



**Momanyi & 5 others v Makwolo & 4 others (Civil Appeal 56 of 2022)  
[2024] KEHC 1239 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1239 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 56 OF 2022  
PN GICHOHI, J  
FEBRUARY 15, 2024**

**BETWEEN**

**THOMAS OMANGA MOMANYI ..... 1<sup>ST</sup> APPELLANT  
THOMAS OMANGA MOMANYI ..... 2<sup>ND</sup> APPELLANT  
ANDREW MIYIENDA OBAGA ..... 3<sup>RD</sup> APPELLANT  
ANDREW MIYIENDA OBAGA ..... 4<sup>TH</sup> APPELLANT  
JOHN MOKAYA OBAGA ..... 5<sup>TH</sup> APPELLANT  
JOHN MOKAYA OBAGA ..... 6<sup>TH</sup> APPELLANT**

**AND**

**JAMES NYACHWAYA MAKWOLO & 3 OTHERS ..... 1<sup>ST</sup> RESPONDENT  
JAMES NYACHWAYA MAKWOLO & 3 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order in Kisii CMCC  
679 of 2016 by Hon. N.S. Lutta (CM) on 26th May, 2021)*

**JUDGMENT**

1. The background of this matter is that James Nyachwaya Makwolo & 3 Others (Respondents) obtained judgment against Tom Momanyi Mwamba & 8 Others in a judgment delivered on 23<sup>rd</sup> January, 2019 in Kisii CMCC 679 of 2016.
2. When the Respondents set in motion the execution proceedings, Appellants filed objection proceedings vide application dated 12<sup>th</sup> February, 2021 seeking that attachment of property they claimed to be theirs be vacated, and/or raised wholly and that the property be restituted to them or compensation be done.



3. The 2<sup>nd</sup> Defendant in the suit (Samuel Benjamin Aosa) also filed an application dated 12<sup>th</sup> February, 2021 seeking orders for stay of sale of attached goods pending the hearing and determination of application dated 11<sup>th</sup> February, 2021 filed in Kisii HCCA 119 of 2019 seeking to set aside an order striking out the appeal.
4. The Respondents opposed both applications and by a ruling dated 26<sup>th</sup> May, 2021, the trial court found both applications merited and dismissed them with costs to the Respondents.
5. The dismissal prompted this appeal vide a Memorandum of Appeal dated 15/08/2022 on eight (8) grounds. In summary, the Appellants impugned the decision of the trial court or failure to consider that the Appellants were never enjoined in the proceedings.
6. They lamented that their properties were unlawfully sold since no proclamation notice, judgment or summons were served upon them. They complained that the orders were a travesty of justice as they were condemned unheard and that the trial court misapprehended the law.
7. In short, the Appellants were saying that the trial court erred in dismissing their applications and in the circumstances, they prayed that:-
  1. The Appeal be allowed by setting aside, varying and quashing the ruling and order of the trial court.
  2. This court be pleased to reconstitute the attached goods.
  3. The costs of the Appeal be borne by the Respondents.
8. The parties agreed to dispose of this Appeal by way of their rival respective written submissions. On 18/01/2023, the Appellants filed their joint submissions dated 16/01/2023. They submitted that they had great interest in attached properties listed in their Application. That although they did not submit proof of ownership, the court ought to have taken their word for it.
9. They submitted that the objectors are not and were not part of the Defendants whose judgment and decree was issued against. In the circumstances, they submitted that their properties ought not have been attached since they were never served with summons, the judgment or execution processes. They maintained that since the attachment of their properties was unlawful, the trial court arrived at a grave misdirection.
10. In their submissions dated 03/05/2023 and filed on 08/05/2023, the Respondents opposed the appeal on two main grounds. Firstly, that Appellants had no right of appeal as they had to first seek leave from this Court as Order 43, rule 1 stipulates the orders that lie on appeal as of right and further, that any appeal under Order 22 rules 51, 52 and 53 of the *Civil Procedure Rules* requires leave of court. On that issue, the Respondents relied on the case of *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR and *Micro-House Technologies Limited v Co-operative College of Kenya* [2017] eKLR.
11. Secondly, their opposition is that Objectors did not prove any nexus between them and the attached goods. The Respondents therefore urged this Court to find that the appeal was incompetent and strike it out.
12. The first issue that this Court has to deal with is whether an appeal lies under Order 22 rules 51 to 53 of the *Civil Procedure Rules*. In *Nyutu Agrovet Limited* (*supra*) the Court of Appeal strike out an appeal filed without leave on the grounds that the right of appeal is either conferred by statute or by leave and not by implication.



13. Similarly, the Court of Appeal in *Micro-House Technologies Limited* struck out an appeal filed without leave saying that it had no reason to depart from the unanimous decision of the five Judges in *Nyutu Agrovet Limited* (*supra*).
14. In light of the above summarized position, the issue as to whether this Court has jurisdiction to hear this appeal is in the negative. The Appellants had no right of appeal to this Court having not obtained leave under Order 43 (2) of the *Civil Procedure Rules*. As a consequence, this appeal is incompetent.
15. The Court would have stopped there but justice demands that the Court also addresses the second issue, that is of whether the Appellants demonstrated that they owned the attached goods.
16. The supporting affidavit to the Appellants application only contained a list of goods to which Appellants laid a claim but with no other supporting documents. The trial court appreciated the duty that was placed on the Appellants to demonstrate that they had a legal or equitable right over the attached goods. It was after considering the affidavits filed in support of the application that the magistrate found them lacking in supporting evidence to demonstrate any direct, indirect or remote relationship with the attached goods.
17. In the circumstances, this Court finds that the trial magistrate's finding that no legal or equitable right over the attached goods had been demonstrated was well founded.
18. From the foregoing, this Court finds that the appeal is not only incompetent but also lacking merit. It is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15TH DAY FEBRUARY, 2024.**

**PATRICIA GICHOHI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

N/A for Appellant

N/A for Respondent

Laureen Njiru/ Aphline, Court Assistant

