

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.289 OF 2003

IN THE MATTER OF THE ESTATE OF

LAWRENCE MWANGI MACHIRA - DECEASED

MARY WANJIRU MWANGI)

PRISCILLA NYARUI MACHIRA).....JUDGMENT DEBTORS

JOSEPH MAHIHU MACHIRA)

VERSUS

ESTHER WANJUGU.....JUDGMENT CREDITOR

AND

RAI SAMIR MOHAMMED SHAFFIR.....OBJECTOR/APPLICANT

RULING

Before this court is the Notice of Motion dated 2nd September 2011 in which one Rai Samin Mohammed Shaffir, the Objector/Applicant herein seeks for an order lifting the Proclamation of attachment of motor vehicle registration [Particulars Withheld], Toyota Hiace Van in execution of court orders. The motion is supported by the affidavit of the objector. It is argued by the Objector that his motor vehicle was wrongly attached because he never sold it nor pledged it as security. Mr. Ng'ang'a, learned advocate for Esther Wanjugu, the judgment creditor argued that the Motion should be dismissed because the same is based on the wrong provision of the law. It is his submission that Order 22 of the Civil Procedure Rules is not recognized by Rule 63 of the Probate and administration Rules hence not applicable. It is also pointed out that the attached motor vehicle has always been in possession of Joseph Mahihu Machira, the judgment debtor hence the same was lawfully attached. The judgment creditor proposed to have the objector summoned to be cross-examined on the issue.

The facts leading to the filing of the motion dated 2nd September 2011 appear to be straightforward. Joseph Mahihu Machira and other beneficiaries of the Estate of Lawrence Mwangi Machira, deceased obtained letters of administration intestate to succeed the deceased's estate. The grant was later confirmed thus paving way for them to distribute the estate. Apparently, Esther Wanjugu Ng'ang'a was prompted to apply to court to be part of those entitled to share the Estate when she realized her siblings had excluded her. She successfully obtained the orders against the administrators of the Estate. Unfortunately for her, the distribution of the Estate was complete hence she was awarded Ksh.600,000/= being the value of her property. Those beneficiaries who had benefited from the Estate were forced to jointly shoulder the responsibility of settling the debt. It would appear the debt was not settled in full hence Esther Wanjugu Ng'ang'a was forced to execute the consent judgment against the administrators and the beneficiaries of the Estate. This explains how motor vehicle registration [Particulars Withheld] Toyota Hiace van was attached. The objector has clearly stated that he is not indebted to the Estate nor to the decree holder hence his motor cannot be attached. The decree holder does not deny that fact. She has simply stated that the motor vehicle has been in the possession of Joseph Mahihu Machira who operated it as a matatu. It would appear she assumed that it was his property. The decree holder also attacked the provisions the objector relied on in filing the objection proceedings. In my estimation two issues have

emerged for the determination of this court. First, is whether the objection proceedings are incompetent or not. Secondly, whether or not the proceedings have been established.

Let me start with the first issue. As to whether the objector's application is property before this court! It is the submission of the decree holder that since Order 22 i.e. former Order XXI of the Civil Procedure Rules have not been recognized by Rule 63 of the Probate and Administration Rules, the Objection Proceedings should be struck out. Let me state from the outset that Rule 63 of the Probate & Administration does not import the application of Order 22 (*formerly Order XXI*) of the Civil Procedure Rules in Succession matters. The question is whether that is fatal? In my view that is not fatal. My view is premised on the fact that the Law of Succession Act and the rules therein does not have a provision for execution of decrees nor the filing of objection proceedings. In fact the decree holder herein cited the Provisions of Order 22(XXI) of the Civil Procedure Rules when applying for execution of the consent judgment. She cannot now turn around and accuse the objector of citing the wrong provisions of the law. She cannot be allowed to approbate and reprobate. In the circumstances of this cause, I am of the view that the application cannot fail because there is no provision to cater for execution of decrees. In such a case the court will exercise its inherent power under Rule 73 of the Probate and Administration Rules and proceed to allow parties to execute decrees and orders and to file objection proceedings under Order 22 of the Civil Procedure Rules. Consequently I find the objection proceedings to be property before this court.

Having determined the first issue, let me now consider the merits of the motion. The objector has clearly shown that the attached motor vehicle is registered in his name. There is no evidence to prove otherwise. I am convinced the motion has been proved to the required standards. I allow it as prayed.

Dated, signed and delivered this 23rd day of August, 2013

J. K. SERGON

JUDGE

In open court in the presence of Wanyonyi holding brief for Nganga for Judgment Creditor and
Mr. Kingori holding brief for Wagiita for Objector