



**Mombasa Trade Centre v East Africa Institute of Certified Studies Limited & 2 others; Equity Bank (K0 Limited (Objector) (Civil Suit 104 of 2021) [2024] KEELC 13669 (KLR) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13669 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 104 OF 2021  
LL NAIKUNI, J  
DECEMBER 2, 2024**

**BETWEEN**

**MOMBASA TRADE CENTRE ..... PLAINTIFF**

**AND**

**EAST AFRICA INSTITUTE OF CERTIFIED STUDIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL WAKABA MACHARIA ..... 2<sup>ND</sup> DEFENDANT**

**SERAH WANJIRU MACHARIA ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**EQUITY BANK (K0 LIMITED ..... OBJECTOR**

**RULING**

**I. Introduction**

1. This Honourable Court is tasked with the mandate to make a determination of the Notice of Motion application by Equity Bank (K) Limited, the Objector/ Applicant herein dated 13<sup>th</sup> June, 2024. It was brought under a Certificate of Urgency and under the provisions of Order 22 Rule 51 of the Civil Procedure Rules, Section 1A,1B,3A of the *Civil Procedure Act* and all other enabling sections of the law.
2. Despite of the Application having been served upon the Respondents, the Plaintiff/ Respondent responded through a replying affidavit was sworn 13<sup>th</sup> July, 2024.



## II. The Applicant's case

3. The Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That the attachment by the Plaintiff pursuant to the Decree dated 22<sup>nd</sup> June 2023 and the warrants of attachment issued by this court to Vintage Auctioneers be raised forthwith and the motor vehicles registration number KCX 124X, KCX 076Y, KCX134X, KCV374A, KCX 127X, KCX129X and KCX 133X be released forthwith.
  - d. That pending the hearing and determination of this application, this honorable court be pleased to grant a temporary order of injunction restraining the Plaintiff either by themselves, agents, or servants from selling, disposing of, transferring, or in any other manner interfering with the suit motor vehicles registration number KCX 124X, KCX 076Y, KCX134X, KCV374A, KCX 127X, KCX129X and KCX 133X.
  - e. That in the alternative, this honorable court be pleased to order the taking of accounts of sale, if any, and the proceeds thereof be paid to the Applicant in full effect of the provisions of the Moveable Properties Security Rights Act.
  - f. That costs be provided.
4. The application by the Applicants is premised on the grounds, facts and testimony on the face of the application and further supported by the 12 paragraphed annexed affidavit of Samuel Wamaitha the Legal Manager employed by the Objector herein with four (4) annexures marked as "SW 1 to 4". The Applicant averred that:
  - i. Vide two offer letters dated 5<sup>th</sup> October 2023 and 16<sup>th</sup> April 2024, the Objector herein advanced various loan facilities to the Defendants totaling to Kshs. 53,833,374/-. The facilities were partly secured by the motor vehicles registration number KCX 124X, KCX 076Y, KCX134X, KCV374A, KCX 127X, KCX129X and KCX 133X. (Annexed in the affidavit and marked "SW 2" a copy of the Letter of offers).
  - ii. In full effect of securing the facility, the Objector herein and by the consent of the Defendant, registered an interest against the aforementioned vehicles under the Movable Properties Security Rights Act and the logbook for the aforementioned vehicles bears the joint names of the Objector and the Defendant herein. (Annexed in the affidavit and marked "SW3 (A)" a copy of the registered interest under MPSR and "SW3 (B)" were copies of the logbooks).
  - iii. The Objector's interest as a registered secured creditor security ranks in priority to any interests of the Plaintiff as decree holder.
  - iv. The Loan was outstanding in the sum of Kshs. 16,778,137/- as confirmed from the extract of the loan statement. (Annexed in the affidavit and marked "SW 4" a copy of the Bank Statement).
  - v. The Objector was not aware of the suit until now and it was not a party to the suit.



- vi. The Plaintiff had through Auctioneers, proclaimed the motor vehicles, pursuant to the decree and warrants issued in execution and they were informed that some of the vehicles had been detained by the auctioneers.
- vii. There was a real likelihood that the Plaintiff would proceed with execution through the sale of the motor vehicles.
- viii. If the motor vehicles were sold in the execution of the decree, the objector's legal interest, protected in statute, as a secured creditor, would have been defeated and the objector would suffer prejudice as the loan would remain exposed and the objector would not recover the full amount due and owing.
- ix. It was in the interest of justice that the prayers sought were granted.

### **III. The response by the Plaintiff**

5. The Plaintiff responded to the Application through a 12 paragraphed replying affidavit sworn by Abdulkader Mohamed Sale Mohammed, the Plaintiff's Accountant duly authorized and competed to swear this Affidavit on behalf of the Plaintiff on 13<sup>th</sup> July, 2024 where the deponent averred that:-
  - a. Prior to the levying of attachment and physical removal of the attached vehicles, he wrote to the objector sought to confirmed whether the objector had any interest in the attached Vehicles. Annexed in the affidavit a copy of the letter dated 5<sup>th</sup> July, 2024 marked as "AMSM – 1".
  - b. The objector ignored the Auctioneer's letter and inquiry and the Auctioneer proceeded to remove and advertise the motor vehicles for the sale. Annexed in the affidavit a copy of the Newspaper Advertisement marked as "AMSM-2".
  - c. It was clear that whereas the Objector obtained orders on 18<sup>th</sup> June, 2024, they failed to serve the order upon the Plaintiff's Auctioneer and Advocates on record until 4<sup>th</sup> July, 2024 long after the attachment and advertisement for sale.
  - d. The objector's irregular and belated attempts to interfere with the ongoing attachment and sale of the motor vehicles is a clear indication that the objection proceedings are presented in collusion with the Judgment-Debtor solely to frustrate the Judgment-Creditor's attempts to recover the Decretal Sum.
  - e. The only option available to the Objector is taking of accounts under the provisions of Movable Properties Rights Act and not seeking to stay the on-going execution.
  - f. The judgment – debtor owned many other valuable properties in Nairobi and Nakuru which are known to the Objector and there is no real possibility that the Objector will suffer any prejudice on its loan as alleged.
  - g. The Objector's interest, if any, cannot be used to frustrate execution of a lawful Court Judgment and Decree.
  - h. He swore this Affidavit in opposition to the Objector's Application dated 13<sup>th</sup> June, 2024.

### **IV. Submissions**

6. On 25<sup>th</sup> July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 13<sup>th</sup> June, 2024 be disposed of by way of written submissions and all the



parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on 16<sup>th</sup> October, 2024 by Court accordingly.

## V. Analysis and Determination

7. I have carefully read and considered the pleadings herein, the written submissions and the myriad of authorities by the Learned Counsels, the relevant provisions by the Constitution of Kenya, 2010 and the statutes.
8. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has two (2) framed the following issues for determination.
  - a. Whether the Notice of Motion dated 13<sup>th</sup> June, 2024 is merited.
  - b. Who will bear the Costs of Notice of Motion application 13<sup>th</sup> June, 2024.

### Issue No. a). Whether the Notice of Motion dated 13<sup>th</sup> June, 2024 is merited.

9. The main substrata of the application here is rather straight forward. The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached. So, a mortgagor can bring an objection on the ground that his interest in the property, viz, the equity of redemption cannot be attached and sold in execution of a decree against the mortgagee. See “Precast Portal Structures – Versus - Kenya Pencil Company Ltd & 2 others [1993] eKLR”; -

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.
10. The Court takes into account the grounds of objections raised, and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.
11. The Objector’s case is that vide two offer letters dated 5<sup>th</sup> October 2023 and 16<sup>th</sup> April 2024, the Objector herein advanced various loan facilities to the Defendants totaling to Kshs. 53,833,374/-.The facilities were partly secured by the motor vehicles registration number KCX 124X, KCX 076Y, KCX134X, KCV374A, KCX 127X, KCX129X and KCX 133X.(Annexed in the affidavit and marked “SW 2” a copy of the Letter of offers).
12. In full effect of securing the facility, the Objector herein and by the consent of the Defendant, registered an interest against the aforementioned vehicles under the Movable Properties Security Rights Act and the logbook for the aforementioned vehicles bears the joint names of the Objector and the Defendant herein. (Annexed in the affidavit and marked “SW3 (A)” a copy of the registered interest under MPSR and “SW3 (B)” were copies of the logbooks). The Objector’s interest as a registered secured creditor security ranks in priority to any interests of the Plaintiff as decree holder.



13. The Loan was outstanding in the sum of Kshs. 16,778,137/- as confirmed from the extract of the loan statement. The Objector was not aware of the suit until now and it was not a party to the suit. The Plaintiff had through Auctioneers, proclaimed the motor vehicles, pursuant to the decree and warrants issued in execution and they were informed that some of the vehicles had been detained by the auctioneers. There was a real likelihood that the Plaintiff would proceed with execution through the sale of the motor vehicles. If the motor vehicles were sold in the execution of the decree, the objector's legal interest, protected in statute, as a secured creditor, would have been defeated and the objector would suffer prejudice as the loan would remain exposed and the objector would not recover the full amount due and owing.
14. The Plaintiff on the other hand argued that prior to the levying of attachment and physical removal of the attached vehicles, he wrote to the objector sought to confirmed whether the objector had any interest in the attached Vehicles; to which correspondence the Objector ignored the Auctioneer's letter and inquiry and the Auctioneer proceeded to remove and advertise the motor vehicles for the sale.
15. It was clear that whereas the Objector obtained orders on 18<sup>th</sup> June, 2024, they failed to serve the order upon the Plaintiff's Auctioneer and Advocates on record until 4<sup>th</sup> July, 2024 long after the attachment and advertisement for sale. The objector's irregular and belated attempts to interfere with the ongoing attachment and sale of the motor vehicles is a clear indication that the objection proceedings are presented in collusion with the Judgment-Debtor solely to frustrate the Judgment-Creditor's attempts to recover the Decretal Sum.
16. The rationale should be traced under Order 22 rule 51(1) of the Civil Procedure Rules which provides as follows;-

“ 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.”
17. In “Stephen Kiprotich Koech – Versus - Edwin K. Barchilei; Joel Sitienei (Objector) [2019] eKLR”, the court held: -

“The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached”.
18. In the case of “Nelson Kombe Mangaro – Versus - Tana River Bus Services; Mansour Naji Said & another (Objectors/Applicants) [2019] eKLR” the Court held that;

In addition, there are a number of particular features that were not dealt with in the specific attachment by the respondent. The attachment was issued against the applicants who were not litigants in the original suit. The decree holder did not undertake due diligence to ascertain the ownership or legal interest and equitable interest of the property proclaimed to fully justify the attachment in execution of a valid Judgment of the Court. This is what seems to have occurred which broadly speaking must have infringed the rights of the shareholders, a decision which could have been avoided by recognizing and giving effect to the basic structure of a limited company with share capital and its shareholders.



19. Further, in “Arun C. Sharma – Versus - Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR”, it was held:-

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”

20. In this case, the Objector produced a copy of the registered interest under MPSR and “SW3 (B)” were copies of the logbooks bearing the joint names of the Objector and the Defendant herein. Accordingly, I am satisfied that the objector has proved her case to the required standard. In the circumstances, I allow the application with costs.

**Issue No. b). Who will bear the Costs of Notice of motion application dated 13<sup>th</sup> June, 2024**

21. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

22. In the present case, the Honourable Court the objector has the costs of the application.

**VI. Conclusion & Disposition**

23. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly the objector has proved their case to the required probability. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 13<sup>th</sup> June, 2024 be and is hereby found to have merit thus allowed entirely.
- b. That the Honorable Court be and is hereby pleased to issue an order that the attachment by the Plaintiff pursuant to the Decree dated 22<sup>nd</sup> June 2023 and the warrants of attachment issued by this court to Vintage Auctioneers be raised forthwith and the motor vehicles registration number KCX 124X, KCX 076Y, KCX134X, KCV374A, KCX 127X, KCX129X and KCX 133X be released forthwith.
- c. That the Objector shall have the cost of this application.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 2<sup>ND</sup> DAY OF DECEMBER 2024.**

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**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Kagisha Advocate for the Objector/Applicant
- c. M/s. Takah holding brief for Mr. Mutubia Advocate for the Plaintiff/Respondent
- d. M/s. Khadija holding brief for Dr. Chokaa Advocates for the Defendants.

**HON. JUSTICE L. L.. NAIKUNI (JUDGE)**

