



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO.150 OF 2001**

**MARGARET WAIRIMU MAGUGU.....OBJECTOR/APPLICANT**

**VERSUS**

**MACHIRA AND COMPANY ADVOCATES.....DECREE HOLDER/1<sup>ST</sup> RESPONDENT**

**ARTHUR KINYANJUI MAGUGU.....DECREE HOLDER/2<sup>ND</sup> RESPONDENT**

**RULING**

(1) Before this Court is the Notice of Motion dated 11<sup>th</sup> December 2018 by which MARGARET WAIRIMU MAGUGU (the Objector/Applicant) sought for orders:-

**“1. SPENT**

**2. SPENT**

**3. SPENT**

**4. THAT this Honourable court be pleased to quash the illegal proclamation of the Objector/ Applicant’s movable properties and restitute the same to the Objector/ Applicant.**

**5. THAT the execution and proceedings to enforce the judgment and decree herein be declared a nullity.**

**6. THAT this Honourable Court be pleased to cancel set aside, recall and lift the Warrants of Attachment and Sale herein for cancellation for having been issued irregularly.**

**7. THAT M/S Kindest Auctioneers be enjoined in these objection proceedings.**

**8. THAT the Decree-Holder 1<sup>st</sup> Respondent bears the costs of the Application and the Auctioneers costs.**

(2) The Application premised upon Sections 1, 1B, 3A, 34 and 63 (e) of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 22 Rules 51 & 52 Order 51 Rules 1,2,3 & 4 of the Civil Procedure Rules, 2010 and Articles 25, 28, 31, 40 & 50 of the Constitution of Kenya 2010, and all other enabling provisions of the law. The same was supported by the Affidavit of even date sworn by the Objector/Applicant.

(3) The Decree Holder/1<sup>st</sup> Respondent MACHIRA & COMPANY ADVOCATES strenuously opposed the Application through the Grounds of Opposition dated 18<sup>th</sup> January 2019, and the Replying Affidavit dated 1<sup>st</sup> February 2019, sworn by JOHN PATRICK MACHIRA an Advocate of the High Court of Kenya. The application was canvassed by way of written submissions. The Objector/Applicant filed her written submissions on 22<sup>nd</sup> February 2019 whilst the 1<sup>st</sup> Respondent filed its submissions on 20<sup>th</sup> March 2019.

**BACKGROUND**

(4) The 1<sup>st</sup> Respondent Ms Machira and Company Advocates acted for ARTHUR KINYANJUI MAGUGU (now deceased) in HCCC

**No.2800 of 1994 International Finance Company Ltd (in liquidation) –Vs- Arthur Kinyanjui Magugu.** After the 1<sup>st</sup> Respondent ceased acting for the Deceased in matter they filed their Bill of Costs for a sum of **Kshs.1,500,000** on **4<sup>th</sup> April 2001**. The Bill was taxed in this amount on **30<sup>th</sup> July 2001** and a Certificate of Taxation issued on **1<sup>st</sup> August 2001**.

(5) The Deceased filed a reference challenging the decision of the Taxing Master and on **7<sup>th</sup> February 2002**, the High Court upheld the reference. The Respondent then filed an appeal to the Court of Appeal which overturned the decision of the High Court and reinstated the decision of the Taxing master to tax the Bill at **Kshs.1,500,000**. This amount was to attract interest at the rate of 14% per annum from **5<sup>th</sup> May 2001**.

(6) By an Application dated **23<sup>rd</sup> October 2017** the Respondent sought to be allowed to execute the Decree before Taxation of Costs. By a ruling delivered on **20<sup>th</sup> December 2017**, **Hon Lady Justice Olga Sewe** made inter alia the following orders:-

**“THAT the Advocate/Applicant (the Respondent herein) be allowed to execute the Decree issued by the Court on 17<sup>th</sup> October 2017 forthwith and before the Taxation of costs.”**

(7) Pursuant to letters of Administration granted in High Court **Succession Cause No.122 of 2015**, the Applicant herein (who was the widow of the deceased) was appointed as the sole Administrator of the Estate of the Deceased (who was the Judgment/Debtor). The said Grant was confirmed on **10<sup>th</sup> October 2016**. A copy of the Certificate of confirmation of Grant of Letters of Administration is annexed (**“MWM1”**) to the Applicant’s Replying affidavit filed on **11<sup>th</sup> December 2018**.

(8) Vide the Notification of Sale of Moveable Property dated **21<sup>st</sup> November 2018 M/S Kindest Auctioneers** instructed by the Respondent went to a residential house along Kiambu Road and proclaimed various assets as follows:-

- One seven seater sofa set
- Two seater sofa
- One Cooker
- One Fridge
- One Glass Coffee table
- One carpet

(9) The Applicant then filed this objection on the basis that the proclaimed goods belong to her and she has first and proprietary rights over all the proclaimed items. That the goods were found in a residential house which the Applicant occupies with her family. The Applicant avers that the proclaimed goods **do not** form part of the estate of the deceased Judgment/Debtor **Arthur Kinyanjui Magugu** and in any event the estate of the deceased has long since been distributed to the beneficiaries. She therefore asks the Proclamation of **21<sup>st</sup> November 2018** be declared unlawful and be quashed by the Court.

(10) In opposing the present application the Respondent argues that the same is defective, incompetent and bad in law as no objection has ever been filed in the matter. That as Administrator of the estate of the Deceased the Applicant was bound to pay the decretal sum therefore the current execution by **M/s Kindest Auctioneers** is both lawful and valid. That the Applicant has merely filed this application in pursuance of her goal to disobey and breach the court orders made on **17<sup>th</sup> October 2017** directing her to pay the decretal amount. The Respondent urged the court to dismiss the application with costs.

#### **ANALYSIS AND DETERMINATION**

(11) I have carefully considered the written submissions filed by both parties in this matter as well as the annexures thereto. The only issue for determination is whether the Decree-Holder should be stopped from proceeding with the attachment of the proclaimed assets.

(12) The Respondent has objected to these proceedings on the grounds that no Notice of Objection was filed with the Notice of Motion and that they were not served with any such notice of objection. He cites **Order 22, Rule 51(1)** which provides:-

**“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.**

(13) I have carefully perused this Court file. I note that the Notice of Motion was filed on **11<sup>th</sup> December 2018**. In the file there is also a Notice of Objection filed on **11<sup>th</sup> December 2018**. Therefore it appears that this ground has no basis as in fact a Notice of Objection was filed on the same date that the Notice of Motion was filed.

(14) It is not disputed that the original Judgment/Debtor against whom execution was to proceed was **Arthur Kinyanjui Magugu** who is now deceased. It is also not in dispute that the Applicant herein who is the widow of the Judgment/Debtor is the Administrator of the estate

of the Deceased and holds a Confirmed Grant. **Section 2 of the Civil Procedure Act, Cap 21 laws of Kenya** defines a legal representative as follows:-

**“Legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”**

**Section 37 of the Civil Procedure Act on Legal representative** provides as follows:-

**“(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.**

**(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.”** [own emphasis]

(15) Therefore in order to succeed the Objector/Applicant must adduce evidence to prove that she had a legal and/or equitable interest in the assets which were attached. In **Precast Portal Structures Versus Kenya Pencil Company Ltd & 2 others [1993] eKLR**, the court held as follows:-

**“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.”**

(16) Therefore the law does permit a decree-holder to execute a decree as against the legal representative of a Judgment/Debtor who is deceased. However the liability of such legal representative will be limited only to the extent of the undisposed property of the deceased which has come into the hands of the legal representative. Therefore, where as in this case, the entire estate of the deceased has gone to the legal representative then execution may be directed at any or all of the property of the deceased which came into her hands.

(17) **Section 37(2)** of the Civil Procedure Act refers to property of the deceased which has come to his (the legal representatives) hands **“ and has not been duly disposed of.”** This provision requires and empowers the court either on application of the Decree/Holder or **“suo moto”** to carry out an inquiry to ascertain such liability or if need be to compel the legal representative to produce accounts as it thinks fit.

(18) This inquiry takes after the procedure provided for Notice to show Cause and it will certainly be an important consideration to establish whether the legal representative has dishonestly transferred, concealed, charged or removed any part of the estate property, or committed any other act of bad faith in relation to the estate property. Thus, where no such property of the estate remains in the possession of the legal representative, (the Judgment-Debtor in the suit) the inquiry is even more intense, and if he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally.

(19) The Applicant has submitted that the items which were attached are not available for attachment by virtue of **Section 44(i)** of the **Civil Procedure Act** which provides that the following items shall not be liable for attachment.

**“(i) the necessary wearing apparel cooking vessels, beds and beddings of the judgment debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted.”**

The items which were attached by **M/S Kindest Auctioneers** do not include any of the essential items mentioned in **Section 44(1)** and are therefore available for attachment.

(20) **Section 83** of the **Law of Succession Act Cap** outlines the duties of a legal representative, which duties include inter alia the duty to pay out of the estate of the deceased all the outstanding debts of the deceased. The Applicant has told the court that the entire estate has been distributed to the named beneficiaries yet it is puzzling why she failed and/or declined to settle the outstanding decree which is an outstanding debt. The Applicant has been fully aware of this decree since the year 2001. It is manifest that the Applicant failed to perform her duties as legal representative under the **Succession Act** by failing/declining to pay that particular debt.

(21) The Applicant argues that the attached goods belong to her separately and are not the property of the deceased. The items which were attached by **Kindest Auctioneers** were ordinary household items. There is no evidence by way of receipts or otherwise to prove that these particular items were purchased by the Applicant or that the said items belonged to her. The assets were recovered in the family home which the deceased and the Applicant occupied together. In the absence of any evidence to the contrary a presumption can be made that the said items belonged to the couple jointly and therefore were attachable in execution of the decree. Further it is not enough for the Applicant to simply object to the attachment without giving an alternative and concrete proposal on how this legitimate debt which is properly owed by the estate of the deceased is to be settled.

(22) I find that the Applicant/Objector having full knowledge of the debt due to the Judgment Debtor proceeded to distribute the estate of the deceased to the beneficiaries and deliberately failed/declined to settle this legitimate debt of which she was aware. She cannot now cry foul when the Judgment/Debtor moves to execute the lawful decree.

(23) **Section 83** of the **Succession Act** obliges a legal representative to:

**“(d) ascertain and pay out of the estate of the deceased all his debts.”**

Accordingly the Applicant as the legal representative of the estate of the deceased had a duty to **ascertain** and **pay out** all the lawful debts of the deceased. She ought not to have proceeded to distribute the estate to the beneficiaries before ensuring that all legal outstanding debts had been cleared. It is trite law that he who comes to equity must come with clean hands. Having failed in executing her legal obligations as an administrator the Applicant cannot now ask this court to exercise its discretion in her favour.

(24) Finally I find that the above objection has no merit and the same is hereby dismissed in its entirety. I further make order as follows:-

(i) The Objector/Applicant to clear the total outstanding amount of the decree in **HCCC No. 2800 OF 1991** within ninety (90) days of today's date.

(ii) Failure to comply with (i) above means that the sale of the attached properties may proceed with no further reference to the Objector.

(iii) Costs to be met by the Objector/Applicant.

**Dated in Nairobi this 17<sup>th</sup> day of December 2019.**

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**Justice Maureen A. Odero**