



REPUBLIC OF KENYA



**Nyambura & another v Baiya (Civil Appeal E025 of 2022)
[2024] KEHC 8190 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E025 OF 2022**

DK KEMEL, J

JULY 5, 2024

BETWEEN

ROSE NJOKI NYAMBURA 1ST APPELLANT

HARUN GITHINJI MWAMBURA 2ND APPELLANT

AND

NJENGA BAIYA RESPONDENT

(Being an appeal from the Judgement of Hon. A. Odawo, Resident Magistrate in Bungoma Chief Magistrate's Court Civil Case No. 277 of 2019, delivered on 7th February 2022)

JUDGMENT

1. Being aggrieved by the Judgement of Hon. A. Odawo, Resident Magistrate in Bungoma Chief Magistrate's Court Civil Case No. 277 of 2019, delivered on 7th February 2022, the Appellants preferred this appeal. They filed a Memorandum of Appeal dated 7th March 2022 and listed the following grounds of appeal:
 1. The learned trial magistrate erred in law and in fact in that she failed to consider that the property attached by the Respondent for sale belonged to the 1st Appellant personally and did not form part of the deceased's estate for which the legal representative was acting;
 2. The learned trial magistrate erred in law and in fact in ignoring and failing to consider or sufficiently consider the evidence that was adduced.
 3. The learned trial magistrate erred in law and in fact by misinterpreting the law in dismissing the Appellant's Objection.
 4. The learned trial magistrate erred in law and in fact in bringing into the issues facts which no party had pleaded.



5. The decision of the trial magistrate is against the weight of evidence and the law applicable.
 6. The learned trial magistrate erred in law and fact by finding that the attached goods are part of the estate of Henry Gitonga Mwambura (deceased).
 7. The learned trial magistrate erred in law and in fact in failing to consider the Appellant's submission thereby arriving at a wrong conclusion.
2. The Appellants prayed that the appeal be allowed, that the judgement of the lower court be set aside and substituted with one in favour of the Appellants and that the Appellants be awarded costs of this appeal and in the lower court.
 3. The appeal was canvassed by way of written submissions. Parties were directed to file submissions on the appeal within a period specified in the order. The Appellant's submissions are dated 20.8.2022 and filed on 1st September 2023. There are no submissions by the Respondent.
 4. From the Memorandum of Appeal, the Appellant's contention is that the trial magistrate allowed personal properties of the 1st Appellant herein to be attached and sold in execution of a decree against her as an administrator of the estate of the deceased.
 5. In the main suit, the Plaintiff (now Respondent) sued the Appellants. It is clear from the proceedings that the 1st Appellant is the widow of the deceased while the 2nd Appellant is the son. This is very relevant because the Plaintiff alleged that the debt arose at a time which made it a liability on the estate.
 6. The Fast Track Plaintiff dated 26th August 2019 was filed on 27th August 2019. The Plaintiff averred that on or before 9th September 2014, he entered into a loan agreement with the deceased, Henry Gitonga Mwambura, wherein he lent him Kshs. 400,000/=. He averred that the amount still remained unpaid until the demise of the deceased and that the Appellants are liable to pay the same as administrators of the deceased's estate. According to him, despite several demands and notice of intention to sue to the Defendants (now Appellants), the same remains ignored thus the suit.
 7. The Appellants entered appearance and filed their statement of defence on 7th October 2019. They denied all the allegations in the Plaintiff save for the description and address of the Appellants. They averred that they are not privy to the facts pleaded in the Plaintiff and that there was no succession cause in regard to the estate of the deceased and that if the same happened, it was simply limited to grant of letters of administration ad litem for purposes of enabling the Appellants to defend the suit. They averred that they did not owe the Respondent any money. They averred that they are not aware of the existence of any legal agreement and that as far as they are concerned, the deceased died without any debt.
 8. The Respondent was the only witness who testified in support of his claim against the Appellants. He relied on his witness statement dated 26th August 2019 and adopted the same as his evidence in chief. He also relied on his documents as contained in the list of documents dated 26th August 2019, which he produced as PEXH1 and PEXH2 respectively. He further produced an additional list of documents dated 22nd October 2019 as PEXH3. According to him, he knew the Appellants as the administrators of the estate of the deceased, Henry Gitonga Mwambura and that the deceased had borrowed from him Kshs. 400,000/= prior to his demise and that he didn't pay him back. He stated that he kept following up on the said amount but the deceased kept on telling him that he would repay him. He added that upon the demise of Henry Gitonga Mwambura, he approached the Appellants for the repayment but they were reluctant. He testified that he wanted the Appellants to be compelled to meet their legal obligations by paying the liabilities of the estate of the late Henry Gitonga Mwambura.



9. On cross-examination, he stated that the loan agreement was executed in 2014 and that the deceased, Henry Gitonga Mwambura, died in 2018. He relied on PEXH1. According to him, the deceased was to refund the money on 30th November 2014 with an interest of 10% and that he was his dear friend that's why he did not resort to litigation at first instance. He stated that he asked the deceased to refund the money on several occasions. He relied on PEXH3 testifying that the amount involved was sourced from the bank with his title deed as collateral. According to him, he took a loan on behalf of the deceased from Faulu and that if he defaulted, the bank would sell his land. He stated that he tried making payments in efforts to salvage his land. He testified that he knew the Appellants as the administrators to the estate of the deceased and relied on PEXH2, which was a limited grant for purposes of filing a suit.
10. On re-examination, he stated that he sued the Appellants as the administrators of the estate of the deceased and that he used his personal title deed to secure a loan on behalf of the deceased.
11. On the other hand, the Appellants' case was also based on one witness. According to the 2nd Appellant, the deceased was his father while the 1st Appellant is his mother. He relied on the recorded witness statements dated 4th December 2020 and adopted them as his evidence in chief. According to him, the deceased died in November 2018 and that they did not take out any grant. He testified that the limited grant was only taken out for purposes of filing a suit against a person who owed his late father money but they however did not file the same.
12. On cross-examination, he stated that the deceased never told them that he owed the Respondent any money and that he was not aware that the deceased used his title deed to secure a loan for his late father. He agreed that his late father and the Respondent were friends. He reiterated that the limited grant was for purposes of filing a suit against a person who owed his late father money and that at his demise his father did not leave them with anything. He added that prior to his demise, his father owned a petrol station in Webuye.
13. In her judgement, the learned trial magistrate held that the Appellants had the capacity to be sued and defend the suit before it on behalf of the deceased's estate. She further held that the Respondent proved his case on a balance of probabilities as he produced documentation to that effect. The mere denial of knowledge of the said debt was not evidence enough to controvert what was on record. The trial magistrate entered judgement for the Respondent for Kshs. 400,000/= plus costs and interest.
14. In his bid to recover the decretal amount and taxed costs, the Respondent commenced execution proceedings against the judgment debtor that resulted in the attachment of the attached goods on 21st November 2021, through Agunja Traders Auctioneers. The application for execution by the Respondent before the lower court is in the record of appeal and that the auctioneers proclaimed the attached goods in November 2021.
15. Those costs were taxed and certified at Kshs. 108,530.00 and a certificate of costs dated 3rd November 2021 issued. The date of the decree is recorded as 3rd November 2021 prior to assessment.
16. I have considered the appeal and the submissions by learned counsel for the Appellant. Although the Appellants set out seven grounds of appeal in their memorandum of appeal, the principal question on which the appeal turns is whether this court should uphold the decision of the trial court.
17. This being the first appellate court, there is need to give a fresh look at the evidence adduced before the lower court bearing in mind that it had no benefit of having seen or heard the witnesses as they testified. This is the principle espoused in the case of Abok James Odera t/a A.J Odera & Associates v



John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate Court: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

18. In Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR the Court of Appeal stated as follows of the role of the first appellate Court:

“..... The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered.”

19. On the issue of the agreement, i concur with the trial magistrate that the court does not interfere with the intentions of the parties to a contract. The duty of the court is to give natural meaning to the language of the contract. In the case of Smith –vs- Cook (1891) AC 297 at 303 the Court held:-

“The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed.”

20. It is imperative to note that the limited grant produced in as PEXH2 was limited for the purpose of filing suit as indicated on the face of it and that the same was under P& A Form 47 A. Pursuant to Legal Notice No. 39 of 2002, the appropriate form to be used should be the one which allows the types of grants for purposes of filing and defending suit, and further representation is granted by the court. I also seek to rely on the decision as quoted by the trial magistrate, Priscilla Njeri Wamiti & 2 Others vs Shiku John Company ltd (2017) eKLR.

21. The above does make it clear that the estate of the deceased could be sued and it can also sue. The Respondent was acting within the benchmarks of the law when he sued the estate of the deceased vide his administrators for recovery of debt owed to him under the contract, PEXH1. The moment the Appellants took out a limited grant to sue, they are deemed to have capacity even to defend a suit lodged against the estate. It matters not that the full grant was yet to be issued to the said Appellants.

22. It is evident that the Respondent sued the Appellants in the lower Court as legal representatives to the estate of the deceased. The fact that the Appellants were not privy is not a factor in this appeal as this court recognizes them as legal representatives to the estate of the late Henry Gitonga Mwambura. As administrators of the estate, they are obliged to defend the estate of the deceased as they have capacity to sue and be sued on behalf of the estate.



23. Section 37(1) & (2) of the *Civil Procedure Act* provides;

“Section 37. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”

“Section 37 (2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.”

24. Section 39 of the *Civil Procedure Act* is on enforcement of decree against legal representative. It provides as follows:

“(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally”.

25. On attachment of property of deceased held by legal representative, the law as I understand it, is that execution against a legal representative of the deceased person is permitted. Except, however, liability thereto will be to the extent of the property of the deceased which has come to the hands of the legal representative and has not been duly disposed of. Therefore, where the entire estate property has gone to the legal representative, as is the case here, execution shall be directed at any or all of the property of the deceased that has come to them.

26. On execution against personal legal representative personally, the law also allows execution against any person who has intermeddled with the property of the estate. But, in a case of intermeddling with the estate of the deceased or where no property has been left in the hands of the legal representative or where there is need to ascertain the link between the property of the legal representative and the estate property, the court is called upon to carry out an inquiry. I borrow this from the clear text of the law above as well as from the words “...only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of” which bear defined legal connotation. Thus, the law requires and empowers the court executing the decree, on its own motion or on application of the decree-holder to carry out an inquiry for the purpose of ascertaining such liability to compel such legal representative to produce such accounts as it thinks fit. This inquiry takes after the procedure provided for namely a Notice to Show Cause and it will certainly be an important consideration to establish whether the legal representative has dishonestly transferred, concealed, charged or removed any part of the estate property, or committed any other act of bad faith in relation to the estate property. Thus, where no such property of the estate remains in the possession of the legal representative- the judgment-debtor in the suit- the inquiry is even more intense, and if he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree



may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally. See Section 39(2) of the [Civil Procedure Act](#) which provides that:-

“Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally”

27. Accordingly, depending on the result of the inquiry i have alluded to above, the law allows execution of such decree against the legal representative as if it was against him personally. This means that in such circumstances, his own properties may be attached in satisfaction of the decree.
28. Doubtless, the Appellants are the Administrators of the estate of the deceased and the beneficiaries thereof. They were sued as the Defendants but in representative capacity, in the suit appealed from. The 1st Appellant is also the judgment-debtor in that case. Therefore, she is subject to section 38 and 39 of the [Civil Procedure Act](#). Notably, the inquiry in section 37 and 39 of the [Civil Procedure Act](#) need not take a particular form of pleading although i stated that it takes after the procedure for a notice to show cause; meaning that, whatever procedure adopted, should avail the person an opportunity to explain why her property should not be attached or sold in execution of the decree therefrom. Therefore, the Objection proceedings provided a perfect atmosphere for such inquiry. And it is laudable that the trial magistrate determined the objection proceedings. And it is laudable that the trial magistrate determined the objection proceedings vide written submissions. As a result of that inquiry, liability for purposes of executing the decree against the personal representative of the deceased was accordingly established. The 1st Appellant failed to inform the court how she had come into possession of the property she alleged belonged to her personally considering the fact that she is a beneficiary of the estate of the deceased. The trial court held that the listed items proclaimed are household goods that would have been bought by either the 1st Appellant or the deceased or both of them. As the African culture views the house and all the properties therein in to belong to the man, there is indeed a presumption that the proclaimed household goods were purchased by the deceased herein especially in this instant scenario where the 1st Appellant failed to avail any sort of evidence to rebut this presumption. Accordingly, i find no fault in the decision by the trial magistrate in her ruling of 7th February 2022 in respect of the Objection proceedings herein.
29. The Appellants only preferred a defence of denial stating that they were not aware of the contract and the subsequent debt but it is clear that a mere denial is not evidence enough to controvert what is on record. The Appellants preferred a ground of appeal stating that the lower court failed to consider their submissions. In the case of *Ali Ngumbao Baya & 2 others v Director of Public Prosecution* [2016] eKLR ‘Reliance has been placed on the Court of Appeal decision in the case of *ROBERT FANALI AKHUYA* case. That case was decided on 12th July, 2012. It no longer stand as good law. Article 159 of [the Constitution](#) is against technicalities. Submissions can either be oral or written. Submissions simply put means an evaluation of the evidence by each party and analysis of the law. This can be done either orally or in writing. At times parties make oral submissions in furtherance or addition to their written submissions. The idea of filing written submissions is intended to save on judicial time and also to enable the parties or their advocates to condense their thoughts on the matter at their own and in good time. This gives the parties enough time to evaluate the case and put down their view in writing. Written submissions gives parties latitude to explain their respective cases with ease as opposed to oral submissions which can be limited inform of time’.



30. On page 3 of the trial magistrate's judgement, she made it clear that the court had the privilege to analyze only the Appellants submissions as those filed by the Respondent seemed to be on a different matter not before the court. I choose to take this ground as a mere allegation that the Appellants clearly could not substantiate. From the foregoing, i am therefore in agreement with the learned trial magistrate that the Respondent did prove his case on a balance of probabilities against the Appellant. Hence, i see no need to interfere with the findings.
31. In the upshot, it is my finding that the Appellants' appeal lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 5TH DAY OF JULY 2024

D. Kemei

Judge

In the presence of:

Maloba for Appellants

No appearance Wekesa for Respondent

Kizito Court Assistant

