



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kihara v Ajele (Returning Officer Naivasha Constituency) & 2 others (Election  
Petition 2 of 2008) [2023] KEHC 22601 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
ELECTION PETITION 2 OF 2008  
HM NYAGA, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**JAYNE NJERI WANJIRU KIHARA ..... PETITIONER**

**AND**

**CHRISTOPHER L AJELE (RETURNING OFFICER NAIVASHA  
CONSTITUENCY) ..... 1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**JOHN MICHAEL NJENGA MUTUTHO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Two applications come up for Ruling. These are;
  - a. The petitioner's application dated 16<sup>th</sup> February 2023.
  - b. The objector's application dated 17<sup>th</sup> February, 2023.
2. I will deal with them in seriatim.
3. The petitioner's application dated 18<sup>th</sup> February, 2023 seeks the following orders;
  1. That this application be certified extremely urgent be heard *ex-parte* and notice thereof be dispensed with in the first instance.
  2. That the Honourable Court be pleased to grant an interim stay of execution or a stay of any further execution of the Ruling/Order/Decree given by this Honourable Court dated 19<sup>th</sup> December, 2019 and/or to stay any further execution proceedings based on Warrants of attachment dated 31<sup>st</sup> January, 2023 and the Proclamation dated 9<sup>th</sup> February, 2023, and any other subsequent execution process thereto, until the full hearing and determination of this application, and/or of the matter pending at the Court of Appeal.



3. That the Honourable Court be pleased to grant a stay of execution and/or of any further execution or of sale of the proclaimed goods, pending and hearing and determination of this application or further Orders of the Court.
  4. That the Honourable Court be pleased to review and/or to set aside the Warrant of Attachment dated 31<sup>st</sup> January, 2023 and based on the defective perjured application for execution filed herein.
  5. That in the alternative and/or in addition and without prejudice to the above, the Honourable Court be pleased to review, vary and/or set aside the order for execution by way of warrants for an attachment and sale, in place thereof, direct that, if any execution is taken out, then this be by way of a Notice To Show Cause being served on the Applicant for hearing and determination by the Deputy Registrar.
  6. That any directions, orders and/or any further relied that may be deemed incidental, fair and just in the circumstances hereof.
  7. That costs of this application be provided for.
4. The Application is based on the grounds set out on the face of it and is supported by the Affidavit of Jayne Njeri Wanjiru Kihara, sworn on 16<sup>th</sup> February 2023.
  5. In a nutshell, the Petitioner/Applicants states that she has an application pending in the Court of Appeal and has preferred an appeal against the judgment entered for what she described as colossal sum of Ksh. 7,523,107/- based on disputed taxation of costs. That she has so far paid a sum of Ksh. 3,100,000/- yet the respondent has sought to execute a decree for ksh. 10,990,286/- with the auctioneer dmandin asum of Ksh. 2,967,530.40 as costs.
  6. The applicant further avers that the certificate of costs issued has a glaring error in that it refers to advocate/client costs, which is not the case herein. That the no costs are payable to a layman as applied for by the 3<sup>rd</sup> Respondent. That there is need for reconciliation of accounts and thus the warrants as issued need to be set aside.
  7. The applicant also avers that there is need for a notice to show cause to issue against her since the decree sought to be executed is more that one year old.
  8. The applicant further avers that the execution has been levied against property that does not belong to her.
  9. The 3<sup>rd</sup> Respondent opposed the Application through a Replying Affidavit sworn on 27<sup>th</sup> February 2023. He avers that from the ruling of Justice Prof. Joel Ngugi of 24/06/2021, the Applicant was granted one calender year (365 days) from the date of the Ruling to process the appeal, which time has since lapsed. Further, the Applicant has also not complied with the other directions given by the High Court on 24/06/2021 and has refused to pay the decretal sum. As such she has no audience before this Honourable Court. That it is clear from Section 7 of the Civil Procedure Act, that the issues raised are *res judicata*.

The respondent further argues that the Applicant is on a fishing expedition as she is seeking to have a second bite at the cherry. That the Application has been orchestrated by the Applicant to vex, embarrass and unduly prejudice the Respondent. That the Applicant is evading the decree and is working in cahoots with the Objector to frustrate execution in this matter, whose aim is to defeat justice.



10. The history of the matter has been aptly summarised by my elder brother J. Ngugi (J) (as he then was and now JA) in his Rulings delivered on the following dates;
  - a. 19<sup>th</sup> December 2019
  - b. 24<sup>th</sup> June 2021
  - c. 31<sup>st</sup> August 2021
11. I will not go back to the history of the matter as it would be a repetition of what my elder brother Judge did, twice. I cannot top how he did it so I will not even start to do so.
12. If I get the Petitioner correctly, he tries to distinguish the current Application from the earlier ones she had made. Her point is that this Application is premised on the fact the execution that was commenced over one year after the decree was issued and therefore a Notice to Show Cause (NTSC) ought to have issued first. She also refers to the erroneous figures in the Warrants of Attachment. That the Auctioneers fees are also excessive. It is also argued that costs are being paid to a layman who is not entitled to costs due to an advocate.

### **Whether the Application is *res judicata* or not**

13. The principle of *res judicata* is set out in Section 7 of the [Civil Procedure Act](#) as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

In [Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others](#) (20171 eKLR the Supreme Court rendered itself on the issue of *res judicata* as follows;

For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR they rendered the elements as;

- I. the former judgment or order must be final;
- II. the judgment or order must be on merits;



- III. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- IV. there must be between the first and the second action identity of parties, of subject matter and cause of action."

14. The court further opined as follows:

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.

15. The 3<sup>rd</sup> Respondent argues that what the Application is doing is to attempt to have a second bite of the cherry, as he has filed similar Applications in this court and in the Court of Appeal.
16. In so far as the Applicant is referring to the merits of the taxation, and the subsequent Judgment that was entered by the court, I find that these are *res judicata* as they were issues that were conclusively handled by Justice Ngugi (as he then was). The Applicant was granted leave to appeal to the Court of Appeal, which she did.
17. More importantly and perhaps with the foresight that there was likely to be another Application made to this court, the Learned Judge did state any further applications would be dealt with by the Court of Appeal and not this court.
18. Clearly, the Applicant did not heed to the court's advice and has come back to this court with the present Application. She tried to wriggle around the directions of the court by introducing the issues that I have mentioned above.
19. So, does the alleged reference to a sum of Kshs. 10 Million in the Warrants of Attachment entitle the Applicant to a stay of execution?
20. In my view an error in the warrants in respect to the figures would lead to their recall and subsequent adjustment. An erroneous extracted warrant does not go to the root of the matter itself. The fact is, if the Applicant did not comply with the stay orders, then the decree holder is entitled to proceed with the executor.
21. So are the figures erroneous as alleged? That is the question that I have to answer?
22. In the warrants issued on 18<sup>th</sup> August 2021, the figures were as follows:-
  - a. Travel costs - Kshs. 7,253,107
  - b. Interest - Kshs. 3,460,629
  - c. Further costs - Kshs. 3,550
  - d. Collection Fee - Kshs. 1,500Total - Kshs. 10,988,786



23. After they were issued, the Applicant moved to court seeking to stay the same. Subsequently, other warrants were issued on 13<sup>th</sup> September 2021 and the figures were set out as follows;
- a. Travel costs - Kshs. 7,253,107
  - b. Interest - Kshs. 3,460,629
  - c. Further costs - Kshs. 3,550
  - d. Collection Fee - Kshs. 3,000
- Total - Kshs. 10,990,286
24. In the latest warrants issued on 31<sup>st</sup> January, 2023, the amounts are set out as follows;
- a. Decretal sum - Kshs. 10,990,286
  - b. Less paid on account - Kshs. 1,100,000
  - c. Balance - Kshs. 9,180,268
  - d. Add Collection Fees - Kshs. 1,500
- Total - Kshs. 9,891,768
25. It is clear that the reference to the “10 Million” is as a result of adding interest to the costs. Therefore, I do not see anything wrong in that figure. If any subsequent payments have been made the same can be deducted from the amount due.
26. Was it necessary to issue a Notice to Show Cause before attachment?
27. Order 22 Rule 18 of the [Civil Procedure Rules](#) provide for instances when a Notice to Show Cause ought to issue. It reads as follows;

Notice to show cause against execution in certain cases [Order 22, rule 18.]

- (1) Where an application for execution is made—
- (a) more than one year after the date of the decree;
  - (b) against the legal representative of a party to the decree; or
  - (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him..



28. The said rule clearly gives exceptions to the general rule. In this matter, the 3<sup>rd</sup> Respondent has been attempting to execute the decree for several years, only to be thwarted by the petitioner through one application after another. The current execution is just a series of such attempts and in that case, and as such, it was not necessary to issue a Notice to Show Cause to the Applicant. She has been aware of the execution all along. Therefore that argument must fail.
29. On the argument that a layman is not entitled to advocate's costs, counsel for the Applicant's position is that the same are not payable. So what costs are being executed for?
30. The fact is that there are the costs awarded by the court when the Applicant's petition was dismissed. They are costs within the Petition and so the 3<sup>rd</sup> Respondent is correctly named in the warrants. The Advocates for the 3<sup>rd</sup> Respondent can only pursue the said costs within the suit itself. That does not mean that it is the 3<sup>rd</sup> Respondent pursuing the costs. He instructed the advocates who are now entitled to costs.
31. I have seen the letter from the 3<sup>rd</sup> Respondent dated 1th February 2023 in which he seeks that the realised costs be paid directly to him. I agree that the 3<sup>rd</sup> Respondent as a person is not entitled to direct payments from the Auctioneer as he has advocates who are acting for him. I think he has over stretched himself in making the request, but that is a matter between him and his advocates. The Applicant's duty is to pay the sum ordered by the court to the Advocates or the Auctioneer, or the court. That does not affect the validity of the Warrant of Attachment as issued by the Court.
32. Reference to Advocate/Client Bill of Costs is a minor disparity. All the parties are aware that it is the 3<sup>rd</sup> Respondent pursuing his costs as ordered by the Court. It is not a sound reason to call off the execution process.
33. Having looked at the Application, I am of the view that the same lacks merit and ought to be dismissed. It is so ordered. Costs to the 3<sup>rd</sup> Respondent.
34. Having said the above, I note that the Warrants of Attachment have since expired. I direct that the Deputy Registrar issues fresh warrants, taking into account all the payments that have been made by the Applicant.
35. I will now deal with the Objector's Application dated 17<sup>th</sup> February, 2023, the same is based on the grounds set out therein and is supported by the Affidavit of Victor Njuguna Kihara. In a nutshell, the objector states that the execution was levied on property that was on the property registered in the joint names of himself and his brother Kenneth Waiganjo Kihara. He avers that the auctioneer visited his premises and purported to attach his household goods and animals. That the said goods and the land do not belong to the Petitioner/Judgment Debtor. He further states that he is a nephew to the Petitioner/Judgment Debtor but she does not reside on the property in question. The objector exhibited a copy of title No. IR 179800 to support his argument.
36. The objector's application was further supported by the Affidavit of Joseph Kanjigi Kariuki. He averred that he is an employee of the objector. That when the auctioneers went to his place of work, he informed them that the premises did not belong to the Judgment Debtor. That the auctioneers did not enter the premises but left a document at the doorway.
37. The objector buttressed his arguments through his Written Submissions, which I have duly considered.
38. In response to this Application the 3<sup>rd</sup> Respondent avers that in reality, the applicant is the one living in the premises in question and that she has connived with the objectors to frustrate the execution process.



39. Order 22 Rule 51 of the [Civil Procedure Rules](#) provides for objections to attachment by 3<sup>rd</sup> parties. It states that as follows:-

‘Objection to attachment [Order 22, rule 51.]

- (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 the parties and 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.
- (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.’

40. The principles applicable in such proceedings were set out in [Arun Sharna vs Ashana Raikundalia T/ A.A. Raikundaulia and Co. Advocates and 4 others](#) [2014] eKLR cited by the respondent.

41. Similarly in [East and Central Africa Enterprises Limited and Another vs Dorcas Wairimu Ndirangu and 2 Others](#) [2020] eKLR, the court held as follows;

“The burden of proving the ownership of these attached goods lay on the appellant. (see *Dubai Bank Kenya Ltd v Come-Cons Africa Ltd & Another Civil Suit 68 of 2003* [2012] eKLR. The 1<sup>st</sup> appellant’s managing director, in his affidavit sworn in support of the application, annexed a certificate of incorporation and certificate of registration showing that the 1<sup>st</sup> appellant was the proprietor of the business known as East Africa Star Bakery. He attached a sale agreement and statements of account to corroborate his averment that the 1<sup>st</sup> appellant had bought the bakery together with its equipment from Linset Industries Limited at Kshs. 5,000,000/=. The 2<sup>nd</sup> appellant also annexed a copy of a logbook to support his assertion that he owned vehicle registration no. KAW 715X Mitsubishi. In my view, the appellants proved on a balance of probabilities that they owned these properties. They successfully countered the 1<sup>st</sup> respondent’s claim that the properties belonged to the 2<sup>nd</sup> respondent. Therefore, there are no questions as to his claim of legal and/or equitable interest in the property.”

42. In [Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei \(Objector\)](#) [2019] eKLR, the court 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.”

43. Lastly in the case of [Grace Wanjiru Mbugua v Philip Karumi Matu](#) [2009] eKLR the court held that;

“The burden is on the objector to prove and establish his right to have attached property released from 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 non account. But where the court is satisfied that the property was, at the time of attachment, held by the judgement debtor, as his own and not on account of any other person, or that it was held by some other person in trust for the judgement debtor or that ownership has changed, whereby the judgement debtor has been divested of the property in order to evade execution, on the change is tainted with fraud, the court shall dismiss the objection.”

44. It is thus clear that the onus lies on the objector to first establish an interest in the attached good to the exclusion of the Judgment Debtor.
45. In this case, the objector states he and his brother are the registered proprietors of the premises visited by the Auctioneer without evidence to the contrary. It would follow that the household goods and the animals on the premises would be presumed to belong to the objector. Of course that presumption is rebuttable by presentation of evidence to the contrary.
46. The Decree Holder states that the Judgment Debtor resides in the premises but provided no proof to rebut the assertions by the objector.
47. I find that the objector has established his interest in the proclaimed goods. The attachment on the said property is hereby lifted and set aside.
48. In view of the close relationship between the Objector and the Judgment Debtor, I think that the Auctioneer was not malicious in attaching the goods but he has now been proved wrong.
49. In the circumstances, each party will bear its own costs in respect to this Application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 20<sup>TH</sup> OF SEPTEMBER, 2023.**

**H. M. NYAGA**

**JUDGE**

