



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 99 OF 2018**

**FRANCIS LIMISI MBASIRA.....APPELLANT**

**VERSUS**

**MAURICE OKORE OMOLO.....1<sup>st</sup> RESPONDENT**

**GRACE ATIENO OYOO.....2<sup>nd</sup> RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon W. K Onkunya (SRM)**

**delivered at Kisumu in Chief Magistrate's Court Case No 231 of 2009**

**on 19<sup>th</sup> October 2018)**

**JUDGEMENT**

1. In his decision of 19<sup>th</sup> October 2018, the Learned Trial Magistrate, Hon W. K. Onkunya, Senior Resident Magistrate declined the Appellant's prayer seeking to amend a Notice of Intention to proceed with execution and raised the attachment in regard to Land parcel Kisumu/Kogony/7237. He also granted the Objector costs of the Objection proceedings that had been filed under Order 52 and 53 of the Civil Procedure Rule.

2. Being aggrieved by the said decision, on 24<sup>th</sup> October 2018, the Appellant filed a Memorandum of Appeal dated 22<sup>nd</sup> October 2018. He relied on six (6) grounds of appeal.

3. The 1<sup>st</sup> Respondent did not file any Written Submissions. However, the Appellant's Written Submissions were dated 27<sup>th</sup> January 2020 and filed on 28<sup>th</sup> January 2020 while those of the 2<sup>nd</sup> Respondent were dated 26<sup>th</sup> May 2021 and filed on 27<sup>th</sup> May 2021. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

**LEGAL ANALYSIS**

4. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and that the question that had been placed before it for considering was of whether or not the Learned Trial Magistrate erred in raising the attachment of land parcel Kisumu/Kogony/7237.

5. The Appellant's case was that he entered into an agreement with the 1<sup>st</sup> Respondent (now deceased), in which the deceased was to sell and he was to purchase L.R. No Kisumu/Kogony/1060 (hereinafter referred to as "the subject premises") for a sum of Kshs 400,000/=. The deceased breached the contract by failing to perform his part as a result of which the Appellant filed a suit seeking a refund of the aforesaid sum of money.

6. The suit was heard on merit whereupon the Trial Court entered judgment in favour of the Appellant against the deceased for the sum of Kshs 400,000/= together with interest thereon at 12.5 per annum. Costs were assessed at Kshs 77,000/= as per the Certificate of Costs and Decree. The deceased only paid Kshs 250,000/= of the decretal amount with the balance continuing to attract interest. As at 2016, the decretal sum stood at Kshs 763,625/=.

7. He conducted an official search at the Land Registry at Kisumu where he noted that the deceased had properties namely, L.R. No Kisumu/Kogony/7235 and L, R. No Kisumu/Kogony/7237 whereupon he filed a Notice of Motion application dated 2<sup>nd</sup> December 2016 seeking the said properties sold by way of public auction with a view to realising the outstanding decretal sum.
8. On 20<sup>th</sup> July 2017, the court granted preservative orders prohibiting alienation of any interests in the aforesaid (2) properties pending hearing and determination of the application. He subsequently filed another Notice of Motion application dated 11<sup>th</sup> December 2017 wherein he sought leave to commence execution proceedings in respect of the aforesaid properties. The said application came up for hearing on 26<sup>th</sup> January 2018 when counsel for the 2<sup>nd</sup> Respondent who was a registered co-owner of the aforesaid properties sought an adjournment so as to file a Replying Affidavit.
9. Subsequently, the 2<sup>nd</sup> Respondent filed an application and Notice of Objection both dated 14<sup>th</sup> September 2018 whereupon in opposition thereto, he filed Notice of Preliminary Objection dated 19<sup>th</sup> October 2018. The Learned Magistrate stayed the Ruling of his application dated 11<sup>th</sup> December 2017 and directed that the 2<sup>nd</sup> Respondent's application dated 14<sup>th</sup> September 2018 be served and the same be heard on 28<sup>th</sup> September 2018.
10. However, when his Preliminary Objection came up for hearing on 19<sup>th</sup> October 2018, the Learned Magistrate delivered a Ruling in respect of the 2<sup>nd</sup> Respondent's oral application and objection proceedings and lifted the attachment of the subject premises, which orders he termed as irregular and illegal.
11. He argued that his Preliminary Objection took precedence as on 28<sup>th</sup> September 2018, both parties fixed it for hearing on 19<sup>th</sup> October 2018 by consent. He averred that the court was unfair to have purported to give precedence to the 2<sup>nd</sup> Respondent's application which was filed after his application and vacating the preservative orders protecting the suit properties was detrimental to him as it rendered the Ruling of his application that had been stayed a mere academic exercise.
12. It was his case therefore that the Learned Magistrate erred by considering a very different issue which was not scheduled for the day as each party needed adequate notice for what is coming up for hearing and hence the ambush was prejudicial and improper.
13. In his submissions, he averred that it was premature for the Learned Magistrate to have invoked the provisions of Order 22 Rule 53 of the Civil Procedure Rules. He placed reliance on the case of **Grace Wanjiku Kageni Waiyaki vs Pegrume Limited & Another [2019] eKLR** where the court therein lifted the attachment for failure by the decree holder to comply with provisions of Order 22 Rule 54 of the Civil Procedure Rules.
14. He argued that although the 2<sup>nd</sup> Respondent filed Notice of Motion application dated 14<sup>th</sup> September 2018 together with Notice of Objection as required under Order 22 Rule 52 of the Civil Procedure Rules, the subsequent provisions in respect of the objection proceedings had not activated as had also been observed in the aforesaid case **Grace Wanjiku Kageni Waiyaki vs Pegrume Limited & Another** (Supra).
15. He submitted that the court did not issue him with the mandatory notice in writing as provided for under Order 22 Rule 53 of the Civil Procedure Rules, calling upon him to intimate in writing, within prescribed time frame, of his intention to proceed with the execution wholly or partially.
16. It was his argument that it was only upon the issuance of the said notice by the court that the court could raise the attachment. He pointed that the Learned Magistrate erred in having relied on the 2<sup>nd</sup> Respondent's letter dated 5<sup>th</sup> October 2018, which he denied to have ever been served with, and the fact that he did not file an intention to proceed with the attachment of the aforesaid properties.
17. He added that whereas the court had failed to comply with the mandatory provisions of Order 22 Rule 53 of the Civil Procedure Rules, he had nonetheless filed Notice of intention to proceed with execution and Replying Affidavit as prescribed by law. To buttress his point, he relied on the case of **Chai Trading Co Limited vs Muli Mwanzia & 2 Others [2019] eKLR** where the court affirmed that the duty of the court to call upon the judgment creditor to intimate his options is couched in mandatory terms.
18. He contended that he erroneously indicated the particulars of one of the suit properties as Kisumu/Kogony/7232 instead of 7237, owing to typographical error. It was his argument that the Learned Magistrate denied him opportunity either to amend notice or regularise the error under Article 50 or 159 of the Constitution of Kenya, 2010. He argued that the court ought to have allowed him regularize the typographical error as the 2<sup>nd</sup> Respondent would not suffer any prejudice for the reason that she was aware that the two properties in issue were 7235 and 7237 and the typing of the parcel number as 7232 instead of 7237 was mere technicality which he ought to have been allowed to correct for substantive justice to be served.
19. He pointed out that he had suffered for years in pursuit of justice and it was the duty of the court to assist him and not frustrate him. He added that he had in fact sought for leave to attach the aforesaid properties and his Ruling having been stayed, there was no attachment to warrant objection proceedings. He thus averred that the court's orders were erroneous and issued in *vacuo*. He urged the court to allow his appeal and condemn the 2<sup>nd</sup> Respondent to pay costs of these proceedings.
20. On her part, the 2<sup>nd</sup> Respondent submitted that on 19<sup>th</sup> October 2018, she sought leave to file a Further Affidavit based on new information the nature of which was likely to influence the court's decision and further applied that attachment of the subject property be raised for the reason the Appellant's Notice of Intention to proceed with attachment did not include the said subject property, notice of her application having been given to the Appellant vide a letter dated 5<sup>th</sup> October 2018.

21. She argued that the letter dated 5<sup>th</sup> October 2018 was served upon the Appellant and an affidavit of service by Robert Ouma Njoga dated 19<sup>th</sup> October 2018 was duly filed on even date. She added that in fact that service was admitted by the Appellant.
22. It was her submission that that the Learned Magistrate granted the orders she had sought in the interests of justice and further deferred the Preliminary Objection to 16<sup>th</sup> November 2018 to enable parties to file further affidavits and submissions on the same.
23. She asserted that the Appellant had failed to demonstrate how and why the Learned Magistrate erred by hearing both parties on her two (2) aforementioned oral applications that she made. She added that it is settled law that leave of court is mandatory before a party can file additional affidavits after and that such leave can only be granted by the court upon a party's application or *suo moto* in appropriate cases.
24. She added that the letter dated 5<sup>th</sup> October 2018 was just a call to the court to exercise its jurisdiction as the said parcel of land was omitted from the list of the suit properties which the Appellant had intimated his intention to proceed with its attachment.
25. She relied on the case of Abdalla Ali Hussein Mohamed vs Clement A. Ojiambo & Others [2013] eKLR where it was held that where a decree holder does not intimate his intention to proceed with the attachment, the objector may request by way of a letter for the attachment to be lifted and that where he files an application instead, then the court is obliged to investigate the title and make inferences from the material before it.
26. She added that the Appellant had not been denied the chance of being heard but rather that it was merely the hearing that was deferred upon the application for leave to file further affidavit. She was categorical that the Appellant was not complaining about the grant of leave to file further affidavit as this was what led to the deferment of his Preliminary Objection but rather that she was raising a technical objection on the procedure which did not demonstrate the prejudice, if any, he had suffered by the proceedings of the court on the said 19<sup>th</sup> September 2018.
27. She invoked Article 159 (2)(d) of the Constitution of Kenya 2010 and relied on the case of Raila Odinga vs IEBC & Others [2013] eKLR where the court held that Article 159(2)(d) of the Constitution simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice.
28. She distinguished the case of Grace Wanjiku Kageni Waiyaki vs Pegrume Limited & Another (Supra) in that it was the Appellant who set in motion the procedural breaches that he was complaining about by prematurely filing the notice to proceed with attachment pursuant to the provisions of Order 22 Rule 52 of the Civil Procedure Rules before receiving a written invitation from the court to do so.
29. She submitted that failure on the part of the court to invite the Appellant under Order 22 Rule 52 did not prejudice him as the same was a mere irregularity that has not occasioned any injustice since the lodged his notice under the said provision of law and to hold otherwise would amount to undue reliance on procedural technicality.
30. She added that having lodged a notice of intention to proceed with attachment pursuant to Order 22 Rule 52 of the Civil Procedure Rules, he Appellant could not claim that he was prejudiced in any way by the court's failure to invite him to intimate his intention to attach. She submitted that this was akin to approbating and reprobating.
31. In this regard he relied on the case of Republic vs Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria [2010] eKLR where the court cited with approval the holding in Evans vs Bartlam [1937] 2 ALL ER 649 at page 652 where Lord Russel of Killowen said;

**“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”**

32. She further submitted that in the case of Chai Trading Co Ltd vs Muli Mwanza & 2 Others (Supra), it was held that the duty of the court to call upon a judgment creditor to intimate his options in objection proceedings was for case management purposes.
33. On the issue on typographical error the Respondent argued that the same was not part of the grounds of the appeal in the memo of appeal dated 22<sup>nd</sup> October 2021 and was therefore an afterthought being irregularly sneaked into the appeal. She urged the court to ignore this argument as it is new and is not properly before this court as no leave had been sought to add new or additional grounds of appeal.
34. Objection proceedings are provided for under Order 22 Rule 51 to 55 of the Civil Procedure Rules, 2010.
35. Order Rule 22 Rule 52 of the Civil Procedure Rules provides as follows

**“Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall ((emphasis court) call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”**

36. Order 22 Rule 53 of the Civil Procedure Rules further provides that:-

**“Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed**

**by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall (emphasis court) make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”**

37. Order 22 Rule 54 of the Civil Procedure Rules stipulates that:-

**“If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.”**

38. It was this court’s understanding that Rule 52 requires the attaching creditor to respond to a valid notice only if called upon by the court to respond by a notice in writing. The Appellant herein despite not being invited by court to do so, proceeded to file a notice of intention which was to this court’s view premature.

39. This court found it superfluous for the Appellant to claim that he had been prejudiced by the court not inviting him to intimate his intention on whether he was proceeding with the attachment and yet in his own motion, he filed the notice of intention. The Appellant could not therefore purport to say that he was prejudiced.

40. Having said so, a perusal of the proceedings showed that on 19<sup>th</sup> October 2018, the Appellant applied for leave to put in a formal application to amend the Notice of Intention to proceed with the execution. He sought for seven (7) days to do so. On the other hand, the 2<sup>nd</sup> Respondent’s counsel objected to the same and termed the said application as an abuse of the court process. The Learned Magistrate therefore directed that he would deliver a Ruling at 2.00pm. There was no indication what this Ruling was in respect of.

41. A further reading of the Ruling of the Learned Magistrate showed that he proceeded to give a Ruling of the 2<sup>nd</sup> Respondent’s application for objection proceedings. He observed that the subject property was not part of the listed properties the Appellant wished to proceed to execute. He concluded that time had lapsed by effluxion of time (sic) and therefore raised the attachment over the subject property.

42. This court agreed with the Appellant that the Learned Magistrate denied him an opportunity to fully present his case as envisaged under Article 50 (1) of the Constitution of Kenya that provides that every person is entitled to have his dispute decided in a fair hearing before a court.

43. Going further, the Learned Magistrate erred in law when he disregarded the provisions of Article 159 (2)(d) of the Constitution of Kenya that provides that courts are mandated to administer justice without undue regard to procedural technicalities. Indeed, in his oral submissions to the court, the Appellant’s counsel informed the court that they wished to proceed with execution of L.R. No Kisumu/Kogony/7237 and that the indication of the property as L.R. No Kisumu/Kogony/7232 was a typographical error that ought to be amended and he cited the provisions of Article 50 (4) (sic) and Article 159(2)(d) of the Constitution of Kenya.

44. In any event, Section 100 of the Civil Procedure Act Cap 21 (Laws of Kenya), the Procedure under which the Notice of Intention to proceed with execution had been brought provides that amendments ought to be freely allowed subject to compensation by way of costs, if need be. The said Section provides that:-

**“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”**

45. In addition, any party can make an oral application to amend any pleading. Order 8 Rule 8 of the Civil Procedure Rules states that:-

**“The court may hear and determine an oral application made under this Order.”**

46. It is worthy of note that the Appellant did not in fact make an oral application to amend the Notice of Intention to execute but rather he sought to make a formal application to amend his Notice of Intention to Execute. Order 8 Rule 5 of the Civil Procedure Rules stipulates that:-

**“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”**

47. The Learned Magistrate’s Ruling on the question of whether the subject property was listed by the Appellant and/or whether the attachment was raised by effluxion of time was premature and denied the Appellant an opportunity to argue on why he ought to have been allowed to amend the said Notice of Intention to Execute.

48. Going further, this court noted that on the same day of 19<sup>th</sup> October 2018, the Appellant’s counsel implored upon the court to determine the Appellant’s Preliminary Objection before acting on the 2<sup>nd</sup> Respondent’s letter of 5<sup>th</sup> October 2018.

49. Notably, on 28<sup>th</sup> September 2018, Hon R.M. Ndombi RM who was handling the matter at the time directed that the Appellant’s Preliminary Objection dated 14<sup>th</sup> September 2018 would be heard on 19<sup>th</sup> October 2018.

50. The Learned Magistrate erred in not having acceded to this request and agreed with the Appellant that the hearing of the consideration of the 2<sup>nd</sup> Respondent's letter of 5<sup>th</sup> October 2018 was an ambush to the Appellant considering that as was mentioned hereinabove, the Learned Magistrate did not indicate what the Ruling was on.

51. Having considered the respective parties' Written Submissions, this court came to the firm conclusion that the Learned Magistrate erred in having denied the Appellant an opportunity to amend his Notice of Intention to Execute, in proceeding to consider the objection proceedings when there was pending Preliminary Objection, in proceedings with the substantive matter for the 2<sup>nd</sup> Respondent when the date was specifically scheduled for the hearing of the Appellant's Preliminary Objection dated 14<sup>th</sup> September 2018 and in not considering that there was a pending Ruling that had been stayed that definitely had an implication on the objection proceedings.

52. Indeed, as the Appellant argued correctly, he had sought leave to execute and hence no attachment had since taken place necessitating the orders the Learned Magistrate issued. The court agreed with the Appellant that the orders was issued in *vacuo*.

53. It was this court's considered view that this was therefore a good case for it to exercise its discretion in setting aside the orders made on 19<sup>th</sup> October 2018 by the Learned Trial Magistrate.

#### **DISPOSITION**

54. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 24<sup>th</sup> October 2018 was merited and the same be and is hereby allowed. The effect of this decision is that the orders that were made by the Learned Magistrate be and are hereby set aside and/or vacated. The 2<sup>nd</sup> Respondent will bear the Appellant's costs of this Appeal.

55. It is hereby directed that this matter be placed before the Chief Magistrate Kisumu Law Courts on 14<sup>th</sup> October 2021 for allocation of this matter to any other magistrate other than the Learned Magistrate who handled this case.

56. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021**

**J. KAMAU**

**JUDGE**