



Wanyange & another (Suing as Administrators of the Estate of the Late Francis John Wanyange Mwangi - Deceased) v Raluoch; Family Commercial Enterprises Ltd (Interested Party) (Civil Appeal E051 of 2023) [2025] KEHC 11304 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E051 OF 2023
GL NZIOKA, J
JULY 17, 2025**

BETWEEN

CATHERINE WAIRIMU WANYANGE 1ST APPELLANT

JAMES ISAAC MWANGI WANYANGE 2ND APPELLANT

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE FRANCIS
JOHN WANYANGE MWANGI - DECEASED**

AND

BENJAMIN RALUOCH RESPONDENT

AND

FAMILY COMMERCIAL ENTERPRISES LTD INTERESTED PARTY

(Being an appeal from the ruling and orders of Hon. N. S. Lutta (CM) delivered on 31st May, 2023 in Naivasha Chief Magistrate Civil Case No. 1203 of 2018)

JUDGMENT

1. By a memorandum of appeal dated 23rd June 2023, the appellants are appealing against the ruling and orders of Hon. N. S. Lutta [CM] delivered on 31st May, 2023, based on the following grounds: -
 - a. The learned trial Magistrate erred in law and in fact in failing to appreciate that the goods attached could not have been sold in March 2021 and still be claimed on 19th October, 2022.
 - b. The learned trial Magistrate erred in law and in fact when he failed to consider or even address the issues of the respondent's non-compliance with Order 22 Rules 53 and 54.



- c. The learned trial Magistrate erred in law and in fact when he failed to appreciate and apply the mandatory requirements of Order 22 Rule 53 and 54 whose effect should have been an automatic lifting of the attachment.
 - d. The learned trial Magistrate erred in law and in fact in failing to appreciate the evidence of ownership of the attached goods which was supplied by the objector/appellant.
 - e. The learned trial Magistrate erred in law and in fact in relying on evidence tendered by the respondent from the bar through submissions and not produced in court as required.
 - f. The learned trial Magistrate erred in law and in fact in finding that the appellants had not proved their case as required despite evidence to the contrary.
 - g. The learned trial Magistrate erred in law and in fact in dismissing the applications before him.
2. The background facts of the case are that, by a notice of motion application dated 24th October, 2022, the appellants moved the trial court as Objectors, based inter alia on the provisions of; Order 22 Rules 51, 52 and 53, of the Civil Procedure Rules, 2010, seeking for the following orders verbatim reproduced: -
- a. Spent.
 - b. That there be a temporary stay of the execution of the decree herein dated 25th April, 2019 and in particular carrying away of the property attached herein pending hearing and determination of this application inter parties.
 - c. That the warrant of attachment and sale issued to Geoffrey Kariuki of Direct ‘O’ Auctioneers herein on 17th October, 2022 be lifted and attachment in pursuance thereof be raised.
 - d. That the properties attached vide the proclamation in pursuance of the decree herein be released to the Objectors.
3. The application was supported by the grounds thereto and an affidavit of the even date sworn by the 1st appellant. She averred that there was a fresh proclamations of the properties belonging to the estate of her late husband Francis John Wanyange and which had been proclaimed and carried away in execution of the decree herein.
4. That underground fuel pumps that had been proclaimed were purchased by the late husband from P.J Petroleum Products Ltd way back in 1993 and that the other pumps were purchased by the deceased from Hudson Petroleum Agencies of Nakuru vide the annexed delivery note dated 24th October 2018.
5. Further the Auctioneer had previously attached similar properties and sold illegally before they could be stopped. That the estate stands to suffer irreparable loss if the assets in the proclamation are carried away and sold.
6. Consequently, she prayed that the warrants of attachments and sale of the attached properties be lifted and the properties be returned to the estate.
7. However, the respondent filed a notice of preliminary objection dated 7th November, 2022 in response to the application based on the following grounds: -
- a. That the application is non-starter, inept and a gross abuse of the process of court.



- b. That the application is res judicata as a similar and identical application dated 18th January, 2022 raising the same issues and seeking similar orders was dismissed by this Honourable court on 31st of August 2022.
- c. That the application cannot be sustained in law.
8. The Objectors application was canvassed through filing of submissions and at the conclusion of the hearing, the trial court rendered a ruling dated 31st May, 2023, and dismissed the application on the ground that the appellants had not proved ownership of the proclaimed goods.
9. However, the appellants being aggrieved filed this appeal based on the afore grounds. The appeal was canvassed through filing of submission. In submission dated 11th October 2023, the appellant reiterated that, goods sold in March 2021, cannot have been proclaimed in October 2022.
10. Further the decree holder did not comply with the provisions of Order 22 Rule 22 of the Civil Procedure Rules, 2010, by intimating the desire to proceed with attachment after they were served with a notice of objection.
11. Furthermore, the decree holder failed to file a replying affidavit pursuant to Order 22 Rule 52 of the Civil Procedure Rules and opted to un-procedurally introduce matters of facts through paragraphs 13-17 of their submissions filed in the trial court which amount to evidence from the bar.
12. The appellants further submits that, the trial court erred by declining to consider and admit the evidence of delivery notes to prove that the pumps belonged to the objector, yet the respondent did not produce any evidence to prove the same belonged to the judgment debtor. Further that a pump cannot have any registration or other document proving ownership.
13. The appellant relied on the cases of; Victor Mabachi & Another v Nurtan Bates Ltd [CA No. 247 of 2015](#) [2013] eKLR, and Michila Messa & Co. Advocates v Katana Kalume Ndurya HCC Misc No. 143/2019 [2021] eKLR, to argue that, once the objector produced the delivery notes, then the decree holder had the burden to prove the pumps belonged to the judgment debtor.
14. However, the respondent filed submissions dated 26th January 2024 and submitted that, the delivery notes produced and marked as “CWW3” belonged to pumps already sold in March 2021, and that the appellant had the burden to prove that, those delivery notes belonged to goods proclaimed in the year 2022.
15. As regard, the non-compliance with the provisions of Order 22 Rules 52 and 53, the respondent argued that, once a preliminary objection is raised, it should be heard and determined first and that in this case, the preliminary objection was based on the principle of Res Judicata.
16. The respondent relied on the cases of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and IEBC –v Maina Kiai & 5 others Civil Appeal No. 105 of 2017 [2017] eKLR as to what a preliminary objection is and argued and that, the respondent had proved all the elements of Res Judicata.
17. On the issue of raising factual matters from the bar, the respondent argues that, it filed submissions as directed by the court and that, the court should not dwell on form but consider substance as envisaged under Article 159 of [the Constitution](#) of Kenya, 2010.
18. Finally, the respondent reiterated that, the appellants failed to prove ownership of the subject proclaimed goods, and other goods proclaimed. That the delivery notes availed without additional supporting material establishing legal and equitable possession do not serve as proof of ownership.



19. At the conclusion of arguments by the parties and taking into account that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court and arrive at its own conclusion as held by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 as follows; -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. In that regard, I have considered the arguments advanced by the respective parties in support of or opposition to the subject application and the decision of the trial court and I note that, several issues arose in the trial court from the submissions of the respective parties. In my considered opinion, these issues include but are not limited to: -
- a. Whether the application before the trial court was Res Judicata.
 - b. Whether the goods that were proclaimed in the months of March 2021 are the same as those proclaimed in the month October 2022.
 - c. Whether the delivery notes marked as “CWW3” are the same delivery notes relied on in an earlier application relating to goods proclaimed in the months of; March 2021.
 - d. Whether the delivery notes produced were adequate evidence in establishing the objectors/ appellants legal and/or equitable ownership of the proclaimed goods, in particular the pumps.
 - e. Whether the delivery notes also proved ownership of the other proclaimed goods or the pumps per se.
 - f. Whether once the appellant availed the delivery notes, the burden of proof shifted to the respondent to prove that, the goods belonged to the judgment debtor.
 - g. Whether the respondent complied with the provisions of Order 22 Rule 52 and 53 and/or by filing a preliminary objection.
 - h. Whether the preliminary objection was adequate response to the appeal.
21. Be that as it may, with outmost respect, from the ruling of the trial court, most of these issues were not addressed. The court basically addressed one issue as to; whether the appellants proved legal or equitable ownership of the proclaimed goods.
22. It suffices to note, and as well submitted by the respondent, once a preliminary objection is raised on a point of law, the proper practice is to dispose it off first, especially if it goes to the roof of the matter.
23. The preliminary objection raised herein was on the issue of Res Judicata. It is the considered opinion of this court that, the trial court should have considered it first. If for example the trial court ruled that,



the application before it was Res Judicata, then the rest of the issues raised would have fallen on the pathway.

24. The challenge that this court finds itself in is whether it should address the afore issues at the first instant, noting that, it does not have original jurisdiction over this matter. And if it does so, and any party is dissatisfied and appeals how will the Court of Appeal hear the matter. As a first or second appellate court. The Court of Appeal may equally find itself in a similar situation.
25. Consequently, it is the finding of this court that, the trial court's decision be and is hereby set aside on the ground that, it is incomplete and I revert the matter back to the Chief Magistrate's court to be heard afresh.
26. To avoid placing the court that heard the matter in a difficult situation, I direct that the matter be heard by a different trial court. That trial court is at liberty to deal with the matter fully without being restricted by the issues raised herein.
27. Each party shall meet costs of appeal.

DATED, DELIVERED AND SIGNED THIS 17TH DAY OF JULY, 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Njuguna for the appellant

Ms. Barmau for the respondent

Ms. Hannah: court assistant

