



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 58 OF 2011

EGYLYNE CHEPCHIRCHIR CHOGE.....OBJECTOR/APPLICANT

HON. SIMEON KIPRUM CHOGE (DECEASED).....PLAINTIFF

VERSUS

COUNTY COUNCIL OF TRANS-NZOIA.....DEFENDANT

RULING

(On objection of attachment of a deceased

judgment debtors' property in satisfaction

of a decree passed after his death)

1. This Court is tasked to determine one of those rare Applications in Kenya. The Application is by way of an application for objection to attachment of movable property said to belong to a judgment debtor who is since deceased. It was raised by the Applicant/Objector herein. The Applicant was not a party to the proceedings that gave rise to the decree being executed herein.
2. Before delving into the issues presented for determination through the Application, prudence requires that I highlight the background of the Application. This suit was brought by way of a Plaint dated **6/6/2011**. It was instituted against Trans-Nzoia County Council by one Hon. Simon Kiptum Choge (now deceased). From the entries in the death certificate annexed to one of the Supporting Affidavit, he died on **14/12/2013**, at the age of **82** years. When he instituted this suit, he sought a declaratory order that **L.R. 2187** in Moi's Bridge belonged to him. He also prayed for a permanent injunction restraining the defendant, its agents and/or servants from trespassing, taking possession, interfering and/or dealing in the suit land in any way.
3. The suit did not proceed to full hearing. However, by a consent dated **6/12/2011** entered between the Plaintiff and defendant, the Plaintiff withdrew it with costs to the defendants. Thereafter, the defendants filed their bill of costs. It was taxed on **29/2/2012** at a sum of Kenya Shillings Eighty-Six Thousand Four Hundred and Seventy-Four (**Kshs. 86,474/=**) only. That was in the presence of both counsel representing the parties. On that day, the Plaintiff's counsel sought a stay of execution for **30 days**. It was granted.
4. On the record is a letter dated **1/3/2012** written by the Plaintiffs' counsel to the Deputy Registrar requesting that they be supplied with the reasons for arriving at the sum in the defendant's taxed bill of costs as well as the ruling to enable them apply for stay of execution. It would appear that no action was taken in respect to the said letter. No reasons were supplied to counsel. Similarly, there was no application for stay of execution that was filed by the Plaintiff's counsel.
5. The record shows further that the Plaintiff's did not apply for execution of the decree after **29/3/12** when the temporary stay of execution granted lapsed. The matter remained dormant up to **11/12/2021**, close to **eight (8) years** and **nine (9) months**, when the decree holder applied for execution of the decree. The Court issued a warrant of attachment to Igare Auctioneers for execution and on **15/12/2021**. The Auctioneers proclaimed movable property which the objector alleged to be hers.
6. As noted above, the Plaintiff died on **14/12/2013**, two years after the suit was withdrawn. Thereafter, the Objector, together with three other persons, took out letters of administration in respect of the estate of the deceased. It was confirmed on **29/9/2016**.
7. Having proclaimed the goods, the auctioneers proceeded subsequently to the objector's home with the intent to attach the properties, in satisfaction of the money decree. It was these actions of the auctioneer that culminated the institution of the present application.

The Application

8. The Objector filed a Notice of Motion on 21/12/2021. It was dated 20/12/2021. It was brought under Section 5 of the Judicature Act Cap 8, Section 45 and 46 of the Law of Succession Act, Order 22 Rules 57 of the Civil Procedure Rules 2010, Section 1A, 1B, 3, 3A, 18(1) (b) (ii) & (2), 34 and 61 of the Civil Procedure Act 2010 and what is said to be “all enabling provisions of the law.”

9. She sought for the following orders:

1. ...spent

2. ...spent

3. ...spent

4. ...spent

5. That the Proclamation dated 15/12/2021 be deemed irregular and void.

6. That the Objector’s assets and accessories be discharged from any or further execution and attachment

7. That Ms. Igare Auctioneers do pay costs and damages for wrongful attachment and trespass.

10. The Application was filed simultaneously with a Notice of Appointment of Advocates filed by the firm of Ms. Katwa & Kemboi Advocates for the Objector, one **Eglyne C. Choge**. It was dated the same date as the Application. This point is important to clearly bring forth in order to give an understanding of the finding below regarding the procedure followed by the Objector in bringing the Application.

11. The Application was premised on the grounds on its face and supported by the affidavit sworn by the Objector on 20/12/2021. The contents of the supporting affidavit expound the grounds. In it she deponed that the advocate who instructed the Auctioneers to levy execution was inactive in practice and therefore not qualified. She annexed a copy of a print out from the Law Society of Kenya Website of an Advocates Search Engine product to show that the advocate was inactive. Her contention was that by a proclamation dated 15/12/2021 the Auctioneers sought to attach her assets despite being informed and aware that their target of execution and attachment was the property of the late Hon. Simeon Kiptum Choge who passed away eight (8) years prior. She stated that she was a different person from the judgment debtor, and the proclaimed assets were hers and not of the judgment debtor. She deponed further that there were no known taxed costs or decretal sum amounts that were done *inter parties* to warrant execution and that any claim against the deceased judgment debtor abated one (1) year from 14/12/2013 in the absence of substitution (emphasis mine).

12. According to her, a “Notice to Show Cause” ought to have preceded execution. She claimed that the judgment debt was over eight (8) years therefore it was time barred. In her view, the proclamation did not specify anything to be attached thus was unlawful, null and void. She averred that the attachment would amount to criminal interference with the assets of the deceased.

13. She asserted that the judgment debtor died on 14/12/2013. She annexed to her Affidavit a copy of a Certificate of Death No. 265826 dated 10/1/2014. She insisted that she had a legal and equitable interest in the whole of the estate. She then indicated that the proclamation was vague, void, unlawful irregular, misplaced and unjust and prejudicial to her. She denied that attachment could be levied on her assets in place of those of the deceased judgment debtor and there was no justification for the alleged attachment.

14. She insisted that all the properties listed in it were hers and did not form part of the properties of the deceased judgment debtor. She was particular that all the tractors, motor vehicles and lorries were in her name and could not be attached. She then contended that the proclamation did not state where it took place and did not state the person in possession of the property proclaimed.

15. She contended that any cause of action against her abated twelve (12) months after the demise of the deceased, in absence of substitution. She insisted that the attachment abated since it was about nine (9) years since the judgment debtor died and the decree had been issued on 07/07/2012. She also argued that the decree holder ought to have sought leave of the court authorizing the attachment. She claimed that the estate of the deceased was under administration. She annexed to her Affidavit a copy of confirmed grant and marked it as EC-1.

16. The objector accused the auctioneers for harassing her with the execution while to her they knew that the judgment debtor was deceased but proceeded to proclaim her property. She urged the court to order the auctioneers to pay her the sum of Ksh. 100,000/= as damages for trespass.

The Response

17. The application was opposed. The Respondent filed a replying affidavit sworn on 3/1/2022 and filed on the same date through its learned counsel, one **Paul Waliula**. The response was that it was trite law that limitation period for execution is 12 years and the costs were taxed at Kshs. 84,474/=. He annexed a copy of the Certificate of costs marked as PW1.

18. He stated that the death of a judgment debtor does not stop execution and that **execution could only abate after the expiry of 12 years**. He stated further that a notice to show cause could not be issued against a litigant who was deceased. To him, the objector had not indicated her entitlement in the estate which was still in the name of the deceased. He insisted that execution by way of attachment of the deceased’s estate was legal. Moreover, he stated further that the objector had not provided evidence that the properties belonged to her. He urged that the application be refused.

Submissions

19. This court directed the parties to canvass the application by way of written submissions. They filed them respectively.

Analysis, Issues and Determination

20. I have given due and careful consideration of the application, the rival affidavits, the submissions as well as both the law and the case law cited. I am of the considered view that the following are the issues for determination:

- a) *Whether an application for execution initiated by an advocate not in inactive practice is defective;*
- b) *Whether a decree abates after the death of a judgment debtor;*
- c) *Whether a proclamation the Estate of a deceased person amounts to intermeddling of the deceased's property;*
- d) *Whether the proclamation was defective, null and void;*
- e) *Whether the Objector followed the right procedure in bringing the Application;*
- f) *What orders to issue and who to bear costs of the application?*

21. The issues I have set out above appear to be many but since the parties raised them both in their prayers and Affidavits even as they endeavoured to support or challenge the Application they ought to be considered. I proceed to analyze them below.

a) Whether an application for execution initiated by an advocate not in inactive practice is defective

22. The objector complained of the competency of the advocate who instructed the auctioneers to proclaim her alleged assets in satisfaction of a judgment debt due to the estate of her late husband Hon. Simeon Kiptum Choge, who was the Plaintiff in this suit. She stated that **Ms. Simiyu Wafula Advocates** which instructed Ms. Igare Auctioneers to levy the attachment on behalf of the decree holder did not have an active practicing status. For that reason, they stated that the firm was unfit to practice and the application for execution was irregular, null and void for reason of being drawn by an inactive an unqualified advocate.

23. The copy of the print out from the Law Society of Kenya's Advocates search engine indeed showed that the status of one **Mr. Simiyu Wafula** Advocate who is said to be the proprietor of the firm was inactive. But there are a few issues that the Objector did not bring out clearly. For instance, she did not demonstrate that the signature on the Application for execution was of the said Mr. Simiyu Advocate. She did not show also that Mr. Simiyu Advocate was the sole practitioner in the said law firm. Also, she did not bring out the legal status of a law firm whose proprietor not inactive practice: does it mean that the said law firm ceases to exist or cannot draw documents as a firm? What is clear in relation to the contention is that the replying affidavit was sworn by one **Mr. Paul Waliaula** who is an advocate in that firm.

24. Thus, the above reasons, and the one that the objector did not avail evidence regarding the status of the advocate who swore the Replying Affidavit make this Court inclined to reject her contention. The fact that a law firm has only a proprietor does not of itself mean that only that proprietor offers legal services in it. A firm of advocates may have more than one advocate apart from the proprietor of the firm. The Applicant needed to do more than alleging the inactive status of the proprietor: that of the Associates should have been confirmed.

25. Again, even if this court were to find that indeed it was Mr. Simiyu Wafula Advocate who is said to be inactive as at 2021 signed the Application for execution, that would not defeat the Application for the reason that he was unqualified. Courts have held that **Sections 9, 22, 31 and 34** of the **Advocates Act** are silent in so far as the steps to be taken on the pleadings signed by such a lawyer. In view, the Advocate does not cease to be one for reason of lack of a licence. However, he can be subject to disciplinary procedures under the Society's Rules and Regulations for practicing without a licence. In the case of **Cheraik Management Limited V National Social Security Services Fund Board of Trustees & another [2012] eKLR**, G.V. Odunga J. stated as Follows:

“Similarly, this section is silent on the fate of the documents drawn by such an advocate.

In my view therefore, documents signed by an unqualified person are in the same position as documents signed by a layman, in so far as their legality is concerned.....”

26. In my considered view, pleadings or documents filed by an advocate not in active practice and thus not be qualified to practice do not render the documents illegal, null and void for all intents and purposes. But the Objectors can report the matter to the relevant body for investigation and possible disciplinary steps once it is confirmed that the Advocate acted without proper status, contrary to the Society's regulations. That should not affect the documents that gave rise to the instructions given to Igare Auctioneers on the execution. Moreover, it is not the business of the Courts to enforce the Society's rules and regulations. By calling it to declare the documents null and void when status of the counsel who practice in the said firm has not been confirmed by the Law Society itself would amount to condemning the said attorney unheard and the Court stepping in to enforce the Society's disciplinary rules and regulations.

b) Whether a decree abates after the death of a judgment debtor

27. Under this issue, the Court looks at the points raised from two perspectives, namely, if the execution is barred by law, and two, if a decree can abate. The law governing time within which legal proceedings may be brought against a party after the passing of a decree is to be

found in the Limitations of Actions Act.

28. Section 4 (4) of the **Limitation of Actions Act** provides:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.

29. In the case of **Willis Onditi Odhiambo vs. Gateway Insurance Company Limited (2014) eKLR**, the Court of Appeal held that the term ‘**action**’ covers execution of judgments. In the instant case the, the execution was **commenced 9 years** after the decree was issued it falls within the statutory time.

30. Further in the case of **Hudson Moffat Mbue vs. Settlement Fund Trustees & 3 Others (unreported) ELC No 5704 of 1992(O.S) Mutungi J.** had this to say;

“What I consider the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within 12 years period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitations of Actions Act will bar you from carrying on with such execution”.

31. In this case, execution was levied **9 years** after the decree was drawn. It was therefore brought within the stipulated time, thus not time barred. The upshot is that this court finds that the proclamation was proper.

32. Regarding the second limb, the term abate in relation to a suit means that the suit ceases to be “alive” or to exist. The term finds its legal basis and application in Kenya through **Order 24 Rules 3 and 4 of the Civil Procedure Rules**. The **Rules 3** provides that:

“(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit;

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff, Provided the court may, for good reason on application, extend the time,

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 subrule (1), the suit shall abate as against the deceased defendant.”

33. It is apparent from the provision that as a general rule, if a pending suit survives a deceased party, it abates after **12 months** from the death of that party if substitution is not made within that period or an extension period is sought and substitution done within the extended timeframe. The position is different when a party dies after a decree has been passed by the Court. In my view, once a Court passes a decree in favour or against a party before the death of that party the decree becomes part of the property deceased’s Estate either as a debt or ‘charge’ (in case of a judgment debtor) or a property or asset (in case of a decree holder). In case a party dies before satisfaction of the decree, it cannot abate for the mere reason of the death of the party. It can only cease to be capable of execution in accordance with the provisions of law in regard to the period and manner of execution of decrees.

34. I have come to the above conclusion basing my reasoning on the exception given under **Order 24 Rule 10**. It provides:

“Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”

35. It is clear from the provision above that since **Order 24 Rules 3, 4 and 7 of the Civil Procedure Rules** apply to the manner in which abatement occurs and the effects of abatement. These are exempted in their application to decrees, then decrees passed before death of a party. Such do not abate by the mere demise of the party. Moreover, the Rules do not provide for substitution of a debtor who dies before execution of the decree. This is also clarified by **Section 37(1) of the Civil Procedure Act**. It provides:-

“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.”

36. When a judgment debtor dies, the decree holder merely applies to Court to execute against the Estate. In my considered view, it follows that there is no need for substitution where the judgment debtor dies. The decree holder can execute even upon any party who is intermeddling with the property of the deceased or the legal representative thereof as long as it is in relation to the deceased's property.

37. In *Agnes Wanjiku Wang'ondu V Uchumi Supermarket Ltd [2008] eKLR*, about **Order 24** and **Order 31** of the **Civil Procedure Rules** the Court held:

*"..that the requirement for substitution does not apply to proceedings in execution of an order. That while Order 30 Rule 1 (now Order 31 Rule 1) states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit. The Court cited the case of *Dhulla Harichand vs Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu-Udin, (1940) KLR Vol. XIX at page 6* where the Court held as follows;*

"No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative".

38. This was the same position in *Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR* where the Court stated:-

"I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties (emphasis mine). This goes a long way in ensuring the overriding objective of the Civil Procedure Act and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit...."

39. Similarly, in the case of *V.Uthirapathi vs Ashrab Ali & Ors on 18 February, 1998*, the Supreme Court of India held:

"Before the decree is passed - that the legal representatives are to be brought on record within a particular period and if not, the suit could abate, - is not applicable to cases of death of the decree holder or the judgment debtor in execution proceedings.

In Venkatachalam vs. Ramaswami [1932 ILR 55 Mad. 352 = AIR 1932 Mad. 73 (FB)], a Full Bench of the Madras High Court has held that this rule enacts that the penalty of abatement shall not attach to execution proceedings. Mulla's Commentary on CPC (Vol.3) p. 2085 (15th Ed., 1997) refers to a large number of judgments of the High Court:

"Rule 12 engrafts an exemption which provides that where a party to an execution proceedings dies during its pendency, provisions as to abatement do not apply. The rule is, therefore, for the benefit of the decree holder, for his heirs need not take steps for substitution under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or they may file a fresh execution application. "

40. In the instant case, on the one hand the Objector claimed that it was not proper or lawful for execution to issue in respect to the decree because it abated one year after the death of the judgment debtor whereas substitution has not been done. On the other, the Respondent contended that the decree could abate only after twelve (12) years. Both positions of the parties are false. From my understanding of the law as given above and the authorities I have given credence to, there is no doubt that abatement applies only in instances pending suits where the suit survives and substitution of a deceased party is not done after one year of that party's death. Where a suit has been determined before the death of a party, execution can issue as discussed above. Simply put, in this case there was no abatement. What happens to a decree that is not executed after the expiry of twelve (12) years from the date of the judgment, unless other factors such as stay of execution intervene? According to **Section 4(4)** of the **Limitation of Actions Act**, the decree holder is barred from executing it. That does not still mean that the decree abated: it simply means that its execution is time barred. This now turns me to the question below.

c) Whether a proclamation the Estate of a deceased person amounts to intermeddling of the deceased's property

41. The objector is one of the four legal administrators of the estate of the deceased. They all obtained a certificate of the Confirmation of grant issued on **29/09/2016**. The position in law, is that a legal administrator would and does in the ordinary sense of the view take up the position of the deceased person in regard to managing his Estate. Administrators may sue or be sued on behalf of the deceased person.

42. The objector was a wife to the judgment debtor before his demise. She was his widow after his demise. Later she became one of the administrators of his estate. **Sections 82** and **83** of the **Law of Succession Act** are explicit on the powers and the duties of personal representatives respectively. Among the duties bestowed on them, as provided under **Section 83(d)** is to ascertain and pay out of the estate of the deceased, all his debts. As stated above, upon the death of a judgment debtor, the decree forms part of the liabilities or debts of the Estate whereas upon the death of a decree holder, the decree forms part of the assets of the deceased. In the instant case, the decree can only be satisfied from the Estate of the deceased: the administrators cannot run away from that responsibility. The debt ought to be paid. A demand for it or execution thereof, as long as it is done within the confines and through the proper procedures of the law, is not intermeddling with the deceased's Estate. I remind the Objector of the import of **Section 37** of the **Civil Procedure Act**.

43. **Section 37** of the Act of which I have reproduced **Subsection 1** thereof. Subsection two (2) stipulates as follows:-

“(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.”

44. From the foregoing, it is evident that the proper party to levy execution against in relation to property of a deceased judgment debtor is one who is legally in charge of and against that property. This is the legal representative(s) appointed by the court or the executors of his will or the trustees where they were appointed by the deceased person.

45. In the instant case, the objector argued that she is a different person from the deceased person and not the target person against whom the execution was directed. One of her contentions was that she was a mere administrator of the Estate. She argued that she had a legal and equitable interest in the whole of the estate. In regard to that cannot be gainsaid. However, the Estate must pay its debts. The deceased did not “die with” debts. To the extent that the objector is the legal representative of the estate of the deceased, I do not agree with her that execution should not be carried out against any properties held by her on behalf of the estate. In the instant case, she failed to distinguish between which of the properties proclaimed belonged to her as an individual from those that belonged to the Estate. Therefore, I do not find any truth in her averment that she was a separate and distinct person from the estate of the deceased. She did not provide any evidence to prove separateness. Nothing could have been easier to do than attached copies of the receipts and evidence of ownership of the same. Her argument fails. That said, this Court is under the duty to determine whether or not the right procedure was followed in executing the decree.

d) Whether the proclamation was defective, null and void

46. The objector argued that the proclamation was defective and null. She also argued that the execution should have been commenced by way of a notice to show cause why execution should not issue. She contended that the decree having not been executed by way of notice to show cause, the proclamation was defective for purporting to proclaim her household goods. This argument goes hand in hand with her other one that there were no known taxed costs hence the execution was not proper. I have perused the record. I note that taxation of the costs in issue was done by the consent of the learned counsel in part on 27/02/2012 while the other items were left to court to decide on them. That was done on 29/02/2012. I also notice that the proclamation dated 15/12/2021. I notice that the auctioneers proclaimed household goods, livestock - 50 cows and all movable assets including motor vehicles and tractor. Her contention on this point was on two limbs.

47. Regarding the first limb, **Section 35 of the Law of Succession Act** vests all the house hold goods to the surviving spouse. Accordingly, the household goods were exempt from attachment in satisfaction of the decree since they were hers absolutely. The auctioneers erred in proclaiming the household goods belonging to the objector. However, that the proclamation was not on those items only. It extended to many more items, which as I have stated the objector did not prove that they were hers. In that regard, her contention about the defectiveness or nullity of the proclamation could not succeed.

48. Second, the Objector argued that the execution having been done after a notice to show cause having been issue. I agree with her for two reasons on that account, as given in **Order 22 Rule 18 (1) (a) and (b) of the Civil Procedure Rules**. First, the decree holder engaged in an execution process after the expiry of twelve (12) months of the decree and send, it did so against the legal representative of the deceased person. But where the decree is more than a year old and the decree holder was of the view that issuing a notice to show cause would delay the execution, he could move the Court to waive that requirement. Of course, he did not do so. Thus, for these reasons, the proclamation was defective.

e) Whether the Objector followed the right procedure in bringing the Application

49. The Applicant filed a Notice of Appointment of Advocates herein together with the instance Application. Thereafter, she filed an Application for the matter to be heard during the vacation rules. The latter Application was overtaken by events. The Court is left with one issue to consider: whether the Applicant followed the proper procedure in bringing the instant Application. **Order 22 Rule 51 of the Civil Procedure Rules** provides that where a person wishes to raise an objection to execution, he/she first has to issue Notice of Objection, which has to be accompanied with an Application supported by an Affidavit. This shall be served on all parties within **seven (7) days** of filing. After that the respondent has, within **fourteen (14) days**, to intimate to Court of intention to proceed. In this matter, the Applicant did not take this important step. This is a serious step which should have been taken so that Application would find a basis for its existence. Without it, the Application is hanging and completely defective. An application of this nature cannot exist on its own since it is not akin to the usual applications. The current one is an Application of a special procedure, and this must be followed. To the extent that the Applicant missed this fundamental step, I have no option than to strike it out.

50. On this I am guided by the holding of Kiage, JA of the Court of Appeal in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR*** where he stated:

“... 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 succor 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 a 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...”

51. I also am guided by the holding by the Supreme Court in ***Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR*** where it observed:

“We have discussed the application of Article 159 already (See the Law Society case above). In Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed further:

“Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

f) What orders to issue and who to bear costs of the application

52. The totality of the whole issue is that for the reasons given above, the Application is incompetent and is hereby struck out. But since I have made a finding that the proclamation and intended attachment too was commenced without following the proper steps, in the interest of justice, I further find, under **Section 63(e)** of the **Civil Procedure Act**, that the warrants of attachment and the proclamation were irregularly issued and made respectively hence a nullity. Both parties are at liberty to follow the right procedure regard to the satisfaction of the decree. Each party shall bear own costs of this Application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF MARCH, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.