



REPUBLIC OF KENYA



**Muriuki v Njogu & another (Civil Appeal E030 of 2021)  
[2023] KEHC 24219 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24219 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E030 OF 2021  
FN MUCHEMI, J  
OCTOBER 25, 2023**

**BETWEEN**

**GRACE WANJIKU MURIUKI ..... APPELLANT**

**AND**

**ROBERT MURIITHI NJOGU ..... 1<sup>ST</sup> RESPONDENT**

**JANE WANJA MUCHIRA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Hon. A. K. Ithuku (CM)  
delivered on 17th August 2021 in Kerugoya CMCC No. 213 of 2016)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the ruling in Kerugoya CMCC No. 213 of 2016 whereby the court dismissed an application by the objector claiming that LR No. Ngariama / Rungeto/1316 is matrimonial property and therefore should not be attached and sold.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in failing to find that the appellant had legal and equitable interest in LR Nos. Ngariama / Rungeto/1316 and Ngariama / Rungeto/2771;
  - b. The learned trial magistrate erred in law and in fact in determining that joint property is available for attachment for a debt of one of the registered proprietors;
  - c. The learned trial magistrate erred in law and in fact in the manner he applied the ratio decidendi in the case of *Mukazitoni Josephine v Attorney General* (2015) eKLR thereby making a wrong



finding that the 1<sup>st</sup> respondent had absolute interest in LR No. Ngariama / Rungeto/1316 whereas the property was jointly owned.

- Parties put in written submissions to dispose of the appeal. The 1<sup>st</sup> respondent elected to not file any submissions.

### **Appellant's Submissions**

- The appellant relies on Order 22 Rule 51 of the [Civil Procedure Rules](#) and the case of [Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 4 Others](#) [2014] eKLR and submits that property that is registered jointly is not available to pay a debt or settle a decree of one of the registered proprietor. She states that LR No. Ngariama / Rungeto/1316 is registered jointly in her name and that of the 1<sup>st</sup> respondent. The appellant further states that it is not in dispute that the 1<sup>st</sup> respondent is the judgment debtor however selling land jointly owned when she is not the judgment debtor will amount to infringing her right to property.
- The appellant argues that the trial magistrate erred in relying on Section 44 of the [Civil Procedure Act](#) and allowing the attachment of joint property when the said provision does not cover properties jointly owned. Further the trial court misapprehended Section 91 of the [Land Registration Act](#) and the case of [Mukazitoni Josephine v Attorney General Republic of Kenya](#) (2015) eKLR and held that the 1<sup>st</sup> respondent owned the suit property. The appellant argues that in the said case, the court clarified that that in a joint tenancy, the ownership of the properties could not be ascertained therefore the interest of the 1<sup>st</sup> respondent in the case herein in the suit land could not be identified for attachment. Consequently, the appellant submits that LR No. Ngariama / Rungeto/1316 is not available for attachment. To support her contentions, the appellant relies on the case of [Nancy Nyambura Karori v John Githere Karanja & 2 others](#) (2018) eKLR.
- The appellant further relies on the cases of [Dubai Bank \(K\) Ltd v Come-Cons Africa Ltd & Impak Holdings Co. Ltd](#) (no citation given) and [Mugo Muiru Investments Ltd v E.W.B](#) (2017) eKLR and submits that she has a legal and equitable interest in LR No. Ngariama / Rungeto/2771. She submits that the said land parcel is registered in the name of the 1<sup>st</sup> respondent but she contributed to its acquisition. She produced the land sale agreement for the purchase of LR N. Ngariama / Rungeto/495 in which LR No. Ngariama / Rungeto/2771 was a resultant number. She further stated that she is in occupation of the said property.

### **The 2<sup>nd</sup> Respondent's Submissions**

- The 2<sup>nd</sup> respondent submits that she filed an application dated 10<sup>th</sup> February 2023 seeking to have the appeal dismissed for want of prosecution. On 30<sup>th</sup> November 2022, the court allowed the appellant's application for stay on condition that she deposits in court Kshs. 750,000/- within 30 days from the date of the order and to file and serve the record of appeal within 60 days from the date of the order. The appeal file was then to be placed before the judge for admission and in default of any of the conditions, execution was to proceed. The 2<sup>nd</sup> respondent argues that the appellant did not comply with the said timelines and served the record on 21<sup>st</sup> June 2022, which is a delay of 8months. As such, the 2<sup>nd</sup> respondent argues that the delay is inordinate and it necessitated the filing of the application dated 10<sup>th</sup> February 2023 which has been submerged in the appeal for consideration. The 2<sup>nd</sup> respondent further states that the appellant did not file any response to the said application despite being served with the same on 13<sup>th</sup> April 2023.
- The 2<sup>nd</sup> respondent relies on Order 42 Rule 13(4) of the [Civil Procedure Rules](#) and submits that the appellant did not place in her record the order granting her leave to lodge her appeal. No leave to appeal



out of time was given as provided under Order 43 Rule 2 of the [Civil Procedure Rules](#) and thus the instant appeal is incompetent and improperly before the court.

9. The 2<sup>nd</sup> respondent submits that LR No. Ngariama / Rungeto/1316 was registered in the names of the 1<sup>st</sup> respondent and the appellant who are husband and wife whereas LR No. Ngariama / Rungeto/2771 was registered in the name of the 1<sup>st</sup> respondent as a sole proprietor. The 2<sup>nd</sup> respondent states that the trial court did not err in finding that the said properties were available for attachment in satisfaction of the decree.
10. The 2<sup>nd</sup> respondent further submits that the trial court considered the decision in [Mukazitoni Josephine v Attorney General](#) (2015) eKLR before concluding that LR No. Ngariama / Rungeto/1316 which was jointly owned was available for attachment. Thus the trial court did not err in finding that the interest of each registered owner is over the whole property, which is the kind of interest covered by Section 44(1) of the [Civil Procedure Act](#).
11. Relying on the case of [Ahmed Mohammed Abdulabi v Jedidah Warui Nyaga](#) Nyeri Civil Appeal No. 9 of 2013, the 2<sup>nd</sup> respondent submits that the appellant was unable to prove that the judgment debtor had no attachable interest in the property attached. However the official searches of the said properties showed that the 1<sup>st</sup> respondent was the registered owner of the said parcels of land and therefore the two properties were available for attachment.
12. Further on the claim that LR No. Ngariama / Rungeto/2771 being matrimonial property, the 2<sup>nd</sup> respondent states that the trial court after considering the arguments and applying Section 44(1) of the [Civil Procedure Act](#) and Section 12(4)(a) of the [Matrimonial Properties Act](#) did not find that the appellant had proved her case. The 2<sup>nd</sup> respondent maintains that the judgment debtor had a registerable interest in the two properties which could be attached to satisfy the decree.

### Issues for determination

13. The main issues for determination are:-
  - a. Whether the appeal ought to be dismissed for want of prosecution;
  - b. Whether the appellant established legal and equitable interests over the proclaimed parcels of land.

### The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1 EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
15. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.



16. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

17. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

#### **Whether the appeal should be dismissed for want of prosecution.**

18. The 2<sup>nd</sup> respondent filed an application dated 10<sup>th</sup> February 2023 seeking for orders that the appeal be dismissed for want of prosecution. The 2<sup>nd</sup> respondent contends that on 31<sup>st</sup> November 2021, the court gave specific timelines within which the appeal was to be disposed of. Further that the appellant filed her memorandum of appeal on 27/8/2021 and the record of appeal on 14<sup>th</sup> June 2022 and served her on 21/6/2022.

19. I have perused the court record and noted that on 30<sup>th</sup> November the Honourable Judge granted stay on the condition that the appellant deposits in court half of the damages in the sum of Kshs. 750,000/- within 30 days of the order, further that the appellant file and serve the Record of Appeal within 60 days from 30<sup>th</sup> November 2021 and the appeal to be admitted on the 60<sup>th</sup> day. In the event the appellant failed to deposit the security as ordered, the 2<sup>nd</sup> respondent was at liberty to execute the judgment.

20. The appeal was admitted on 25/1/2022 by the judge. Thereafter the 2<sup>nd</sup> respondent filed her application dated 10<sup>th</sup> February 2023 and when the appeal came for directions, counsel for the 2<sup>nd</sup> respondent before the Deputy Registrar stated that the said application could be heard together with the appeal. Parties were directed to file submissions on the appeal.

21. I have perused the said application and noted that it is brought under Order 42 Rules 13, 35 and Order 51 Rule 1 of the *Civil Procedure Rules*. Order 42 of the *Civil Procedure Rules* contains relevant rules on how appeals and related matters should be dealt with. In my considered view, none of the rules cited under Order 42 provides for dismissal of appeals for want of prosecution in the manner that the appellant has approached the court.

22. Even if there existed a rule that allowed dismissal of appeals in that regard, the said application was overtaken by events the moment the appeal was admitted and directions taken for hearing of the appeal. By asking the court to deal with this application together with the appeal is tantamount to pushing the court to apply a reverse gear in a vehicle that has already moved forward. This approach in my view is misconceived. This application was never prosecuted at the right time. It is my considered view that the application was abandoned and I hereby so hold.

#### **Whether the appellant established legal and equitable interests over the proclaimed parcels of land.**

23. The case herein emanated from a traffic road accident which occurred on 20<sup>th</sup> July 2011 which involved the 2<sup>nd</sup> respondent as a pedestrian and the 1<sup>st</sup> respondent's motor vehicle registration number KBB 271D. As a result of the accident, the 2<sup>nd</sup> respondent sustained injuries and filed HCCC No. 3 of 2014 which was later transferred to the magistrates' court, CMCC No. 213 of 2016. Judgment was



entered in favour of the 2<sup>nd</sup> respondent as against the 1<sup>st</sup> respondent in the sum of Kshs. 1,500,000/- as general damages for pain suffering and loss of amenities and Kshs. 249,850/- as special damages. The 2<sup>nd</sup> respondent was further awarded costs of Kshs. 264,585/- and interest at the rate of 14% p.a. on special damages from 10<sup>th</sup> February 2014, when the suit was filed and 14% on general damages from the date of the award. The 1<sup>st</sup> respondent made a payment of Kshs. 290,000/- and the 2<sup>nd</sup> respondent proceeded to carry out execution proceedings to satisfy the decree resulting to the objection proceedings, the subject of the appeal herein.

24. Order 22 Rule 51 (1) of the *Civil Procedure Rules* stipulates as follows on the steps to be taken by a party claiming interest over proclaimed goods:-

A person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to court and to all the parties and to the decree holder of his objection to the attachment of such property.

25. The court is required to determine whether an objector has an interest, legal or equitable in the attached property. In *Ann C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 4 Others* [2014] eKLR the court held as follows:-

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.

26. In *Precast Poratil Structures v Kenya Pencil Company Limited & 2 others* [1993] eKLR it was held:-

The burden is on the objector to prove and establish his right to have attached property released from the attachment. On the evidential material before the court, a release from attachment may be made if the court is satisfied:-

- a. That the property was not when attached, held by the judgment debtor for himself or by some other person in trust for the judgment debtor; or
- b. That the objector holds that property on his own account.

27. The court further observed that:-

But where the court is satisfied that the property was, at the time of attachment, held by the judgment debtor as his own and not on an account of any other person, or that it was held by some other person in trust for the judgment debtor or that ownership has changed whereby the judgment debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the court shall dismiss the objection.

The court takes into account the grounds of objections raised and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.

28. In the instant case, the appellant argues that LR No. Ngariama / Rungeto/1361 cannot be attached and sold as the same is jointly owned in the name of herself and the judgment debtor and therefore the interest cannot be severed. The 2<sup>nd</sup> respondent argues that the 1<sup>st</sup> respondent is a registered owner of the land in trust and pursuant to Section 44(1) of the *Civil Procedure Act* the said properties are liable for attachment.



29. I have perused the court record and noted that the appellant and 1<sup>st</sup> respondent are husband and wife. The appellant argues that LR No. Ngariama / Rungeto/1316 is registered in both their names. A copy of an official search was annexed to buttress her argument. I have further looked at Section 44(1) of the *Civil Procedure Act* which lists property liable for attachment in execution of a decree. The said provision stipulates:-

All property belonging to a judgment debtor including property over which or over the profits of which he has disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.

30. In light of the above, it is evident that the said land parcel is available for attachment as it belongs to the 1<sup>st</sup> respondent and it is held in his name.

31. The appellant further submits that she contributed to the purchase of LR. No. Ngariama / Rungeto/2771 although she is not registered as a proprietor. Furthermore, she contends that they have established their matrimonial home on the said parcel of land. I have perused the court record and noted that the appellant did not produce any evidence to show her financial contribution to the said property. What was produced was a sale agreement in respect of 0.20ha out of LR No. Ngariama / Rungeto/495. Moreover she did not provide any evidence to show that their matrimonial home sits on the said parcel of land. In fact, the 2<sup>nd</sup> respondent stated that she knew that the appellant and the 1<sup>st</sup> respondent put up their matrimonial home on LR. NgariamaRungeto/1547 and annexed a copy of a search certificate to support her contentions. Notably, neither the appellant nor the 1<sup>st</sup> respondent controverted this fact. Moreover, Section 12 (4)(a) of the *Matrimonial Property Act* provides allows for matrimonial property to be attached to satisfy a decree. It stipulates:-

Subject to sub section (3) a spouse shall not be evicted from the matrimonial home by any person except:-

On the sale of any estate or interest in the matrimonial home in the execution of the decree.

32. The appellant had told the court during the hearing of the objection that the 1<sup>st</sup> respondent and herself had built their matrimonial home on LR. No. Ngariama / Rungeto/1316 but this contention was found to be untrue as there was evidence to the contrary. As such, the appellant failed to satisfy the court regarding her objection to the attachment.

33. It is therefore apparent that the appellant did not demonstrate that she had a legal and/or equitable interest over the said properties which would warrant the properties to be released from attachment. The 2<sup>nd</sup> respondent clearly demonstrated that at the time of attachment, the properties were held by the judgment debtor as the legal proprietor and therefore were available for attachment and sale.

## Conclusion

34. In view of the foregoing, analysis, I find that the court below did not err in dismissing the objection for the reason that the appellant failed to prove that she had sole legal and equitable interest in LR. No. Ngariama / Rungeto/1316. The law was not in her favour either that jointly owned property is free from attachment.

35. I find no merit in this appeal and it is hereby dismissed.

36. Each party to meet their own costs of this appeal.



37. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 25<sup>th</sup> day of October , 2023

