

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 494 OF 2001**

ELIAS NGUNGI NGANGA

T/A E.N. NGANGA & Company Advocates :::::::::::::::::::::::::::PLAINTIFF

VERSUS

CHARITY WAITHIRA MARINE

DOROTHY WANGARE NDERI

(sued as joint administrators of the Estate of

ALFRED MARINE NDERI) :::DEFENDANT

AND

EDWARD NDERI MARINE

KENNETH NGIGE MARINE

CHARLES KAMWERU MARINE :::::::::::::::::::::::::::::::::::OBJECTORS

RULING

This is an application brought under Order XXI Rules 53, 56 and 57 of the Civil Procedure Rules. The application is brought by Sons of one of the Defendants, Charity Waithera Marine who is now deceased. The said Charity Waithera Marine was sued together with Dorothy Wangare Nderi as joint Administrators of the Estate of Alfred Marine Nderi. The application is supported by an affidavit sworn by the 2nd applicant Kenneth Ngige Marine and a supplementary affidavit sworn by the same 2nd Applicant. The grounds for the application are that L.R. No.209/7484 Nairobi House No.128 in Lavington beneficially and equitably belong to the applicants and does not belong to the Defendants per se.

The application is opposed, and a replying affidavit was filed by the Plaintiff/Decree Holder. The application came before me for hearing on 19th May 2004. Mr. Mwaura argued the application for the applicants and Ms Ngugi opposed the application for the Decree Holder. Counsel for the Applicants submitted that the attached property is the family home of the Applicants who are the equitable and beneficial owners of the same. The property therefore does not belong to the Defendants who are the Legal Representatives of the Estate of Alfred Marine Nderi. Counsel argued that the family has made provision for the decretal amount by offering for sale a different asset of the Estate. Counsel further submitted that under Section 35(5) of the Law of Succession Act the property under attachment devolves to the Applicants and the Administrators merely hold the same in trust for the Applicants pending distribution. For this proposition reliance was placed on Black's Law Dictionary at page 1105.

In Reply Ms Ngugi for the Decree Holder submitted that the Defendants were sued not in their personal capacities but in their capacity as Administrators of the estate of the deceased father of the Applicants. All the prerequisites before attachment of the said property were completed. There have been numerous applications to stop the sale of the attached property without success. On 16th July 2003, the 1st Applicant applied to be enjoined as a Defendant in place of his mother who had died. In Counsel's view the 1st Applicant cannot be a Defendant and an Objector at the same time. Counsel further submitted that the averments in the affidavits of the Applicants in the present application are the same as

the averments in the affidavits in support of the many applications to stop the sale of the attached property. Counsel submitted that the present application is not made in good faith in the light of a letter dated 24th March 2004 from the Administrator of the Estate of the deceased i.e. one of the Defendants addressed to their Advocates instructing them to pay the Plaintiff Ksh 2,164,000/=. This sum has not been paid to date.

I have considered the application, I have perused the record of this case and listened to Counsel's rival submissions. I have to consider whether or not the applicants have proved that they are entitled to a legal or equitable interest in the attached property. The applicants also needed to establish that the Judgment Debtors do not have attachable interest in the property. The Decree in this case is against the Estate of the deceased. The Applicants cannot argue that the administrators of the Estate of the deceased do not have attachable interest in the attached property. The Applicants are heirs to the deceased's estate. They are indeed part of the Estate of the deceased. They do not quantify as objectors in respect of the attached property. Indeed the 1st Applicant in his affidavit sworn on 16th July 2003 in support of his application to be enjoined as a Defendant in place of his deceased mother Charity Waithera Marine, described himself as one of the Administrators and beneficiaries of the estate of the late Alfred Marine Nderi deceased. The 1st Applicant in an earlier affidavit sworn on 15th April, 2003 in support of his application for injunction to stop the sale of the attached property described himself in similar terms. At paragraph 3 of the said affidavit the 1st applicant mentioned the 2nd and 3rd Applicants as his siblings who would stand to suffer if the attached property would be sold.

It is clear from the record that the Applicants are aware of the superior interest of the estate of the deceased in respect of the attached property. Their present application in my view is really clutching at straws. It cannot succeed. The same is dismissed in its entirety with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-