



Kuria v Gachanjo & another; Gathara & another (Objector) (Miscellaneous Civil Application 444 of 2017) [2023] KEHC 18476 (KLR) (Commercial and Tax) (12 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS CIVIL APPLICATION 444 OF 2017

JWW MONG'ARE, J

JUNE 12, 2023

BETWEEN

JOHN GATHARA KURIA JUDGMENT DEBTOR

AND

MUNYAMBU NJUGUNA GACHANJO 1ST DECREE HOLDER

KEZIAH WANGARI MUNYAMBU 2ND DECREE HOLDER

AND

HANNAH WAIRIMU GATHARA OBJECTOR

MARGARET NYATHIRA CHEGE OBJECTOR

RULING

1. Before the court is the objectors' Notice of Motion application dated 14/9/2021 brought under Order 22 Rule 51, 52 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*. The objectors seeks to have the court declare that the assorted goods listed in the Proclamation Notice served on 19/8/2021 by M/S Front Bench Auctioneers belong to the objectors and a prayer that costs of this application plus auctioneer charges be borne by decree holders.
2. The application is supported by the affidavits of Hannah Wairimu Gathara and Margaret Nyathira Chege, the objectors herein. The said application is premised on the grounds that the goods proclaimed in the Proclamation Notice dated 19/8/2021 by M/S Front Bench Auctioneers are owned by the objectors; that the 2nd objector is a lessee of the 1st objector and duly resides on the property erected on L.R No.kiambu/Lari/461 where her household goods were proclaimed.
3. The objectors argued that the judgement and decree subject of the current execution is not against them as they were not party to the instant suit therefore the execution against them is unlawful.



4. The 1st respondent and Decree Holder opposed the application through a replying affidavit sworn on 6/6/2022. He averred that the Judgment Debtor instituted these proceedings in order to frustrate realisation of the judgment; that this was the second objection proceedings being preferred the first having been through the application dated 14/8/2019.
5. That the objectors have failed to discharge the onus of proof of any legal or equitable interest of the attached goods; that the 1st objector who is married to the Judgment Debtor provided an unverified land search to prove ownership of the premises but failed to produce the actual title deed to demonstrate how the ownership of the land excludes the judgment-debtor who is her husband from ownership of the livestock found on the premises; that the 1st objector did not demonstrate how the Judgment-Debtor could not be legally and equitably regarded as the owner of the livestock.
6. Further, the Decree-holder averred that the 1st objector's allegation of a tenancy relationship with the 2nd objector was not established as the 2nd objector did not provide any receipts to prove ownership of any household items or even a valid tenancy agreement to the premises.
7. Further the Decree-Holder averred that there has been no objection to the attachment of motor vehicle registration number KCB 642E whose value is the greatest in the proclamation, therefore this ought to be allowed as there is no objection to its attachment. The Decree Holder contended that it was imperative that the court gives effect to the judgement herein otherwise a successful litigant will forever be frustrated through mischievous applications like the instant one.
8. The Decree Holders also opposed the instant application through grounds of opposition dated 6/6/2022 which echoed the grounds set out in the replying affidavit of even date.
9. It was contended that the allegations of the 1st objector being the registered owner of the premises on LR No. Kiambu/Lari/461 is contradictory and inconsistent with the allegation of leasing to the 2nd objector while still being an absentee owner of livestock in the premises; that the lease agreement exhibited by the objectors is inadmissible in evidence for want of stamp duty payment as well as improper exception and attestation.
10. That the application is a ploy to create third party interest and a scheme to frustrate execution of a judgement of the court.
11. Front Bench Auctioneers who proclaimed the impugned moveable assets filed an affidavit sworn by Godfrey Marangu on 17/6/2022.
12. He averred that the auctioneers received instructions from Ndungu Njoroge & Kwach Advocates to execute a decree against the Judgement Debtor herein; that they were provided with a confidential investigation report which detailed the Judgement Debtor's attachable assets; that the proclamation was done at the known home of the Judgement Debtor at Lari Limuru as guided by the Investigation Report.
13. That on arrival at the said property, a worker in the premises confirmed that it was indeed the rural residence of Mr. John Kuria Gathara though he did not reside there on a daily basis; that the auctioneer left the proclamation at the premises due to threats received by villagers at the premises and that at no time did he see the objectors at the residence particularly the 2nd objector alleging to be a tenant at the premises.
14. In this case the Decree-holder's agent M/S Front Bench Auctioneers issued a proclamation notice dated 19/8/2021 marked as 'HWG1' in the objectors' supporting affidavit. The proclamation was for the recovery of the decretal figure of Kshs.8,679,926.25/-. The items proclaimed included a motor



- vehicle, livestock, assorted water tanks, dining table, chairs, tv set, fridge, gas cooker, microwave and other attachable goods.
15. Objection proceedings are provided for under Order 22 Rule 51(1) of the *Civil Procedure Rules* which provides as follows;
- “ 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.”
16. In the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR where the court held as follows;
- “ 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? ”
17. In *Precast Portal Structures v 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 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 judgement-debtor for himself, or by some other person in trust for the judgement-debtor; or
- (2) that the objector holds that property on his own account.”
18. From the authorities above it can be concluded that the objector had the burden of proving his/her legal or equitable interest over the proclaimed goods.
19. The 1st objector claimed that the goods proclaimed were located in her property L.R No. Kiambu/Lari/461, that the livestock proclaimed in the premises belong to her and could not be used to settle the decretal sum in issue. Further that although she does not reside on the said property, she had leased it out to the 2nd objector herein who is therefore the owner of the household goods mentioned.
20. To prove that the said property had been leased out, the 2nd objector annexed a copy of the lease between the 1st objector and herself. I note however that neither of the objectors provided evidence of payment of rent.
21. The objectors claim to be the owners of the livestock found on the premises and all the goods listed on proclamation but have not provided any proof of this through receipts or otherwise. I therefore agree with the Decree-Holder that in this day and age, payment receipts are issued at every purchase and this would have been the best demonstration of ownership. I further note that the 1st item on the schedule of attached moveable property is a motor vehicle whose value is given as Ksh.500,000/- and yet the objectors have not provided its log book to prove its ownership.
22. Flowing from the evidence availed by the objectors, I find that the objectors have not discharged their burden of proof of any legal or equitable interest in the attached goods as required by the law and the decisions emanating from the courts on the same. I therefore find no need to interfere with the



execution process. The objectors application dated 14/9/2021 is without merit and is dismissed with costs awarded to the Decree-Holders.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Kimani for the Applicant/objector and Judgment Debtor
2. No Appearance for the Respondent.
3. Sylvia- Court Assistant

