



REPUBLIC OF KENYA



KENYA LAW

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**Priyann Enterprises Limited v Henkel Polymer Company Limited t/
a Henkel Chemicals (EA) & 2 others (Commercial Case E072 of 2021)
[2023] KEHC 24552 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E072 OF 2021
MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

PRIYANN ENTERPRISES LIMITED DECREE HOLDER

AND

**HENKEL POLYMER COMPANY LIMITED T/A HENKEL CHEMICALS
(EA) 1ST JUDGMENT DEBTOR**

RUTH MARTHA HENKEL 2ND JUDGMENT DEBTOR

MIKAEL SHAUKI HENKEL KHALIL 3RD JUDGMENT DEBTOR

RULING

1. The application before me is a Notice of Motion dated 21st December, 2022 brought under the provisions of Sections 1A, 1B, & 3A of the [Civil Procedure Act](#), Order 22 Rules 29(1) & 48 and Order 40 Rule 10 of the [Civil Procedure Rules, 2010](#) and all other enabling provisions of the law. The decree-holder seeks the following orders -
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. Spent;
 - v. That pending the hearing and determination of this suit an order of preservation and/or inspection of property Title Number Mombasa/Block 1/201, Ruiru Town/43 and Mombasa/Block XLVIII/107 do issue in favour of the decree-holder/plaintiff against the judgment-



debtors to preserve the property at its good condition pending execution and to grant access to the decree-holder/plaintiff or its agent to inspect the properties for purposes of execution of the judgment and decree;

- vi. That this Honourable Court be pleased to grant any other order it deems fit; and
 - vii. That the costs of this application be provided for.
2. The application has been brought on the grounds on the face of it and is supported by affidavits sworn on 21st December, 2022 and 2nd May, 2023 by Dikipati Naresh Kumar, a Director of the plaintiff herein. In opposition thereto, the judgment-debtors filed a replying affidavit sworn on 20th February, 2023 by Ruth Martha Henkel, a director/shareholder of both the 1st judgment-debtor and the 2nd judgment-debtor herein.
 3. The instant application was canvassed by way of written submissions. The decree-holder's submissions were filed on 2nd May, 2023 by the law firm of Kipkenda & Company Advocates, whereas the judgment-debtors' submissions were filed by the law firm of Osiemo Wanyonyi & Company Advocates on 2nd June, 2023.
 4. Mr. Naibei, learned Counsel for the decree-holder cited Section 38(1) of the *Civil Procedure Act* and submitted that it grants Courts powers to order execution of a decree. He also cited the case of *Peter Kariuki Njeru v Erastus Gilbert Kimani & another* [2022] eKLR in stating that Courts shall not unnecessarily stand in the way of a decree holder enjoying the fruits of its judgment. He relied on the provisions of Order 22 Rules 29(1) & 48 and Order 40 Rule 10 of the *Civil Procedure Rules, 2010*. He cited the case of *Ogembo Ondieki v Samwel Bosire Angwenyi & 2 others* [2020] eKLR and submitted that the decree holder holds a valid decree against the judgment-debtors hence the latter cannot defeat attachment of their properties by an authorized Auctioneer acting in agency to the decree-holder while exercising its mandate in carrying out execution of the judgment.
 5. Mr. Naibei relied on the case of *Kenya Anti-Corruption Commission v John Faustin Kinyua & 3 others* [2016] eKLR and stated that the orders sought in the instant application are in no way adverse to the interests of the judgment-debtors as there is an admission in its replying affidavit to the debt owed to the decree-holder hence no loss will be suffered if the orders sought herein are granted.
 6. Mr. Osiemo, learned Counsel for the judgment-debtors submitted that the judgement-debtors deny ever being served with any proclamation notices as alleged by the decree-holder. He indicated that they also deny claims by the decree-holder that they declined to grant it access to enter the company's premises to issue the proclamation notices. He referred to the case of *Ogembo Ondieki v Samwel Bosire Angwenyi & 2 others* (supra) and submitted that property Title Numbers Mombasa/Block 1/201 and Mombasa/Block XLVIII/107 sought to be attached in the application herein are not available for attachment as they had been lawfully attached by an order of the Superior Court and earmarked to be sold by the firm of Advocates representing the decree-holder herein. Counsel relied on the case of *Dorcas Muthoni & 2 others v Michael Ireri Ngari* [2016] eKLR and stated that in the matter herein, it is the Court that gave the prohibitory orders against the two properties and as such, the judgment-debtors have been stopped from any dealings with them. He submitted that the said prohibitory orders had not been set aside and this Court cannot place further prohibitory orders against the same property.
 7. Mr. Osiemo submitted that property title No Ruiru Town/43 cannot be attached by the decree-holder as it does not belong to the judgment-debtors, as the registered owner of the said property is Mr. Herman Robert Wilhelm (deceased) who is not a party to this suit. He stated that after his death, his estate is before the High Court in Nairobi for administration. Counsel cited Section 44(1) of the



Civil Procedure Act and submitted that the judgment-debtors do not have powers of disposal over the properties in issue, capable of being exercised for their own benefit.

8. In a rejoinder, Mr. Naibei submitted that recent searches carried out over property Title Numbers Mombasa/Block 1/201 and Mombasa/Block XLVIII/107 show that they are registered in the names of the judgment-debtors hence the decree-holder can also be given orders for attachment of the said properties. He further submitted that the 2nd and 3rd judgment-debtors are the beneficiaries of the deceased's estate since in his will, the deceased transferred his property to them.

Analysis and Determination.

9. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the judgment-debtors and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for attachment of the judgment-debtors' properties should issue.
10. In the affidavit filed by the decree-holder it deposed that on 12th April, 2021, the Court entered judgment in its favour as against the judgment-debtors in the sum of Kshs.28,071,607.18 together with interest at Court rates until payment in full. The decree-holder averred that it later sought professional services of the firm of C/M Kamande T/A Chaka & Company Auctioneers to assist in recovering the decretal sum, and that the said firm of Auctioneers applied for warrants of attachment for purposes of executing the said judgment and a decree dated 20th April, 2021 and the said warrants were granted by the Court.
11. The decree-holder further averred that the said Auctioneers on several occasions made attempts to enter the judgment-debtors' premises for purposes of issuing a proclamation notice but they were denied entry thus defeating the process of attachment of movable properties.
12. It further deposed that upon carrying out searches in various land registries, it established that the judgment-debtors have vested interest in three properties namely, property Title Numbers Mombasa/Block 1/201, Title No Ruiru Town/43 and Mombasa/Block XLVIII/107. The decree-holder averred that it is only just and fair for this Court to grant the orders sought herein so as to realize execution of the decree in favour of the decree-holder.
13. The judgment-debtors in their replying affidavit deposed that they are unaware that the decree-holder had instructed an Auctioneer who upon due diligence established that they did not own any valuable movable assets to attach. They averred that the decree-holder had not exhibited warrants of attachment of immovable or movable property on the execution of decree for money as is legally required.
14. It was stated by the judgment-debtors that the properties the decree-holder herein is seeking to attach as sought in prayers 2 and 4 of the application herein are unavailable as they had been attached by another supplier in HCCC No 24 of 2019- Remy GMBH. Co. KG v Henkel Polymer Ltd. That pursuant to the order made in the said case, the creditor therein sought orders of entry to the property located in Mombasa so that it could sell it.
15. They further stated that the property listed in prayer No 3, property Title No Ruiru Town/43 does not belong to any of the judgment-debtors herein thus it is unavailable to be attached by the orders of this Court. The judgement-debtors stated that in issuing the orders dated 23rd January, 2023, this Court made final orders at an interlocutory stage to their detriment hence the said orders should be set aside.
16. The decree-holder in its supplementary affidavit deposed that the judgment-debtors have admitted to their indebtedness to the decree-holder in paragraphs 4, 5, 6, 7 & 8 of their replying affidavit hence



they cannot cry foul over the decree-holder's exercise in execution of the judgment over its property to recover the sum owed.

17. It averred that Auctioneers visited the 2nd and 3rd judgment-debtors' premises at Macushla House Hotel located at Hardy, Karen where the 2nd judgment-debtor resides and operates a family business but they were denied entry by the 2nd and 3rd judgment-debtors' servants to effect a proclamation notice. It further averred that it has carried out searches on the judgment-debtors' properties and is certain that they are still registered in their names.
18. The decree-holder stated that Mr. Harman Robert Wilhem Henkel (deceased), the registered owner of property Title No Ruiru Town/43 is the father to the 2nd and 3rd judgment-debtors and the founder of the 1st judgment-debtor. That he was also a co-director of the 1st judgment-debtor but later transferred his shares to the 2nd and 3rd judgment-debtors.
19. The decree-holder further stated that Mr. Harman Robert Wilhem Henkel died testate on 5th December, 2017 and the 2nd judgment-debtor was appointed as the Executrix and beneficiary of his estate hence qualifying the decree-holder with the right to carry out attachment of the property Title No Ruiru Town/43.

Whether an order for attachment of the judgment-debtors' immovable properties should issue.

20. Execution proceedings relating to immovable property is provided for under Order 22 Rule 48 of the [Civil Procedure Rules, 2010](#), which states as hereunder–

“(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

(2) A copy of the order shall be affixed on a conspicuous part of the property.”

21. The decree-holder has a valid decree dated 20th April, 2021 against the judgment-debtors that is yet to be fulfilled. The decree-holder averred that it instructed the firm of C/M Kamande T/A Chaka & Company Auctioneers to assist in recovering the decretal sum. The said firm of Auctioneers applied for warrants of attachment for purposes of executing the decree dated 20th April, 2021 and the said warrants were granted by the Court. It was contended that on several occasions the Auctioneers were unable to enter the judgment-debtors' premises for purposes of issuing a proclamation notice since they were denied entry thus defeating the process of attachment of movable properties.
22. The judgment-debtors denied having ever been served with any proclamation notices as alleged by the decree-holder and/or denying the decree-holder access to enter the company's premises to issue the proclamation notices. He who asserts must prove as per the provisions of Sections 107 and 109 of the [Evidence Act](#) which state as hereunder –

“107 Burden of Proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109 Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

23. Based on the above provisions of the Evidence Act, the decree-holder bears the legal burden of proving that the judgment-debtors were served with proclamation notices by the Auctioneer and/or that the judgment-debtors frustrated service of the requisite proclamation notices. Annexed to the decree-holder’s supplementary affidavit are copies of notice of entry of judgment, decree dated 20th April, 2021, warrants for sale of property in execution of decree for money and warrant of attachment of movable property in execution of decree for money. The decree-holder did not however attach copies of the proclamation notices served or attempted to be served upon the judgment-debtors.

24. As was correctly submitted by Counsel for the decree-holder, Section 38 of the Civil Procedure Act, Cap 21 Laws of Kenya gives this Court the power to grant the orders sought in the application herein. It states as follows-

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree-

- a. by delivery of any property specifically decreed;
- b. by attachment and sale, or by sale without attachment, of any property;
- c. by attachment of debts;
- d. by arrest and detention in prison of any person;
- e. by appointing a receiver; or
- f. in such other manner as the nature of the relief granted may require...”

25. The process of execution of immovable property involves three essential steps, proclamation, attachment and sale. See *Syrilla A. Barasa & 2 others v Margaret Aseka Barasa* [2022] eKLR. In this case, no evidence has been tendered by the decree holder to demonstrate that the judgment debtors were served with copies of notice of entry of judgment, a copy of the decree dated 20th April, 2021, warrants for sale of property in execution of decree for money, warrant of attachment of immovable property in execution of decree for money and the requisite proclamation notices. Such service would have been confirmed by an affidavit of service. Due to lack of evidence of service of the said documents, this Court has no way of ascertaining whether the judgment-debtors were served with the aforementioned documents. As a result, I find that the decree-holder has failed to discharge its burden of proof hence this Court cannot make an order for preservation and/or attachment of the judgment-debtors’ immovable properties.

26. The upshot is that the application dated 21st December, 2022 is hereby struck out with costs to the judgment-debtors.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Naibei for the decree-holder/applicant

Mr. Maina holding brief for Mr. Osiemo for the judgment-debtors/respondents

