



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 54 OF 2013**

**GREGORY MUTACHI WAMACHE.....PLAINTIFF**

**VERSUS**

**KWEYU OKUMU RAMADHAN**

**DAN MAKHALI WA OPEMBE.....DEFENDANTS**

**AND**

**JULIET MUTACHI ..... APPLICANT**

**VERSUS**

**JAKATA AUCTIONEERS..... RESPONDENT**

**RULING**

The application is dated 21<sup>st</sup> January 2021 and is brought under Section 3 & 3A of the Civil Procedure Act and Order 22 Rule 51 of the Civil Procedure Rules seeking the following orders:-

1. That service of this application be dispensed with and the application be heard exparte in the first instance.
2. That this honourable court do issue an order staying the execution of the warrant of attachment, warrant of sale and proclamation in execution of a decree for money issued herein.
3. That this honourable court do direct and/or order that service of the said warrant of attachment, warrant of sale and proclamation in execution of a decree for money upon the applicant herein is untenable and unlawful.

It is based on the annexed affidavit of Juliet Mutachi and on the following grounds that the plaintiff herein Gregory Mutachi Wamache is her late husband. That she does not know the defendants herein and has never had any dealings and/or any court cases whatsoever against them. That she does not know the respondent, Jakacha Auctioneers and never have had any dealings with them. That her husband passed away on 11<sup>th</sup> July, 2015. That on 16<sup>th</sup> November, 2020, a group of people stormed her home claiming that they were auctioneers. That despite telling the auctioneers that her husband was dead, they proceeded to hand over certain documents which upon perusal, she noted that they were a warrant of attachment, warrant of sale, proclamation and auctioneers bill of costs. That the said auctioneers informed her that they would return to cart away the proclaimed property.

The respondent submitted that the applicant has opposed the execution of the decree in this matter on the ground that her husband Gregory Mutachi Wamache is deceased having died on the 11<sup>th</sup> day of July, 2015. However, certain facts concerning this matter are indisputable, namely; That the said Gregory Mutachi Wamache was the original plaintiff in this matter; That upon his demise, his son, Peter Mutachi Rapando was granted leave to proceed with the suit herein as the legal representative of the estate of the deceased. That before proclaiming the items appearing on the Warrant of Attachment, they made inquiries and established that the said items belonged to the deceased, a fact not denied by the applicant. The question then that begs is whether the respondent could legally attach property which belonged to the deceased, notwithstanding the fact that at the time of attachment, the deceased was already dead. The respondent humbly submits that the law permits execution of the decree against the property of the deceased. They relied on the case of David Kirimi Charles vs. Muntu Kirimana Mungania (2017) eKLR.

This court has considered the application and the submissions therein. Section 39 of the Civil Procedure Act provides as follows,

**“ 39 (1) where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.**

**(2) where no such property remains in the possession of the judgment – debtor, and 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 to satisfy the court in the same manner as if the decree had been against him personally.”**

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.”**

It is evident from the record, and the fact is not contested that the plaintiff was deceased as at the time the decree and the warrants for the attachment were issued. The applicant does not deny being his widow. He died in 11<sup>th</sup> July 2015, the proclamation was on 16<sup>th</sup> November 2020, about five years later. His son stepped in to give evidence on a claim of adverse possession which was dismissed with costs by the court. This is not the same as 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 claim lies elsewhere with the deceased’s estate and one would have 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.

**In this scenario Section 37 applies. Section 39 on the enforcement of decree against legal representative states that;**

**(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.**

**(2) Where no such property remains in the possession of the judgment-debtor, and 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 legally.**

This means that execution against a legal representative of the deceased person is permitted. Except, however, liability thereto will be to the extent of the property of the deceased which has come to the hands of the legal representative and has not been duly disposed of. Be that as it may, in the instant case no evidence has been adduced to show that the applicant is the legal representative of the deceased. I find that the execution of this decree is unlawful. I find that the application has merit and I grant the same as prayed.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**