



Marucha & another v Akinyi aka Rose (Widow Suing as a Legal Representative of the Estate of Fredrick Omondi Riaga) (Civil Appeal E083 of 2022) [2023] KEHC 24338 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E083 OF 2022
KW KIARIE, J
OCTOBER 24, 2023**

BETWEEN

VINCENT DUNDO MARUCHA 1ST APPELLANT

KENYA COMMERCIAL BANK LTD 2ND APPELLANT

AND

ROSELINE AKINYI AKA ROSE (WIDOW SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF FREDRICK OMONDI RIAGA) RESPONDENT

(Being an Appeal from the ruling and order in Oyugis Senior Principal Magistrate's SPMCC No. E079 of 2022 by Hon. Celesa Okore–Principal Magistrate)

JUDGMENT

1. On the 6th day of October 2022, the learned magistrate delivered a ruling in respect of an application dated July 26, 2022. In the application, the applicants were seeking orders as follows:
 - a. The court to order the plaintiff-respondent to file the bill of costs before the execution process.
 - b. The court to make an order to recall, set aside, or annul the warrants of attachment and sale issued in favour of the respondent.
2. The application was dismissed with no orders as to costs. The appellants were aggrieved and filed this appeal through the firm of M/s O.M. Otieno & Company advocates. They raised the following grounds:
 - a. That the learned trial magistrate erred in law when she misapprehended the legal issues raised in the application dated the 26th day of July 2022, thus dismissing the same.



- b. The learned trial magistrate erred in law by failing to hold that the execution of the decree as initiated by the respondents against the movable properties of the appellant in the alleged execution of the decree, was premature, illegal, null, and void.
 - c. That the learned trial magistrate erred in sanitizing, validating, and countenancing and illegality being perpetrated in the very eyes and held by a court of law.
 - d. That the execution process as commenced was irredeemably bad, illegal, and ought to have been set aside ex debito Justitiae.
 - e. The learned trial magistrate erred in law the underpinnings and mandatory safeguards set out under the Provisions of Order 21 Rules 1, 2, 3, and 4 of the *Civil Procedures Rules* and Orders 21 Rules 9 (A, B, & C) of the *Civil Procedure Rules* as read with the provisions of Article 50 of *the Constitution* of Kenya, thus occasioning a miscarriage of justice and unnecessary escalating costs and sanctioning sharp practices by an ambush.
 - f. The learned trial magistrate erred in law when she chose to ignore submissions by the counsel of the appellant and binding authorities cited therein thus reaching erroneous decisions.
3. The appeal was opposed by the respondent through the firm of M/s Nyatundo & Company Advocates. It was argued that it was not illegal for the respondent to execute before costs were assessed.
 4. As the first appellate court, I understand that it is my responsibility to carefully examine all the evidence presented in the case. Since I did not have the opportunity to observe the witnesses and their demeanor during the trial, I will rely on the guidelines established in *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123. This case stipulates that the first appellate court must review and analyze the evidence presented in the lower court, evaluate it, and come to its own conclusions on the matter.
 5. During their appeal, the appellants argued that partial execution in the magistrate's court is not allowed. They pointed to section 94 of the *Civil Procedure Act*, which allows for partial execution in the High Court, and claimed that the execution in question was therefore illegal. Section 94 of the *Civil Procedure Act* provides as follows:

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.
 6. In *Kartar Singh Dhupar & Co. Ltd vs. Lianard Holdings Limited* [2017] eKLR addressed itself to the purpose of section 94 as follows:

The mischief sought to be addressed by section 94 of the *Civil Procedure Act*, is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit.
 7. The other issue that was raised by the appellant was the extraction and sharing of the decree before an application for execution could be made. These are the safeguards provided for under Order 21 Rule



7 (2). I agree with the appellant that these safeguards were overlooked prior to the commencement of execution. In *Equity Bank Ltd vs. Capital Construction Ltd & 3 others* [2014] eKLR, it was held:

Order 21 Rule 7 (2) as read with Order 21 Rule 8 (2) provides that any party to the suit shall prepare a draft Decree in accordance with Rule 7 (2) and present the same to the other party or parties for approval, with or without amendment. It also provides at Rule 8 (2) that if the draft is approved the same shall be forwarded to the Registrar who shall sign and seal the Decree if he is satisfied that the draft Decree is in accordance with the judgment. It is further provided at Rule 8 (3) that the Registrar may approve the decree if within seven days of service of the draft decree on the other parties, no approval or disagreement is filed and/or received...

8. I find that it was not illegal for the respondent to execute before costs were assessed as long as the laid down procedure was adhered to. In this case, it was not.

9. From the foregoing analysis I make an order for the warrants of attachment issued herein to be revoked.

The costs of this appeal are to be borne by the respondent.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER 2023

KIARIE WAWERU KIARIE

JUDGE

