



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 124 OF 2007**

**JOSEPH THIGA KARIUKI (Suing as the legal representative of the estate of  
PAULINE WANJIKU THIGA (DECEASED)).....APPELLANT**

**VERSUS**

**JOSEPH KAHONOKI NJOROGE.....1<sup>ST</sup> RESPONDENT**

**CATHERINE NYAWIRA BOSIRE.....2<sup>ND</sup> RESPONDENT**

**AND**

**SARAH WANJIKU KAHONOKI.....OBJECTOR**

**R U L I N G**

1. It is necessary to give this back ground. This matter started as **Chief Magistrate's Civil Case Number 2033 of 2004** and translated into **High Court Civil Appeal Number 124 of 2008**.
2. In CMCC 2033/2004 Joseph Kahonoki Njoroge was sued together with Catherine Wawira Bosire (the legal representative to the estate of Kennedy Ogoli Bosire). The two were at the material time the registered owners of two (2) motor vehicles, KAP 318D and KAK 480S which collided, leading to the death of one Pauline Wanjiku Thiga who was a passenger in motor vehicle registration number KAP 318D. Liability was apportioned by consent of parties at 95% in favour of the plaintiff, 55% against 1<sup>st</sup> defendant and 40% against 2<sup>nd</sup> defendant.
3. After the delivery of Judgment, the trial magistrate in subsequent orders, on the ground of error on the face of the Judgment struck out the award of special damages for the plaintiff because fees had not been paid at the filing of the plaint for the claim on special damages. The Plaintiff filed this appeal against that order. The appeal was allowed by a judgment dated 31<sup>st</sup> October 2014 and delivered on 13<sup>th</sup> November 2014, wherein the award was reinstated.
4. It is the recovery of those damages that has led to these proceedings.
5. From the record before me, execution proceedings commenced and a warrant of attachment was issued on 7<sup>th</sup> November, 2019 for sum of Ksh. 303,807/= against the two (2) defendants.
6. It would appear that on 15<sup>th</sup> November 2019 Auctioneers went to the home of the 1<sup>st</sup> Defendant/Respondent and proclaimed domestic animals and household goods in the absence of the Objector herein Sarah Wanjiku Kahonoki.
7. On 21<sup>st</sup> November 2019 she filed a Notice of Objection under **Order 22 rule 51 Civil Procedure Rules**, indicating her objection to the auctioneers' proclamation dated 15<sup>th</sup> November, 2019.
8. On that same day she filed Notice of Motion under **Order 22 rule 51 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act** seeking orders;

a] *THAT the application be certified as urgent and be heard on a priority basis.*

b] *THAT pending the hearing of this application inter-partes, the honourable court does stay execution of the attachment of*

*the objector's properties proclaimed on the 15<sup>th</sup> November 2019.*

*c] THAT the Honourable court stays execution of the attachment of the objector's properties proclaimed on the 15/11/2019 and sets aside the attachment of the objector's properties.*

*d] THAT costs be provided for.*

On the grounds;

- 1. THAT the objector is the wife of Joseph Kahonoki Njoroge (deceased).*
- 2. THAT the objector is the owner of cows, calf, sofa set, coffee table, TV set and wall unit which were proclaimed by GILLETTE TRADERS AUCTIONEERS.*
- 3. THAT the 2<sup>nd</sup> plaintiff in this case has already passed away and no administrator has been appointed for this Estate.*
- 4. THAT it's unjust for the Auctioneers to attach the cows, calf, sofa set, coffee table, TV set and wall unit which were bought by the objector single-handedly.*
- 5. THAT it would be unjust for the objector properties to be attached yet she was not a party to the Nakuru High Court Appeal No 124 of 2007 and Nakuru CMCC No 2033 of 2004.*

The application is supported by the affidavit of the applicant, and the annexures, certificate of death of the 1<sup>st</sup> defendant showing date of death as 11<sup>th</sup> February, 2017.

9. By a Replying Affidavit sworn by the plaintiff Joseph Thiga Kariuki, opposed the application for failure to comply with **Order 22 rule 1** and further that;

- 1. THAT the objector proceedings lacking any relief sought, as a rule, reliefs not founded on pleadings cannot be issued.*
- 2. THAT further, no evidence has been tendered by the applicant to demonstrate that at the date of the proclamation and attachment she had a legal or equitable interest in the properties attached.*
- 3. THAT indeed the applicant was alluded to having bought the cows, calf, sofa set, coffee table, TV set and wall unit but has failed to produce any evidence that would indeed prove to this court that she holds any legal interest in the properties.*
- 4. THAT I am advised by my advocates on record that the law is well-settled with regards to production of evidence in objector proceedings and the same was solidified in **Precast Portal Structures versus Kenya Pencil Company Ltd & 2 Others [1993] eKLR**; 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.*
  - 2. That the objector holds that property on his account.*
- 5. THAT without the benefit of scrutinizing receipts and/or any other viable ownership documents, this court cannot ascertain that indeed the attached properties belong to the applicant/objector and cannot therefore issue the orders sought.*
- 6. THAT the applicant herein is not entitled to the orders of stay as she has failed to establish her proprietary interest on the attached properties, and thus no loss of irreparable can attach.*

7. I gather from the submissions that the applicant did file a supplementary affidavit on 6<sup>th</sup> December 2019 providing documentary proof of ownership of the properties.

8. On 21<sup>st</sup> November 2019 the matter was placed before *Ng'etich J* under Certificate of Urgency. She granted stay of execution pending further directions.

9. On 6<sup>th</sup> December, 2019 counsel appeared before me and agreed to proceed by way of written submissions.

10. The issue is whether the application before me is merited.

11. I have perused through the submissions and authorities cited. It is submitted for the applicant that, the 1<sup>st</sup> defendant died on 11<sup>th</sup> February 2017 and there is no administrator of the estate. That the properties proclaimed belong to the objector, she purchased the cows, her son purchased the sofa set for her and her deceased's husband's personal use. She relies on **Chai Trading Company Limited v Kenya Tea Development Authority Limited & Another [2019] eKLR**.

12. For the respondent it is argued that the documents produced by the objector do not prove ownership of the goods as required by **Order 22 rules 51**, and the case of **Duncan Kabui vs Samuel Bede Ogembo & Another [2014] eKLR** and **Stephen Kiprotich Koech vs Edwin Barchilei Joel Sitienei (objector) [2019] eKLR**.

*“The burden of proof in this regard is on the objector to establish her legal or equitable interest in the property which is the subject matter of the execution objected to, and it is not for the decree holder to prove that the goods belong to the Defendant.”*

It is also argued that she produced a receipt in the name of Samuel Njoroge Kahonoki, who is a 3<sup>rd</sup> party but who is not complaining.

13. **Order 22 rule 51** provides;

**51. Objection to attachment [Order 22, rule 51.]**

*(1) Any 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 the court and to all the parties and to the decree-holder of his objection to the attachment of such property.*

*(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.*

*(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.*

14. In the affidavit in opposition of the application it is deponed that the application does not comply with these provisions. As far as I can see, the applicant complied and seeks that the attachment be set aside.

15. It is evident from the record, and the fact is not contested that the 1<sup>st</sup> defendant was deceased as at the time the decree and the warrants for the attachment were issued. The objector does not deny being his widow. He died in February 2017, the proclamation was in November 2019, more than two (2) years later. Was this execution proper in the first place? Could the warrants be executed against the objector?

16. This is not a situation similar to that where the judgment debtor is alive and the property being proclaimed is presumed to be his. In this case, the judgment debtor is deceased. The moment he died, the situation changed and the Decree Holder's respite lies elsewhere; the deceased's estate; to execute his decree against deceased's estate through the administrator. Until this happens the judgment debtor cannot just go into the home of the deceased and proclaim anything in sight. That is against the law of succession. In any event **Section 35 of the Laws of Succession Act** makes very specific provisions with regard to the surviving spouse. The surviving spouse is entitled to the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate. The net intestate estate defined as the remainder of an intestate's estate after payment of expenses, debtors, liabilities and estate duty. Under **Section 66** the respondent is entitled as a creditor to file for letters of administration in order to get paid. But of importance is the requirement of **order 24 rule 4** procedure in case of death of one of several defendants or of the sole defendant.

**4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]**

*(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

*(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

*(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.*

17. Though the suit is at execution stage the principle does not change. It applies in equal measure. The decree holder knows what to do, and should have done so.

18. I find that the application is merited and the same is allowed. The attachment is set aside. The objector will have the costs of this application.

**Delivered, Dated and Signed at Nakuru this 30<sup>th</sup> day of April, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of:- Via ZOOM

Edna Court Assistant

Mirugi Kariuki & Company Advocates

Nancy Njoroge Kairu & Co. Advocates