on a notice to show cause why the suit should not be dismissed for inaction. I am in total agreement with Honourable Jeanne Gacheche J (as she was then) in Fredrick Kibet Chesire V Paymond W. Bomet (supra) case (2006) e KLR- that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which he should enter appearance and file his defence. It also informs him of the consequences for failure to comply.”

45. I am persuaded by the finding in the case of Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another [2021] eKLR where the court observed that;

“even without the issuance and service of summons, a Defendant enters appearance or files defence or otherwise actively participates in defending its position in proceedings without protesting that it has not been served then it will be taken to have waived its right to challenge the validity of the suit on account of failure to comply with order 5 rule 1. Unless, and this is the condition, it can demonstrate that non-adherence to those provisions has prejudiced or caused it hardship which cannot be compensated in costs.”

46. In conclusion, I find that the judgment entered was regular and decline to set it aside. This suit was filed in 2012, judgment delivered in 2019 and the present applications filed in 2022. Setting aside the judgment on the accounts raised by the Applicant would not be in the interest of justice.

Whether the proclamation and warrants of attachment thereof issued on 13th December 2022 should be lifted

47. The reasons advanced by the Objector for setting aside of the proclamation are that she is the legal wife of the Applicant however for the reasons discussed earlier, I see no reason to lift the proclamation and warrants of attachment issued on 13.12.2022.

Disposition

48. In the end, I issue orders as follows;

- a. The Application dated 14.12.2022 filed by the Objector is dismissed.
- b. The Application dated 14.12.2022 filed by the 1st Defendant is dismissed.
- c. Costs of both applications are awarded to the Respondent.



**RULING DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 31ST JULY, 2023
(VIRUTAL/PHYSICAL CONFERENCE)**

M. W. MUIGAI

JUDGE

In The Presence of:

Ms Ndungu for the Applicants

No Appearance -For the Respondent

Geoffrey/Patrick - Court Assistant(s)

COURT: 30 days stay of execution granted.

M. W. MUIGAI

JUDGE

31/07/2023

