



**Abdulahi v Nyaboke & 2 others (Civil Appeal 149 of 2021)  
[2024] KEHC 15363 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 149 OF 2021  
E OMINDE, J  
DECEMBER 4, 2024**

**BETWEEN**

**MOHAMMED ABDULAHI ..... APPELLANT**

**AND**

**JOSPHINE NYABOKE ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS OMARI OGARI ..... 2<sup>ND</sup> RESPONDENT**

**PETER NGUNJI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Ruling of the Honourable E. Kigen  
(SRM) delivered on 12/11/2021 in Eldoret CMCC No. 691 of 2019)*

**JUDGMENT**

1. This appeal arises from the Ruling of Honourable E. Kigen (SRM) delivered in Eldoret CMCC No.691 of 2019 on 12/11/2021.
2. The background leading to the filing of the instant appeal is that at the trial Court, the 1<sup>st</sup> Respondent sued the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent seeking general damages for pain and suffering and loss of amenities, special damages and future medical expenses plus costs and interests of the suit arising from a road accident that occurred on 1/6/2019 along Eldoret-Webuye road at Maili Nne area wherein 1<sup>st</sup> Respondent was a pillion passenger aboard motor cycle when same was according to her hit by motor vehicle registration number KCK 075J Toyota Probox owned by the 3<sup>rd</sup> Respondent and driven by the 2<sup>nd</sup> Respondent.



3. The matter then proceeded to full hearing and after hearing the case, the trial Magistrate awarded liability in the ration of 80:20 in favour of the 1<sup>st</sup> Respondent and proceeded to award damages as follows;

General damages.....280,000/=

Special damages.....16,100/=

Total .....296,100/=

Less contributory negligence .....59,220/=

Costs and interests of the suit

4. After obtaining judgment in her favour, the 1<sup>st</sup> Respondent then commenced the process of execution by obtaining warrants of attachment as well as a proclamation notice against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. However, aggrieved by the said proclamation notice, the Appellant herein vide a Chamber Summons Application dated 19/5/2021 instituted Objection proceedings against the proclamation.
5. He alleged that he runs a business in the name of Baraka shop where he sells foodstuff, groceries and gas cylinders, that on or about 18/5/2021 while at his shop, he was informed by his shop attendant that he has been served with a warrant of attachment arising from Eldoret CMCC No.691/2019 by M/s Chartless Auctioneers.
6. That said auctioneers proceeded to proclaim his stock in trade including the following; 22 pieces of 6kg gas cylinder, one desktop computer, 1 fridge, 4 bags of sugar and 6pieces of 20 kg cooking fat and that the auctioneers also purported to proclaim a motor vehicle KCK 075J which was not only at his shop but does not belong to him. At the trial Court, the Appellant maintained that he had nothing whatsoever to do with the case, that he wasn't a party to the suit and that the proclaimed goods were his stock of trade and business accessories at his shop. In the end, the Appellant urged the trial Court to lift the proclamation notice as its illegal and a trespass on his chattels and stock in trade.
7. The Objection proceedings were opposed by the 1<sup>st</sup> Respondent through her Replying Affidavit dated 22/6/2021, wherein she maintained that the attached goods belonged to the judgment debtors therein and the Appellant's Application was only a scheme to frustrate the execution process. The 1<sup>st</sup> Respondent contended that the Appellant/Objector failed to establish title and ownership to the attached goods.
8. That he had not attached any receipts, invoices, delivery notes and purchase documents and in the absence of which the Objection should fail. According to the 1<sup>st</sup> Respondent, the Objector failed to prove that he is entitled to or has any legal or equitable interest on whole or part of the attached goods as required by Order 22 Rule 51 (1) of the Civil Procedure Rules and that the attachment process was carried out procedurally and legally and in accordance with Section 44 of the Civil Procedure, Act.
9. In her ruling dated 12/11/2021, the trial Magistrate cited the case of Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others (2014) eKLR, where the court held that: -

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?



10. And also the case of Precast portal structures –versus- Kenya pencil company ltd & 2 others [1993] eKLR where the court held that;

“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 judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or
- (2) that the objector holds that property on his own account.

11. The trial Magistrate then proceeded to make a finding that the Appellant’s application lacked merit.

12. Aggrieved by the Ruling of the trial Court, the Appellant filed a Memorandum of Appeal dated 16/11/2021, citing the following grounds:

1. That the learned trial Magistrate erred in law and fact by totally ignoring the submissions and evidence tabled by the Appellant herein.
2. That the learned trial Magistrate erred in law and in fact in holding that the Appellant had not proven ownership of the attached goods when in fact, the Applicant attached documents proving ownership of the premises were the goods attached and which clearly showed that there was no relationship between the Appellant and the Judgment Debtor.
3. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the Appellant had discharged the burden of proof relating to the attached goods.
4. That the learned trial Magistrate erred in law and in law and in fact by failing to appreciate the law on objection proceedings.
5. That the learned trial Magistrate erred in law and in law and in fact by not finding that the goods in question were actually stock in trade that do not belong to the judgment debtor.
6. That the learned trial Magistrate erred in law and in law and in fact by ignoring the evidence that there was no relationship between the Applicant and the Judgment Debtor.
7. That the Ruling is not supported by evidence on record.

### **Submissions**

13. The Court directed parties to file and serve their respective submissions. Pursuant to the said directions the Appellant filed his submissions on 17/1/2023 whereas the Respondents despite being afforded several opportunities to do so, they did not file any.

### **The Appellant’s Submissions**

14. Counsel for the Appellant submitted that the question for this court to determine is whether the Appellant has established a legal or equitable interest in the goods subject of the attachment, that the Appellant annexed therein the business permit of the shop namely "BARAKA" where the allegedly attached properties were found, the business permit was issued by Uasin Gishu County, under Uasin Gishu County Trading License Act, a licensee is defined as a person or personal entity to whom license has been issued under the Act and that the single business permits and the Trade License produced in evidence is proof that the Appellant operates the shop.



15. Counsel submitted that the documents referred to herein on a balance of probability, show that the Objector/Applicant has an interest on the shop stocks attached. That they state so because to have a legal or equitable interest does not translate to the objector proving ownership to the goods. In *Dubai Bank (K) Ltd v Come-cons Africa Ltd and Impak Holdings Co. Ltd*, Odunga J Stated:

“ Although the law is that in the objection proceedings the court does not and cannot make a finding as to the ownership of the property subject of the objection proceedings but simply decide whether or not the Objector has interest legal or equitable in the attached property.”

The rule was further upheld in the case of *Kenya Petroleum Oil Workers Union v Desnol Investment Ltd & another; Okoth t/a Aneles Cafe’ (Objector) (Cause 280of 2018) [2022] KEELRC 1227 (KLR) (21 July 2022)(Ruling)*.
16. Counsel added that this in consonance with Section 44 of the *Civil Procedure Act*, which provides that in execution proceedings, only the property belonging to the judgment debtor is subject to attachment and that the Respondent did not submit any evidence to the contrary. According to Counsel, it therefore follows that from the said annexure that at the time of attachment, all goods in the shop belonged to the Objector being a licensee therefore a bona fide proprietor of the shop.
17. Counsel maintained that the Appellant’s Application was filed pursuant to Order 22 Rules 51 and 52 of the Civil Procedure Rules. Counsel submitted that the matter came to Court on 19/5/2021, filed under certificate of urgency before Hon. Odenyo and that it was certified urgent and heard ex-parte and order of stay of warrant of attachment as well as ensuing proclamation issued by M/S Chartless Auctioneers was issued pending inter-partes hearing.
18. That after the ex-parte temporary orders were given to the Attaching Creditor, she was required under Order 22 Rule 51 to intimate to the court whether or not she would be proceeding with the said attachment, the said stay order notwithstanding. Counsel cited Rule 53 which states that:

“Should the attaching creditor in pursuant of a notice issued under Rule 52 fail to reply to the court and the Objector...that he does not propose to proceed with the execution..., the court shall make an order raising the attachment ... and shall make such order as to costs as it shall deem fit.”
19. Counsel further submitted that said orders were served upon the Judgment Creditor on 2/6/2022 and were received by them and the auctioneers. However, Counsel contended that there was no response from the Attaching Creditor as required under Rule 52, the Attaching Creditor did not intimate to court or to the Objector in writing within the time required whether she proposed to proceed with the attachment and execution thereof but instead Counsel submitted, the 1<sup>st</sup> Respondent only filed a Replying Affidavit.
20. According to Counsel, that requirement under Order 22 Rule 52 is mandatory and that such failure is fatal to any defence which the Attaching Creditor may mount to the objection proceedings because the requirement under Rule 52 is couched in mandatory terms. Counsel contended that under Rule 53, the court has no option where there is a failure to comply with Rule 52 but to raise the proclamation and attachment and award costs and this is what the lower Court ought to have done.
21. In support of this submission, Counsel relied on the holding in the case of *Siso Limited v Caroline Wanjihia t/a C.W. Wanjihia & Co. Advocates & another [2015] eKLR*.
22. In regard to the issue of the stock, Counsel submitted that the auctioneer’s M/s Chartless served the Appellant with proclamation which purported to attach the Objector’s stock in trade and accessories



being: 22 pieces of 6 kg gas cylinder, 1 desktop computer, 1 fridge, 4 bags of sugar and 6 pieces of 20kg cooking fat in line with the execution of a decree issued in this matter and yet the Appellant was not party to the suit and that the attached goods constitute of his business stock and accessories.

23. Counsel urged that such items are exempt from attachment under Section 44 (1) of the *Civil Procedure Act*. Counsel relied on the case of Nicholas Mwaka v Caroline Nthenya [2019] eKLR where the court opined that;

.... the appellant annexed a copy of the proclamation by Cash Gate Auctioneers. The same reveals that the items proclaimed are; 50 pcs engine belts, 50 pcs shock absorbers, 70 pcs car batteries, 100 pcs leaf springs, 100 pcs engine oils, 50 pcs coolants, 50 pcs pistons, 200 pcs bushes and 1 pc sky top TV which items are tools of trade. Such items are exempt from attachment under Section 44(1) of the *Civil Procedure Act*. In the circumstances, I find that the appellant has established that he stands to suffer loss if the orders sought are not granted.'

24. In conclusion, Counsel submitted that the Appellant is a stranger to any debts owed to the Respondent and it is against the rules of natural justice for its properties to be sold in purported decree for recovery of the debt it does not owe. It is therefore the Appellant's position that the proclamation is wrong, unreasonable and unlawful. It ought not to have been allowed to proceed. As such, the learned trial magistrate erred in law and in fact and her ruling must be set aside.

### **Analysis and Determination**

25. Being a first appeal the court relies on a number of principles as set out in the case of Seller and Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123:

“...this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

26. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same stated with regard to the duty of the 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 re-analyze 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.

27. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the submissions by learned counsels for both parties. From the record of Appeal, and submissions on record and I single issue for determination is: -

Whether the Appellant proved his claim that he is entitled to or he has a legal or equitable interest in the whole of or part of any property attached in execution of a decree herein

28. Objection proceedings are governed by Order 22 Rule 51 of the Civil procedure Rules which provides;
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.
29. The Objector bears the burden of proving his claim that he is 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. What evidence was tendered by the Appellant/Objector before the trial Court?
30. In the case of *Chatabhai M. Patel v Chaprabhi Patel* [1958] EA 743, it was stated that:
- a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment, the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.
  - b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.
  - c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.
  - d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.”
31. Also, in the persuasive High Court case of *Akiba Bank Ltd v. Jetha & Sons Ltd* (2005) EKLRL it was correctly held that for an objector to succeed in his objection he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of decree.
32. The holding of Odunga J, in *Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co Ltd* already herein above cited is also very relevant on who should establish ownership in objection proceedings.
33. Regarding goods attached from business premises, the Court of Appeal in *Zingo Investment Limited v Miema Enterprises Limited*, [2015] eKLR held that:
- “Title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the attached goods. If this were not the case landlords may well become objectors whenever a tenant’s goods are proclaimed and this cannot be the law.”



34. In the case of Mercy Njambi –versus- Othaya Villas Co Limited & another [2020] eKLR the Court while dismissing a similar application held that;

“ Accordingly, without any documentary evidence to prove ownership or beneficial interest in the attached goods, the objector’s case lacks any legs to stand on and as such it must collapse. Whereas the place where the proclaimed goods were found by the Auctioneer during the proclamation is quite material in determining whether the goods belong to the Objector, in this case the Objector has failed to prove by documents or otherwise, that the proclaimed goods were in her premises and not in the respondent’s premises.”

35. I have considered the objection proceedings in the lower court as well as the impugned Ruling. I note that the only document of ownership that was availed before the lower Court is the very same document herein referred to and that is the Business Permit of a shop named BARAKA whose detailed activity is indicated as Retail/Mpesa.

36. Other than that, no details and/or anything linking the ownership of this shop to the objector has been availed. Further, the kind of retail business that the said shop is involved in that can be associated with the goods that were proclaimed that he says are his stocks in trade is also not indicated. In light of the above, having considered the Ruling of the Trial Magistrate, I am satisfied that she properly directed herself on the facts and the law based on the evidence that was availed to her by the objector and I therefore find no fault with the Hon Magistrates’ decision and I accordingly uphold the same.

37. In this regard, I find that the Objector’s Appeal has no merit and the same is now hereby dismissed with costs to the Respondents.

**READ DATED AND SIGNED AT ELDORET ON 4<sup>TH</sup> DECEMBER 2024**

**E.OMINDE**

**JUDGE**

