



REPUBLIC OF KENYA



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**KCB Bank Kenya Limited v Ndungu & 2 others (Civil Appeal  
E092 of 2023) [2025] KEHC 6732 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6732 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E092 OF 2023**

**EM MURIITHI, J**

**MAY 15, 2025**

**BETWEEN**

**KCB BANK KENYA LIMITED ..... APPELLANT**

**AND**

**SILAS NGICHIRI NDUNGU ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL WANJALA WAFULA ..... 2<sup>ND</sup> RESPONDENT**

**EXCELLENT LOGISTICS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. S.M. Nyaga, SRM delivered  
on 5th October 2023 in Baricho PMCCC No. E111 of 2021 being Silas  
Ngichiri Ndungu vs Samuel Wanjala Wafula & Excellent Logistics Limited)*

**JUDGMENT**

1. The appellant filed an appeal dated 30<sup>th</sup> October, 2023 against the Ruling delivered in Baricho Case No. E111 of 2021 setting out the following grounds:
  1. That the learned magistrate erred in law and fact in failing to appreciate that once the Objector had proved its interest in the attached property, the Court was obliged to make an order raising the attachment of the subject motor vehicle.
  2. That the trial magistrate erred in law and fact in failing to hold that the Objector's equity of redemption in the motor vehicle could not be attached and sold in execution of a decree against the defendants.
  3. That the trial magistrate erred in law and fact in failing to uphold the law and in particular Section 44(1) of the *Civil Procedure Act* that expressly provides that in execution proceedings, only property of the judgment debtor is liable to attachment.



4. That the trial magistrate erred in law and fact in fail to uphold that the Attaching Creditor, having failed to intimate to the court his intention of proceeding with the attachment and execution, was precluded from opposing the Objection and the purported replying affidavit filed thereafter was null and void.
5. That the trial magistrate erred in law and fact in disregarding the overwhelming evidence that in the circumstances of the case no genuine auction had taken place.
6. That the trial magistrate erred in law and fact in holding that the objection proceedings had been overtaken by events whereas Order 22 Rule 51 (1) allowed for objection to be filed “at any time prior to payment out of the proceeds of sale of such property.”
7. That the trial magistrate erred in law and fact in basing the entire ruling on the unsubstantiated averments in the Plaintiff’s affidavit that were not within his knowledge hence inadmissible.
8. That the trial magistrate erred in law and fact in holding that the sale had been concluded yet there was no vesting order issued by the court to sanction the sale and effect transfer of the motor vehicle.
9. That the trial magistrate’s ruling in this matter was not supported by the material evidence placed before him.

#### **Background to the case**

2. The Plaintiff herein pursuant to the Judgment of this court given on December 15, 2022, obtained Warrants of Attachment and Sale of movable assets belonging to the Defendants on 31<sup>st</sup> July, 2023.
3. The Plaintiff thereafter instructed First Choice Auctioneers who on 10<sup>th</sup> August, 2023 proclaimed Motor vehicle registration number KCL 940B prompting the Appellant to institute objection proceedings seeking an order for the release of the motor vehicle registration number KCL 940B to the Objector.
4. The Objection was premised upon the ground that the Objector as a secured creditor had a legal and equitable interest in the subject motor vehicle.
5. The 1<sup>st</sup> Respondent opposed the objection maintaining that the application had been overtaken by events as the vehicle had been sold to the highest bidder on 19<sup>th</sup> August, 2023.
6. The trial court heard the objection and in its ruling delivered on 5<sup>th</sup> October, 2023 dismissed the same on the ground that the objection proceedings had been overtaken by events. It is against the said dismissal that the Appellant has preferred the present appeal.

#### **Appellant submissions**

7. The Appellant instituted objection proceedings pursuant to Order 22 rule 51(1) of the Civil Procedure Rules.
8. The Appellant was required to demonstrate to the court that it had an interest, legal or equitable in the attached motor vehicle registration number KCL940B.



9. In *Precast Portal Structures vs Kenya Pencil Company Ltd & 2 Others* [1993] eKLR it was held: -

“The burden is on the objector to prove and establish his right to have 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.

- i. 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.
- ii. That the objector holds that property on his own account.
  1. The principle that emerges from the above cited decisions is that once the Objector proves his interest in the attached property, the Court then makes an order raising the attachment as to the whole or a portion of the property subject to the attachment. Therefore, the question that this court need to ask itself is whether the objector established a legal or equitable interest in the whole or part of the motor vehicle registration number KCL940B attached in execution of the decree?
  2. The Appellant produced a search of the subject motor vehicle and a copy of the logbook thereof both showing that the subject motor vehicle was registered in the joint names of the Appellant and the 3<sup>rd</sup> Respondent. Therefore, the motor vehicle that was attached did not belong to the judgment debtor and any purported attachment and sale of the said motor vehicle was in contravention of the said Section 44 (1) of the *Civil Procedure Act* and thus null ab initio.
  3. The Attaching Creditor (1<sup>st</sup> Respondent) despite taking part in the objection proceedings never intimated to the trial court or to the Objector in writing within the time required that he intended to proceed with the attachment and execution thereof.
  4. Further, while the Proclamation and Attachment were on 10<sup>th</sup> August, 2023, the Advertisement for Sale was on 12<sup>th</sup> August, 2023 with the auction being conducted on 19<sup>th</sup> August, 2023 which, excluding the date of the advertisement and the date of auction, is only five days as opposed to the rules that stipulate that the auction should not be less than seven days from the date of advertisement.
  5. The appellant relied on *Syrilla A. Barasa & 2 others v Margaret Aseka Barasa* (2022) eKLR, for the proposition that that the auction should not be less than seven days nor more than 14 days from the date of advertisement.



## **Respondent submissions**

### **Ownership of the suit motor vehicle**

15. The 1st Respondent submit that contrary to ground I of the Memorandum of Appeal and the Appellant's submissions that the Objector had proved its interest on the attached property, the Respondent submits that the same was not proved within the prescribed time as claimed. The 1st respondent relied on Order 22 Rule 51 of the Civil Procedure Rules 2010 providing that "Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 the parties and to the decree-holder of his objection to the attachment of such property."
16. The Respondent submit that it is not disputed that the Appellant filed an Application dated 15<sup>th</sup> August 2023, seeking to object the execution proceedings of Motor Vehicle Registration Number KCL 940B. The said application was duly filed in the trial court on August 17, 2023 as per evidenced by the receipt (pg4 of the Record of Appeal).
17. According to the Respondent what is false is the Appellant's averments in Paragraph 22 of their written submissions that there are no proceedings that supports that there were interim orders issued and Paragraph 35 that the trial court had issued an Order of Stay of Execution dated August 18, 2023.
18. The Respondent strongly disagree with the Appellants sentiments and responds that the Appellant herein has intentionally and fraudulently failed to attach in their Record of Appeal the exparte Orders issued on August 21, 2023. The said orders were served upon the Respondent and it is our strong belief that the said ex-parte orders are readily available in the lower court file, which has been availed and within the premises of this Honourable court records.

### **On ground 2 of the Appeal**

19. The 1st respondent pointed out that in Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 others (1993) eKLR, the Court stated that "where the court is satisfied that the property was, at the time of attachment, held by the Judgment Debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-Debtor or that ownership has changed whereby the Judgement-Debtor has been divested of the property in order to evade execution on the change is tainted with fraud, the court shall dismiss the objection."
20. As per the Proclamation of Attachment Notes dated July 31, 2023. (pg 47 of the Record of Appeal) and Notification of Sale of Movable Property dated August 10, 2023(pg 48 of the Record of Appeal), the Respondent through their appointed auctioneers First Choice Auctioneers proclaimed motor vehicle registration number KCL 940B in the registered postal address, offices, location and premises of Excellent Logistic Limited. It was pointed out, moreover, that the Motor Vehicle Search records dated August 10, 2023 (pg12 of the Record of Appeal) state that the judgment debtor one "Excellent Logistic Limited" is one of the registered owner and at the time of the Auction it was holding and using the said motor vehicle on its own.

### **Failure to intimate to court his intention of proceeding with attachment and execution**

21. The respondents submit that as per the issued orders dated August 21, 2023; the application was certified urgent, a stay of execution granted and that the application was for mention on August 24, 2023. There were no issued court orders at the time that required the Judgment creditor to notify



the court as to the reasons they had proceeded with execution as per Order 22 Rule 52 of the Civil Procedure Rules 2010. Further the interim stay orders were issued on 21/8/2023 after the Respondent had disposed the proclaimed movable property at a public auction that took place on the Saturday, August 19, 2023. It was submitted that Rule 52 is clear that the notice ought to have been issued by Court to the Decree-holder requiring him by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

22. It was urged that as at the hearing of the Application on 24<sup>th</sup> August 2023, the Court had not issued such notice to the Decree-holder/judgement creditor and it would have been impossible for the court to do so as the execution had already been finalized. When the Application was being heard to the issuance of the Ruling, the judgement creditor had not been issued with any notice from court requiring him to declare his reasons to proceed with the execution. Reliance was placed on *Grace Wanjiku Kageni Waiyaki v Pegrume Limited & another* [2019] eKLR where the Court (Maureen Atieno Odero J.) interpreted Rule 52 as follows:

“My understanding is that Rule 52 requires the attaching creditor to respond to a valid notice only if called upon by the court to respond by a notice in writing. Rule 53 and 54 were not activated.”

### **Issue**

23. The issue for determination is whether the trial court’s ruling should be reviewed and or set aside. The Court’s duty to review the evidence before the trial court as held in *Selle & Anor. v. Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 and *Peters v. Sunday Post Limited* (1958) EA 424 cited by the Appellant is appreciated.

### **Analysis\_**

24. The Appellant instituted objection proceedings pursuant to Order 22 rule 51(1) of the Civil Procedure Rules. The Court has confirmed that the trial Court (D. M. Ireri PM) issued an order for stay of execution on 18/8/2023 which was extracted and issued on 21/8/2023, so it could only have been served on that date or thereafter.
25. The regime of rules for dealing with objections to attachment of property in execution of decree of court is set out particularly in Order 22 Rules 51-55 of the Civil Procedure Rules as follows:

“[Order 22, rule 51.] Objection to attachment

51. Any person claiming to be entitled to or to have a legal or equitable interest
- (1) in the whole of 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 the parties and to the decree-holder of his objection to the attachment of such property.
  - (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
  - (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.



[Order 22, rule 52.] Stay of execution.

52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

[Order 22, rule 53.] Raising of attachment.

53. Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.

[Order 22 rule 54.] Notice of intention to proceed 54.

If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.

[Order 22, rule 55.] Power to order property attached to be sold and proceeds to be paid to person entitled.

55. Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.”

26. The Appellant was therefore required to demonstrate to the court that it had an interest, legal or equitable in the attached motor vehicle registration number KCL940B.

27. I respectfully agree with F. Gikonyo, J. in *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] KEHC 1412 (KLR) on the test under Order 22 Rule 51 (1) of the Civil Procedure Rules that:

“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?”

28. The question that this court must ask is whether the objector/appellant established a legal or equitable interest in the whole or part of the motor vehicle registration number KCL940B attached in execution of the decree. The Appellant produced a search of the subject motor vehicle and a copy of the logbook thereof both showing that the subject motor vehicle was registered in the joint names of the Appellant and the 3<sup>rd</sup> Respondent.



29. The motor vehicle search proves that it was registered in the joint names of the Appellant and the 3<sup>rd</sup> Respondent, and consequently, the Appellant has a legal interest as a co-owner of the motor vehicle subject of the suit.

Section 44 Requirement that only property of the judgment debtor is liable to attachment

30. Section 44(1) of the *Civil Procedure Act* provides that in execution proceedings, only property of the judgment debtor is liable to attachment, in the following terms:

“44. Property liable to attachment and sale in execution of a decree

1. All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:”

31. In *Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 others* 1993 eKLR the Court (Kuloba, J.) held:

“The objector must adduce evidence to show that at the date of the attachment he had a legal or equitable interest in the property. 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.

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.

But where the Court is satisfied that the property was, at the time of attachment, held by the judgment – debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-debtor, or that ownership has changed whereby the judgment – debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the Court shall dismiss the objection.”

32. The respondent submitted that the Motor Vehicle Search records dated August 10, 2023 state that the judgment debtor “Excellent Logistic Limited” is one of the registered owners and at the time of the Auction it was holding and using the said motor vehicle on its own.

33. In the present case, the motor vehicle that was attached clearly did not wholly belong to the judgment debtor and, therefore, any purported attachment and sale of the said motor vehicle was in contravention of the said Section 44 (1) of the *Civil Procedure Act* and thus null ab initio.



### **Failed to intimate to the court his intention of proceeding with the attachment and execution**

34. Under Order 22 Rule 51 of the Civil Procedure Rules, the Attaching Creditor, is required to intimate to the court whether or not they would be proceeding with the said attachment. Rule 53 allows the court to make an order raising the attachment if the attaching creditor in pursuant of a notice issued under Rule 52 fails to reply to the court and the Objector that he does not propose to proceed with the execution.
35. The appellant submits that the Attaching Creditor (1<sup>st</sup> Respondent) despite taking part in the objection proceedings never intimated to the trial court or to the Objector in writing within the time required that he intended to proceed with the attachment and execution thereof.
36. That failure was fatal to any subsequent defence that he mounted to the objection proceedings since the requirement under Rule 52 is couched in mandatory terms. Even under Rule 53, the court had no option where there was a failure to comply with Rule 52.
37. In the case of *Siso Limited v Caroline Wanjihia t/a C.W. Wanjihia & Co. Advocates & another* [2015] eKLR, the court had the occasion to consider the said Rule 52 and the effect of failure to comply with the same, and held:-

“The requirement under Order 22 Rule 52 is mandatory. The Attaching Creditor has no option but to intimate in writing whether he intends to proceed with attachment and execution. If he intends to do that, such notice will be accompanied by a replying affidavit under Rule 54 and the court will give directions for the hearing of the application. If, however, the attaching creditor fails to give information in writing, under the above stated Rule 53, the court has no option but to raise the attachment and give direction on costs.”

The appellants submit that despite the above decision binding on the trial court, the trial magistrate did not consider that issue yet it had been raised by the Appellant.

38. The appellant argues that the trial magistrate stated that the interim stay was issued on 21 August 2023 whereas the auction took place on 19<sup>th</sup> August 2023. This is not supported by the record of proceedings that clearly shows that the initial Application was filed on 17 August 2023.
39. The Respondents submit that as per the issued orders dated August 21, 2023; the application was ordered to be urgent, a stay of execution granted and that the application has been set for mention on August 24, 2023. There were no issued court orders at the time that required the Judgment creditor to notify the court as to the reasons they had proceeded with execution as per Order 22 Rule 52 of the Civil Procedure Rules 2010.
40. This Court would agree with the statement of the Court in that “The requirement under Order 22 Rule 52 is mandatory” if the Court upon an objection under Rule 51 had exercised discretion under Rule 52 to “order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment....” In the order of 18/8/2023 issued on 21/8/2023, the Court did not “call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment.” There was no breach of the rule 52 by the Decree-holder in this case, and Rule 53 did not come into operation.



## Conclusion

41. Having established that the appellant had a legal interest of a co-owner under a debenture for money advance to the judgment debtor, the Court determines that the the appellant was entitled to an order lifting the attachment on the basis of section 44 of the *Civil Procedure Act* and Order 22 Rule 51 (1) of the Civil Procedure Rules.
42. The court, however, did not lift the attachment because it ruled that the objection was overtaken by events. The full text of the Ruling is attached:

“Republic of Kenya

In the Principal Magistrate's Court at Baricho

Civil Case No. 111 of 2021

Silas Ngichiri Ndungu Plaintiff

Versus

Samuel Wanjalawafula Lst Defendant

Excellent Logistics Limited 2nd Defendant

Ruling

This court delivered a Judgment on 15/12/2022 jointly and severally against the defendants.

A Stay for 30 days was easily granted on the same day.

A decree for decretal sum of Kshs. 549,373/= AND costs and interests for Kshs.114,100/= was subsequently issued on 28/7/2023.

On 31/7/2023 the Plaintiffs Advocate through First Choice Auctioneers were after application, issued with a warrant of sale of property in execution of decree for money.

KCB Bank Kenya Limited applied as unpaid financier on 15/8/2023 for release of Motor Vehicle KCL 940B allegedly proclaimed on 10/8/2023 basically seeking release of the said automobile.

On 21/8/2023, Court issued Interim Stay Orders pending hearing of the said application.

In reply, the Plaintiff confirmed a public auction of the said motor vehicle was conducted on 19/8/2023 hence the orders of stay of 21/8/2023 were overtaken

by events since even the buyer at the auction took over possession of the motor vehicle after executing a memorandum of sale.

The Plaintiff confirmed through relevant documents that it complied with the procedure for auction and that the defendant was duly notified of the same all through.

Parties submitted and simply therefore is whether the auction process can be stopped at this point and orders that can be granted.

The undisputed evidence is that the auction process already ended before stay orders were issued.

Stopping process now would be in vain. The objector got late to court.



In view of this court the objection proceedings are overtaken by events and to avoid delving too much on issues that may be subject to subsequent proceedings, I hereby dismiss application of 15/8/2023 with each party to bear own costs.

Right of appeal explained.

Ruling delivered, dated and signed at Baricho this 5th day of October, 2023.

S. M. Nyaga

Principal Magistrate

05/10/2023”

43. The provisions of section 44 of the *Civil Procedure Act* are clear that only property belonging to a judgment debtor may be attached and by Order 22 Rule 51(1) that objection proceedings could be taken “at any time prior to payment out of the proceeds of sale of such property”.
44. The Respondent did not show that payment out of the proceeds of sale of the suit vehicle and a vesting order under Order 22 Rule 67 of the Civil Procedure Rules had been made following the alleged sale of the suit property. Therefore, the trial Court had authority to entertain an application for release of attachment under Order 22 Rule 51, and properly make the call to the Decree holder in terms of Rule 52 thereof, and ultimately, in this case raise the attachment as the property did not wholly belong to the judgment debtor, and the appellant bank had a legal chargee’s interest. The finding by the trial court that the objection had been overtaken by events was not properly founded.
45. The Court, therefore, finds merit in the substantive appeal herein.

#### **Orders**

46. Accordingly, for the reasons set out above, the Court finds merit in the appeal herein and consequently, makes an order that the Ruling of the trial Court made on 5th October 2023 is set aside.
  47. The Appellant shall have the Costs of the Appeal to be paid by the 1st respondent.
- Order Accordingly.

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Nadia for Ms Mumbua for the Appellant.

Ms. Ms. Githinji for Ms. Mwanzia for the 1st Respondent.

Mr. Kisaka for the 2nd and 3rd Respondents.

