



**Republic v Director of Public Prosecutions & another; Chande (Interested Party); Kandie & another (Objector); Kandie (Exparte Applicant) (Judicial Review Miscellaneous Application 17 of 2019) [2024] KEHC 7552 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7552 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION 17 OF 2019**

**OA SEWE, J**

**JUNE 20, 2024**

**IN THE MATTER OF AN APPLICATION FOR CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF KWALE CHIEF MAGISTRATE’S CRIMINAL CASE NO. 206 OF 2019: REPUBLIC V DAVID KANDIE**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT, KWALE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ALI HAMISI CHANDE ..... INTERESTED PARTY**

**AND**

**BEN KEMBOI KANDIE ..... OBJECTOR**

**MUSTAFA KARATE KAGWAINE ..... OBJECTOR**

**AND**

**DAVID KANDIE ..... EXPARTE APPLICANT**



## RULING

- (1) Before the Court for determination is the Notice of Motion dated April 14, 2023. It was filed by the two objectors, Ben Kemboi Kandie and Mustafa Karete Kagwaine, pursuant to Article 159(2)(d) of the Constitution of Kenya, 2010, Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 22 Rule 51 of the Civil Procedure Rules and Order 51 Rule 1 of the Civil Procedure Rules. It seeks orders that:
  - (a) Spent
  - (b) Spent
  - (c) The Court be pleased to make an order raising the attachment of the 1<sup>st</sup> objector's movable properties, being Motor Vehicle Registration Number KCN xxxx, Television Set, Sofa Set, Fridge, Coffee table and water tanks.
  - (d) The Court be pleased to make an order raising the attachment of the 2<sup>nd</sup> objector's Motor Cycle Registration No. KMDY xxxx attached on April 11, 2023.
  - (e) the costs of the application be in the cause.
- (2) The application was premised on the grounds that the 1<sup>st</sup> objector is the exclusive owner of the motor vehicle Registration No. KCN xxxx as well as the Television Set, Sofa Set, Fridge, Coffee table and water tanks attached in execution of the decree passed herein. In the same vein, the objectors contended that the 2<sup>nd</sup> objector is the exclusive owner of the Motor Cycle Registration No. KMDY xxxx which was also attached by way of Proclamation alongside the 1<sup>st</sup> objector's property on April 11, 2023. They averred that the decree-holder has no right or authority to attach, repossess and/or sell the said properties because they do not belong to the judgment debtor. They further contended that no prejudice will be occasioned to the decree holder if the orders sought herein are granted since they can proceed to execute against the judgment debtor.
- (3) The application was predicated on the Supporting Affidavit sworn by the two objectors on April 14, 2023. They averred that, on the April 11, 2023, Auctioneers attached their property without carrying out any due diligence to ascertain ownership of the targeted property beforehand. They denied any relationship whatsoever with the judgment debtor and averred that they stand to suffer irreparable loss unless the orders prayed for are granted.
- (4) A Replying Affidavit was filed by George Maingi, an Auctioneer practising in the name and style of Mugema Auctioneers. He confirmed that, in the month of April 2023, he received instructions from the firm of Mungai Kamau & Co. Advocates to obtain Warrants of Attachment and Sale for execution against David Kandie, the judgment debtor herein. He further stated that he thereafter proceeded to the residence of the judgment debtor in Galu Kinondo area within Kwale County and found the premises locked from the main gate. He consequently proclaimed the items listed in the Proclamation Notice and served the same by affixing the documents on the main gate.
- (5) Mr. Maingi further averred that, prior to the attachment, he had inquired about the assets of the judgment debtor and ascertained that they were registered in his name. Hence, Mr. Maingi deposed that the two documents relied on by the objectors to prove ownership of the attached motor vehicle and motor cycle were obtained after the fact to frustrate the execution process and obstruct the



realization by the decree holder of the fruits of his judgment. For that reason, Mr. Maingi deposed, at paragraph 13 of his affidavit that:

“...as a result of the foregoing and the judgement debtors deliberate efforts to frustrate the execution of the orders of this Court, I have been instructed by the instructing client to apply to this Court for substitution of the mode of execution from the attachment of property to personal arrest and committal to civil jail of the judgment debtor.”

- (6) The application was canvassed by way of written submissions, pursuant to the directions given herein on April 20, 2023. Accordingly, the objectors filed their written submissions dated June 23, 2023. They relied on Order 22 Rule 51 of the *Civil Procedure Rules* and the case of *Odhiambo Owiti & Company Advocates v Dominion Farms Limited; Sukari Industries Limited (Objector)* [2021] eKLR to underscore their submission that they have sufficiently demonstrated that the attached properties belong to them and that they have no relationship or connection with the judgment debtor.
- (7) The objectors further pointed out that they are not parties to the proceedings and therefore are under no obligation to settle the decretal sum. They relied on *Boleyn Magic Wall Panel Ltd v Nesco Services Limited; Boleyn International (K) Limited (Objector)* [2021] eKLR for the proposition that they are different personalities from and have no relationship with the judgment debtor.
- (8) The interested party, Ali Hamisi Chande, also filed his written submissions dated May 23, 2023
  - (a) Whether the objectors established a legal or equitable interest in the whole or part of the attached property.
  - (b) Whether the mode of execution can be changed from attachment of property to committal to civil jail.
- (9) The interested party submitted that the burden of proof was on the objectors to prove that the attached property did not belong to the judgment debtor at the time of attachment; and that they have the legal or equitable interest in the whole or part of the said property. The interested party relied on *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR and *Arun C. Sharma v Ashana Kaikundalia T/A A. A. Raikundalia & Co. Advocates & 4 Others* [2014] eKLR and submitted that none of the objectors established which of the items belong to which objector.
10. The interested party further submitted that the best evidence would have been the production of the log books for the attached motor vehicles; and that even then such evidence is only presumptive. He urged the Court to note that the documents produced are in respect of April 12, 2023 as opposed to April 11, 2023 when the Proclamation of Attachment was made. The interested party also relied on Section 44(1) of the *Civil Procedure Act* which recognizes that a judgment debtor's property may also be in the name of another person but held by such other person on behalf of the judgment debtor.
- (11) The interested party further posited that the attached motor vehicles were transferred by the judgment debtor to the objectors after the Proclamation was pronounced; and that for that reason, the judgment debtor ought to be committed to civil jail under Section 38 of the *Civil Procedure Act*. In his submission, the objectors have failed to discharge their burden of proof and therefore their application is a gross abuse of the court process, as it is merely intended to frustrate the execution of lawful orders of the court.
- (12) I have given due consideration to the application, the responses thereto as well as the written submissions filed herein by learned counsel. I have likewise perused the court record from which it is discernible that these proceedings commenced in March 2019 when the Court (Hon. Ogola, J.) granted leave to the ex parte applicant, David Kandie, to apply for the judicial review orders of



Prohibition and Certiorari. The said leave was to operate as stay of the proceedings in Kwale Criminal Case No. 206 of 2019. The substantive application was thereafter filed, argued and determined vide the Judgment dated November 18, 2019. It was dismissed with costs. The interested party thereafter filed its Party and Party Bill of Costs for taxation; which Bill was taxed in the sum of Kshs. 244,758.33. A Certificate of Costs was accordingly issued in favour of the interested party dated December 1, 2022.

- (13) The record further shows that the interested party thereafter filed an Application for Execution of Decree on March 27, 2023 on the basis of which Warrants of Attachment and Sale dated June 5, 2023 were issued. The Warrants were issued to Mugema Auctioneers for execution. There is no dispute that it was that Proclamation of Attachment by Mugema Auctioneers that precipitated the instant objection application. A copy of the Proclamation was annexed to the objectors' Supporting affidavit as Annexure BM1.
- (14) It is therefore common ground that Motor Vehicle Registration No. KCN xxxx as well as the Television Set, Sofa Set, Fridge, Coffee table and water tanks were attached by Mugema Auctioneers on the April 11, 2023 in execution of the decree passed herein. It is also not in dispute that Motor Cycle Registration No. KMDY xxxx was similarly attached alongside the 1<sup>st</sup> objector's properties on April 11, 2023. While the objectors claim legal and beneficial ownership of the above properties, the interested party and the auctioneer are of the contention that the properties belong to the judgment debtor.
- (15) Order 22 Rule 51 of the Civil Procedure Rules, pursuant to which the instant application was brought provides:
  - (1) 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.
  - (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.
- (16) Accordingly, the burden of proof is on the objectors to satisfy the Court as to their legal or equitable interest in the proclaimed property. This was succinctly stated in Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others (*supra*) thus:

“...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...”
- (17) Likewise, in the case of Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector) [2019] eKLR, it was 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 premises, the single issue for consideration, in my view, is whether the objectors have proved legal or equitable interest in the proclaimed goods. The issue of change of mode of execution is certainly



not within the ambit of the instant application and therefore cannot form part of the issues for determination herein.

(19) In support of their claim to ownership of the attached properties, the objectors annexed documents to the Supporting Affidavit confirming that as at April 12, 2023, the Motor Vehicle Registration No. KCN xxxx and Motor Cycle Registration No. KMDY xxxx belonged to the 1<sup>st</sup> and 2<sup>nd</sup> objector respectively. Consequently, the burden of proof thereupon shifted the interested party to adduce rebuttal evidence; particularly in this instance where the contention of the interested party and the Auctioneer was that the motor vehicles were fraudulently transferred after attachment to defeat the course of justice.

20. In *Odhiambo Owiti & Company Advocates v Dominion Farms Limited; Sukari Industries Limited (Objector)* (*supra*), it was held:

“In the instant case the Objector having produced the logbooks which disclose it as the registered owner of the vehicles in question and the legal presumption being in its favour, the onus shifts onto the applicant decree holder to prove the contrary as stated in Section 8 of the *Traffic Act*. In those circumstances, the legal burden still remains on the Objector but the evidential burden shifts to the applicant decree holder to show that despite the prima facie registration of the vehicles in the name of the Objector, the Objector does not have any interest, legal or equitable in the same.”

(21) No evidence having been adduced herein by the interested party to demonstrate the allegations of fraudulent transfer of the motor vehicles to the objectors, it is plain that the objectors have proved their legal and beneficial interest in the attached property to warrant the lifting of the Proclamation of Attachment.

(22) The upshot is that the application dated March 3, 2022 is meritorious. The same is hereby allowed and orders granted as hereunder:

- (a) That an order be and is hereby made raising the attachment of the 1<sup>st</sup> objector’s movable properties being Motor Vehicle Registration Number KCN xxxx, Television Set, Sofa Set, Fridge, Coffee table and water tanks.
- (b) That an order be and is hereby made raising the attachment of the 2<sup>nd</sup> objector’s Motor Cycle Registration No. KMDY xxxx attached on April 11, 2023.
- (c) That the costs of the application be borne by the judgment debtor.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF JUNE 2024**

**OLGA SEWE**

**JUDGE**

