REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

ELECTION PETITION NO. 1 OF 2017

BETWEEN

WAVINYA NDETI.....1ST PETITIONER

PETER MATHUKI.....2ND PETITIONER/1ST APPLICANT

-VERSUS-

INDEPENDENT ELECTRORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MACHAKOS COUNTY RETURNING OFFICER.....2ND RESPONDENT

ALFRED NGANGA MUTUA.....3RD RESPONDENT

-AND-

TEKA GENERAL

MERCHANDISE LIMITED.....OBJECTOR/ 2ND APPLICANT

RULING

1. This ruling is the subject of two applications dated 3rd September 2021 and 17th September 2021 seeking an injunction restraining 3rd Respondent by himself, his agents, servants and or employees or any person acting on his behest from auctioning, selling, disposing off, alienating, levying execution, attachment, sequestration and/or distress against any assets or in any other manner interfering with the Objector/2nd Applicant's and 2nd Petitioner /1st Applicant properties.

2. These proceedings are the offshoot of the proceedings which were the subject of this petition arose in which the Court awarded costs of Kshs 5,002,450/- to the Respondents. The current proceedings are challenging the execution process.

3. The applications are two pronged. It is contended that no proper service of the proclamation notice was made to the 2nd Petitioner/Applicant as required by the ***Auctioneers Rules, 1997***. According to the Applicants, the 2nd Petitioner, who is a director of the Objector, works in Arusha at East African Community. However, an unclear Proclamation Notice was sent to him via WhatsApp on 8th August, 2021 contrary to the Rule 12(1)(b) of the ***Auctioneers Rules, 1997***.

4. In support of his case the 2nd Petitioner relied on Rule 12(1)(b) of the ***Auctioneers Rules, 1997*** which provides that;

> ***"12 (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—***
>
> ***(b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that***

effect."

5. According to the Applicants, the above provision is cast in mandatory terms and the 3rd Respondent's agents, Sumumu Auctioneers, were under obligation to ensure that the same was complied with by including in the proclamation a schedule indicating the value of specific items and the condition of each item and ensure that such inventory is signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed. In the event where any of the foregoing persons refuses to sign such an inventory the auctioneer ought to have signed a certificate to that effect. According to the Applicants this provision was never complied with. In support of this position the Applicants relied on **Lakeland Motors Limited vs. Harbhajan Singh Sembi Civil Application No. Nai 24 Of 1998 (11/98UR) [1998] eKLR**, where the Court of Appeal held that;

> ***"There does not appear to be any provision in the Auctioneers Act, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule [Rule 12 (1)(b) of the Auctioneers Rules]. Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution."***

6. It was contended that from the principles set out in the foregoing authority, it is evident that the complacent manner in which the 3rd Respondent's agent filled the Proclamation form hardly met the statutory threshold as "the value of **specific items** and the condition of **each item**," ought to have been set out by the auctioneer who should also have ensured that such inventory was signed by the owner of the goods or an adult person residing or working at the premises where the goods were attached or repossessed and in the event that the said persons refused to sign such an inventory the auctioneer ought to have signed a certificate to that effect . In this case the Applicants' case is that the 3rd respondent's agent casually prepared the proclamation notice by failing to include all the details and information as required by the ***Auctioneer's Rules.*** Further reliance was placed on **Hughes Limited vs. Mohammed S Kassam [2008] eKLR** where the court rendered itself thus;

> **"The question therefore is whether there was attachment in execution of decree in accordance with the law. There was not. The auctioneers' failure to prepare an itemized inventory of the goods attached indicating the condition of each specific item and the value thereof renders the purported attachment fatally flawed. It is not for nothing that rule 12 (b) exists. It is to ensure that the specific goods attached and their conditions and values are clearly known. This would ensure that there are no unnecessary disputes regarding what may or may not have been attached. It would also ensure that there is transparency in the subsequent sale of such attached goods and the proceeds thereby realized."**

7. According to the Applicants, in light of the uncontroverted evidence, the 3rd Respondent's agents failed to comply with the Rule 12 (1)(b) of the ***Auctioneers Rules, 1997***. It was therefore argued that the failure by the 3rd respondent's agents to comply with the Auctioneers Rules marred the entire proclamation process and therefore the proclamation by Samumu Auctioneers under instructions from 3rd Respondent was unlawful, illegal and unprocedural and should be declared null and void and be set aside**.**

8. The other limb of the Applications was that upon receipt of the said Proclamation, the 2nd Petitioner forwarded a copy thereof to the office of the objector, Teka General Merchandise, who was not a party to the election petition proceedings but has a legal, equitable and beneficial interest in the properties set out in the proclamation of attachment by the agents of the 3rd Respondent and hence stands to suffer substantial financial loss should the items be carted away and the eventual auction proceeds.

9. It was contended that the properties so listed in the Proclamation do not belong to the 2nd Petitioner/1st Applicant and that the 2nd Petitioner/1st Applicant and the Objector/2nd Applicant are two distinct persons each having capacity to be sued and/or enjoined in proceedings in their own capacity and that the Objector/2nd Applicant bears no liability to the 3rd Respondent. In support of their case the Applicants relied on Order 22 rule 51(1) of the ***Civil Procedure Rules*** and submitted that the objector has the burden of proof in relation to the facts in issue and relevant to the objection and that generally speaking, the facts in issue in any case are those disputed issues of fact which a party must prove to succeed and obtain a ruling in its favour. In this regard the Applicants relied on **Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 Others [1993] eKLR and Grace Wanjiru Mbugua vs. Philiph Karumi Matu [2009] eKLR** for the position that the burden is on the objector to prove and establish his right to have the attached property released from the attachment.

10. In this case it was contended that the crux of the of the objector' s case is that the properties listed in the proclamation notice did not belong to the 2nd Petitioner but to the objector, who is an independent and separate legal entity from the 2nd Petitioner and it does not hold any of the properties proclaimed in trust for the 2nd Petitioner. In support of the legal status of the Objector, the Applicants relied on **Kolaba Enterprise Ltd vs. Shamsudin Hussein Varvani & Anor. (2014) eKLR**.

11. In this case, it was contended that at the time of the purported proclamation, the goods were in possession and control of the Objector and it held and continues to hold the said goods in its own account and not in trust for the 3rd Respondent. Reliance was placed on **Chotabhai M. Patel vs. Chaprabhi Patel [1958] EA 743** and **David Muhenda & 3 Others vs. Margret Kamuje Succession Cause No. 9 of 1999** and it was contended that the objector has proved on a balance of probabilities that the subject goods legally belonged to it and they were under its possession and control at the time of the decree, subsequent proclamation and attachment by Samumu Auctioneers is untenable since the objector herein has never been sued as a party by the 3rd Respondent and the 3rd Party has failed to controvert the evidence by the objector as to that legal or equitable title, or beneficial interest upon the attached goods to entitle him the right of attachment in execution of the decree. The Applicants' contention was therefore that the identified suit property was wrongly proclaimed and attached by the 3rd Respondent. In support of its case the Applicants relied on the right to private property under Article 40 of the Constitution

12. The Applicants also revealed that the 1st and 2nd Respondent were actively involved in out of court negotiations hence this matter is a proper and justifiable one for Court annexed mediation since parties are all senior officials who are amenable to mediation.

13. It was further urged that the 3rd Respondent should bear the cost of these Applications for he has callously through his agents failed to comply with the provisions of ***Auctioneers Rules*** and has proceed to attach good that belong to an entity which was not a party in the proceedings which the judgement he seeks to execute was obtained.

14. In response to the Application dated 3rd September, 2021 the 3rd Respondent relied on the following grounds:-

1. The Application offends the Respondents' right to access to justice as envisaged under Article 48 of the Constitution, 2010.

2. The firm of Lumallas Achieng & Kavere is not properly on record for not seeking leave to come on record after Judgment in this matter had already been delivered on 21st December, 2018 as per Order 9 Rule 9 of the Civil Procedure Rules, 2010.

3. The Applicants' Counsel is yet to comply with this requirement of the law and therefore the Application herein is still an abuse of the process of court for reason that it has been brought by a firm which is not properly before the court as they did not seek leave to enter appearance and file a notice of appointment and are thus mere busy bodies.

4. The orders obtained on 12th August, 2021 by the Applicant's Counsel were therefore fraudulently obtained and the same ought to be set aside.

5. The Application offends the maxim grounded under section 107 of the Evidence Act, Cap 80 Laws of Kenya that asserts that *"he who alleges must prove"* by failure to attach documents to prove ownership.

6. That further to the above, the 2nd Applicant has failed to prove ownership of the properties namely livestock, tractor, water boozer and household goods at paragraph 2 of the supporting affidavit of Teresia Nthenya sworn on 3rd September, 2021, furthermore none of the annexures by the Applicants speak to the properties proclaimed, and as such the Application is baseless and has laid no basis to warrant the grant of the prayers sought.

7. That failure by the 2nd Applicant to prove ownership of the properties outlined in paragraph 2 of the supporting Affidavit of Teresia Nthenya sworn on 3rd September, 2021 warrants the presumption that the said goods belonged to the 1st Applicant since they were found in his house.

8. Further to the above, the 1st Applicant herein participated in Election Petition Appeal No. 8 of 2018, being an appeal against the judgment issued in this matter by Hon. Justice A. O. Muchelule in the court of Appeal and also in Election Petition Appeal no. 11 & 14 of 2018 in the supreme court. It is worth noting that the supreme court in its judgment of 21st December, 2018, the court reinstated Hon. Justice A. O. Muchelule's judgment in its entirety and therefore dismissed the Petitioners' petition and made the award Kshs. Five Million (Kshs. 5, 000, 000/-) to the 1st and 2nd Respondents and Kshs. Five Million (Kshs. 5, 000, 000/-) to the 3rd Respondent in respect to costs yet the 2nd Applicant has made no attempts to settle the said debt.

9. The instant application is a further attempt by the Applicants to proliferate litigation.

10. The Applicant has not furnished this court with any plausible or sufficient reasons to warrant this Honorable Court to exercise its discretion and grant the orders sought under Order 40 Rule 1 (a & b) of the Civil Procedure Rules, 2010.

11. The Application herein is scandalous, an afterthought, a non-starter, speculative, vexatious and premature.

12. The Application herein lacks merit, it's a non-starter and the same ought to be dismissed with costs.

15. In respect of the application dated 17th September, 2021 the 3rd Respondent relied on the following grounds:-

1. The Application offends the Respondents' right to access to justice as envisaged under Article 48 of the Constitution, 2010.

2. The application does not meet the threshold applied in such applications and is meant to delay the 3rd Respondent's enjoyment of the fruits of judgment.

3. The application offends the principles in the celebrated case of Giella-versus- Cassman Brown & Co. Ltd (1973) E.A 358.

4. The Applicants have failed to prove that they would suffer irreparable loss that cannot be compensated by an award of damages to warrant the grant of the prayers sought in their application.

5. The instant application is a further attempt by the Applicants to proliferate litigation.

6. The Applicant has not furnished this court with any plausible or sufficient reasons to warrant this Honorable Court to exercise its discretion and grant the orders sought under Order 40 Rule 1 (a & b) of the Civil Procedure Rules, 2010.

7. The Application herein is scandalous, an afterthought, a non-starter, speculative, vexatious and premature.

8. The Application herein lacks merit, it's a non-starter and the same ought to be dismissed with costs.

16. It was submitted on behalf of the Respondent that the firm of Lumallas Achieng & Kavere is not properly on record for not seeking leave to come on record after Judgment in this matter had already been delivered on 21st December, 2018 as per Order 9 Rule 9 of the ***Civil Procedure Rules, 2010*** which makes it mandatory for any change of Advocates after judgment has been entered be effected, that there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. It was submitted that this was not done by the firm of Lumallas Achieng & Kavere and the court was urged not to turn a blind eye to this situation where the Rules are flagrantly breached. In this regard reliance was placed on the case of **James Ndonyu Njogu vs. Muriuki Macharia [2020] eKLR**.

17. It was submitted that although the Applicants have a Constitutional right to be represented, there are clear provisions of the law regulating the procedure of such representation, and this court ought to ensure that the same is adhered to hence the procedure set out under Order 9 Rule 9 is mandatory and cannot be termed as a mere technicality. On those grounds alone, it was submitted that the firm of Lumallas Achieng & Kavere is not properly on record and are thus mere busy bodies and has no legal standing to move the Court on behalf of the Applicants and therefore all pleadings filed by it ought to be struck out.

18. On the merits of the Application dated 3rd September, 2021, it was submitted that this application offends the maxim grounded under section 107 of the Evidence Act, Cap 80 Laws of Kenya that asserts that "*he who alleges must prove"* by failure to attach documents to prove ownership. According to the Respondent, the 2nd Applicant has failed to prove ownership of the properties namely livestock, tractor, water boozer and household goods at paragraph 2 of the supporting affidavit of Teresia Nthenya sworn on 3rd September, 2021, furthermore none of the annexures by the Applicants speak to the properties proclaimed, and as such the Application is baseless and has laid no basis to warrant the grant of the prayers sought.

19. According to the 3rd Respondent, failure by the 2nd Applicant to prove ownership of the properties outlined in paragraph 2 of the supporting Affidavit of Teresia Nthenya sworn on 3rd September, 2021 warrants the presumption that the said goods belonged to the 1st Applicant since they were found in his house. Reliance was placed on the case of **Stephen Kiprotich Koech vs. Edwin K. Barchilei; Joel Sitienei (Objector) [2019] eKLR** which cited the case of **Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others [1993] eKLR** and it was submitted that the objector has failed to prove the ownership of the properties outlined in this application and/or failed to attach any evidence of ownership of the properties by the 2nd Applicant nor is there evidence of legal possession by it and it cannot be tendered in evidence in these proceedings or their own and without any other material for legal title or possession in equity as prove that the 2nd Applicant 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 and as such this court cannot grant the orders sought in the application dated 3rd September, 2021.

20. Regarding the merits of the application dated 17th September, 2021 it was submitted that this application offends the Respondent's right to access to justice as envisaged under Article 48 of the Constitution, 2010 as well as the principles in the celebrated case of **Giella-versus-Cassman Brown & Co. Ltd (1973) E.A 358** *and* restated, together with their mode of application in ***Nguruman Limited vs. Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012.** It was submitted that the Applicants have failed to prove that they would suffer irreparable loss that cannot be compensated by an award of damages to warrant the grant of the prayers sought in their application.

21. It was therefore the 3rd Respondent's position that the applications dated 3rd September, 2021 and 17th September, 2021 are a further attempt by the Applicants to proliferate litigation. They are scandalous, an afterthought, a non-starter, speculative, vexatious, premature lack merit, are non-starter and the same ought to be dismissed with costs.

Determination

22. I have considered the foregoing. It is contended that the firm of Lumallas Achieng and Kavere, the firm that has made the two applications did not come on record procedurally as the said applications were made after judgement. That the said two applications were filed after judgement is not in dispute. Order 9 rule 5 of the ***Civil Procedure Rules*** provides that:

> ***A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.***

23. Order 9 rule 9 of ***the Civil Procedure Rules*** provides as follows:

> ***When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.***

24. In **John Langat vs. Kipkemoi Terere & 2 Others (2013) eKLR**, **Muchelulue, J** expressed himself as hereunder:

> **"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the**

judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates

"without an order of the court."

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."

25. In **Loise Wambui Karigu & another vs. Joel Gatungo Kiragu & Another [2016] eKLR**, **Limo, J** expressed himself as hereunder:

It is important to note that the provisions of *Order 9 rule 9* were put in place to cover some mischief by a party who after being represented by an advocate in the entire trial decides to abandon the same advocate after judgment without addressing the issue of legal fees earned to that date. It was also intended to ensure that the advocates or parties on the other side are kept informed about the change of address for service of any further court process. The intention of the drafters of this rule was noble and aimed at having some order in civil practice. In the case of LALJI BHIMJI SHANGANI BUILDERS & CONTRACTORS –VS- CITY COUNCIL OF NAIROBI [2012]eKLR the High Court in Nairobi presided over by Hon. Justice Odunga struck out an application by a defendant who did not comply with *Order 9 rule 9* of the *Civil Procedure Rules* and made the following observation:-

> *"A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."*

The court went further to quote with approval the holding by Hon. Sitati Judge, in MONICA MORAA –VS- KENINDIA ASSURANCE CO. LTD. [2010] eKLR where the court held as follows:

> *"……there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached…"*

The applicant's counsel submitted that the provisions of *Order 9 rule 9* do not apply to miscellaneous applications but after judgment has been entered usually what remains is the execution or application for stay or such other application such as the present application. The firm of Rugaita & Co. Advocates deserved to be informed of intention of his client to engage the services of another firm of advocates. The other parties to the said suit also deserve to be notified of the new change of address hence the need to comply with the said rules. In the absence of such leave of court as provided by the law, the application dated 10th February, 2016 is incompetent and is struck out with costs."

26. In answer to this issue, the Applicants have contended first that the firm of Lumallas Achieng and Kevere Advocates does not require leave to file an application on behalf of the Objector. That submission is correct because the leave is only meant to protect the advocate who is on record for a party in the proceedings. Since the objector is not a party to the proceedings, leave is not necessary and is not required for his advocate to commence objection proceedings.

27. Secondly, it is contended that the firm of Lumallas, Achieng and Kavere was acting alongside the firm of advocates that was acting for the 1st Applicant herein hence no need for it to seek leave. With due respect, acting alongside another firm of advocate is different from acting for a party. While there is completely nothing wrong with the firm of advocates on record seeking assistance from another firm or one advocate seeking assistance from another advocate, the firm that is recognised as being on record for the purposes of filing pleadings and costs remains the advocate which was acting for the party and not the assisting counsel or firm.

28. I associate myself with the position adopted in **James Ndonyu Njogu vs. Muriuki Macharia [2020] eKLR** that:

"The reasoning behind the provision was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where the judge observed as follows:

> **"…In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him…."**

5. In the case of Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR the Court held as follows:

> **"A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."**

The court went further to quote with approval the holding by Hon. Sitati Judge, in Monica Moraa –vs- Kenindia Assurance Co. Ltd. [2010] eKLR where the court held as follows:

> **"……there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached……."**

29. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

30. In **Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651,** the Court of Appeal held that:

> **"The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.**

31. I associate myself with the decision of the Court of Appeal (**Kiage, JA**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

> **"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."**

32. In **Taracisio Githaiga Ruithibo vs. Mbuthia Nyingi Civil Appeal No. 21 of 1982; [1984] KLR 505,** it was held that no court, could wish away the Rules of Court so ignobly.

33. Accordingly, I agree with the 3rd Respondent that the applications or reliefs sought on behalf of the 2nd Petitioner/ 1st Applicant herein by the firm of Lumallas, Achieng and Kavere are incompetent for the failure by the said firm to seek and obtain leave after the judgement was entered.

34. As regards the application by the Objector, Order 22 rule 51(1) of the ***Civil Procedure Rules*** provides as follows;

> ***Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 the court and to all parties to the decree-holder, of his objection to the attachment of such property.***

35. Under the said provision, what the court is to determine is whether the Objector has an interest, legal or equitable in the attached property. In **Arun C. Sharma versus Ashana Raikundalia T/A 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."***

36. In the case of in **Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 others [1993] eKLR the court expressed itself thus:**

> ***'The burden is on the objector to prove and establish his right to have the 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.***
>
> ***(1) 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***
>
> ***(2) that the objector holds that property on his own account."***

37. The court continued to observe:-

> **"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 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 Judgement-Debtor has been divested of the property in order to evade execution on 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."**

38. Once the Objector proves that then the Court makes an order raising the attachment as to the whole or a portion of the property subject to the attachment.

39. For a person to properly bring himself within the ambit of Order 22 rule 51(1) of the ***Civil Procedure Rules,*** he has to meet certain conditions. First he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof. Second, he must prove that execution of his property has been levied in execution of the said decree. Third, he must prove that he is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of the decree. Fourth, he must prove that no payment out of the proceeds of sale of such property has been made.

40. In this case, the Objector's case is that it is a stranger to the proceedings the subject of the execution proceedings herein, yet its properties have been attached. Where the objector is a legal entity and the judgement debtor is a natural person, the properties of the legal person cannot be attached in execution of a debt owed by the natural person even if the natural person is a director or shareholder of the legal person since as was appreciated by **Gikonyo, J** in **Kolaba Enterprise Ltd vs. Shamsudin Hussein Varvani & Anor. (2014) eKLR** where it was appreciated: -

> **"that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved…"**

41. This is in line with the decision of the Court of Appeal in **Hannah Maina T/A TAA Flower vs. Rift Valley Bottlers Limited [2016] eKLR** where the court held that:-

> **"In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned judge. The authority that she cited, RE: SOUTHARD LIMITED [1979] 3 ALL ER 565 is quite apt:**
>
> > **"… a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."**

42. However, in determining these proceedings, it is important for the court to make a finding that the Objector is not the same person as the Judgement Debtor. In other words, it is important that the Objector sufficiently discloses its identification in order to prove that it is a separate and distinct entity from the Judgement Debtor. Where the Objector is a legal person, as the Objector herein contends, it is prudent that the certificate of incorporation be exhibited so as to prove that the Objector is in fact a different person and not the Judgement Debtor trading under a different name. In this case, the Objector surmounted that hurdle successfully.

43. From the documents exhibited it is not in doubt that the Objector herein was not a party to these proceedings and no order has been made against it in these proceedings. It claims that its properties were attached in execution against the Defendant herein. However, there is no evidence at all that the proclaimed properties belong to the Objector. I agree with the position adopted in **Chotabhai M. Patel vs. Chaprabhi Patel [1958] EA 743** and **David Muhenda & 3 Others vs. Margret Kamuje Succession Cause No. 9 of 1999** where the court stated as follows:

> **"Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the objector, and in all other respects as if he was a party to the suit. The objector shall adduce evidence to show that at the date of attachment he has some interest in the property attached. The question to be decided is, whether on the date of attachment, the judgement debtor or the objector was in possession or where the court is satisfied that the property was in possession of the objector, it must be found whether he held it on his own account or in trust for the judgement debtor. The sole question to be investigated is, thus one of possession of and some interest in the property."**

44. It is therefore the duty of the Objector to disclose all material facts including how its goods found themselves in the Judgement Debtor's premises since section 109 of the ***Evidence Act***, Cap 80, Laws of Kenya, places the burden of proof on him by providing that: -

> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.***

45. Where there serious and credible doubts raised as to the veracity of the Objector's allegations, the Court may well be entitled to disregard the Objector's claim. I therefore associate myself with the holding in the case of **Grace Wanjiru Mbugua –vs- Philip Karumi Matu [2009]**

eKLR where it was observed as follows:-

> **"The Decree-holder has created sufficient doubt in the mind of the court as to the veracity of the objector's contentions. Because of the glaring omissions on the part of the objector, the court can only infer that such information, if provided by the Objector, would have been prejudicial to her case"**

46. As was appreciated by the Court of Appeal in **Abdalla Ali Hussein Mohamed vs. Clement A. Ojiambo & Others Civil Appeal No. 118 of 1997:**

> **"Where the 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 but where he instead files an application then the Court is obliged to investigate the title and make inferences from the material before her…Where an alleged transfer of a motor vehicle is made when the execution of the decree is about to be made the Court is entitled to assume that the sale was not genuine and was intended to avoid the due process of execution…It remains for the court to decide, in this instance, if the transfer to the objector was genuine or was done with a view to avoid the process of execution and as already stated, the court agrees with the learned Judge in regard to the inferences she drew. She could not have inferred otherwise…It is not for the objector to raise the issue that once a Judgement creditor has taken a particular step in execution he is barred from taking up any other mode of execution as he cannot speak for the Judgement debtor…Section 8 of the Traffic Act simply states that unless the contrary is proved, the person in whose name the motor vehicle is registered is deemed to be the owner; in other words the fact of registration is only *prima facie* evidence of ownership and contrary facts can show otherwise and in this case there was sufficient material before the learned Judge to conclude that such registration was effected to avoid the execution of the decree."**

47. In the absence of any evidence that the proclaimed properties belong to the Objector there is no basis upon which the Objector's application can succeed. Whereas the Court is mandated to promote alternative dispute resolution mechanisms including mediation, that route cannot be attained by way of objection proceedings. Nothing however prevents the parties from initiating or carrying on with mediation or any other mode of alternative dispute resolution that they may wish to pursue.

48. In the premises, the objection fails and is dismissed.

49. The 3rd Respondent will have the costs of both applications to be borne by the 2nd Petitioner and the Objector.

50. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

MR ESIBI FOR MS LUMALLAS FOR THE OBJECTOR

MR MIKWA FOR THE 1ST AND 2ND PETITIONERS

MR OKUMU FOR MR NYAMU FOR THE RESPONDENT

CA SUSAN