



**Don Woods Company Limited v Yonge & 2 others (Appeal E151 of 2024)
[2024] KEELRC 2488 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2488 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E151 OF 2024
NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

DON WOODS COMPANY LIMITED APPELLANT

AND

JOHN CALEB YONGE 1ST RESPONDENT

ATHI RIVER MABLE & GRANITE LIMITED 2ND RESPONDENT

NAIROBI CONNECTIONS AUCTIONEERS 3RD RESPONDENT

*(Being an appeal from the Ruling and order of Hon. Hosea Ng'ang'a
(PM) delivered on 3rd May 2024 in Milimani Chief Magistrate Court
CMEL No.525 of 2018 consolidated with CMEL No. E526-530 of 2018)*

JUDGMENT

1. Through the Memorandum of Appeal dated 22nd May, 2024, the Appellant being dissatisfied appealed against the Ruling delivered by Hon. Hosea Ng'ang'a on 3rd May,2024 in Milimani Chief Magistrates' Court CMEL No. 525 of 2018.
2. The Appeal was based on the grounds that:
 - i. The trial Magistrate erred in law and fact in disallowing the objection proceedings despite Appellant demonstrating through evidence that its registered and beneficial owner of the movable properties and /or fixtures attached to property known as Kajiado/Noonkopir Township/28 and does not hold them in trust of the 2nd Respondent nor is there any nexus between the two companies.



- ii. The Learned Magistrate erred in law and fact by failing to appreciate the ingredients of objection proceedings as the Appellant was not a party to Milimani MCELRC No. 525 -530 of 2018 and therefore not under any obligation to liquidate the decretal sum therein.
- iii. The trial Magistrate erred in law and facts by disregarding evidence showing that the transfer of the property known as Kajiado and all the fixtures attached to it was done in 2017 before the 1st Respondent filed his case and therefore the same was not done to defeat a decree issued by the trial court.
- iv. The trial Magistrate erred in law and facts by failing to appreciate that upon the filing of the Objection proceedings by the Appellant no intention to proceed as contemplated under Order 22 Rule 54 of the Civil Procedure Rules was filed by the 1st Respondent and thus the trial court should have lifted the attachment.
- v. The Learned Magistrate erred in law and facts by holding that the 1st Respondent could proceed with execution of the Appellant's movable property (fixtures) whilst the Appellant adduced evidence from the sale agreement showing that the property was sold together with the fixtures attached to it and there was consideration of Kenya Shillings Five Million (Kshs 5,000,000/=) for the movable properties which was paid by the Appellant through asset financing by Prime Bank Limited.
- vi. The trial court erred in law and facts by failing to appreciate key legal principles in land that provides that he who owns the land owns everything extending to the very heavens and to the depths of the earth Cujus Est Solum Eius Usque Ad Coelum At Ad Inferos And Quidquid Plantatour Solo, Solo Cedit which provides that the objects attached to the building in question become annexed to the realty with the result that they are regarded as fixtures.
- vii. The Learned Magistrate erred in law and facts by faulting the Appellant for having purchased the subject property because it was previously charged to Prime Bank and failed to appreciate that when a charger intends to dispose its security the same can be done with consent of the charge and the charger can refinance the potential purchaser and a charge registered.
- viii. The trial court erred in law and facts by holding that since no valuation was done the transaction was to absolve the 2nd Respondent of the 1st Respondent's claim yet the Appellant demonstrated that before the purchase of the subject property and fixtures attached parties negotiated for the sale of the land at a sum of Kshs 70,000,000/= and the fixtures for a sum of Kshs 5,000,000/= and the same was reduced in writing through a sale agreement dated 27th July,2017.
- ix. The Learned Magistrate erred in law and fact by dismissing the Appellant application on grounds that the entire sum was financed by Prime Bank Limited whilst a bank can finance a property up to one Hundred (100%) percent.
- x. The trial court erred in law and facts by failing to appreciate the 2nd Respondent was served with the Appellant's Application for objection but it did not file a response.
- xi. The trial Magistrate erred in law and facts by failing to hear and determine the Preliminary Objection filed by the 1st Respondent and to date the same is pending despite proceedings to give orders that the 1st Respondent can proceed with execution of the Appellant's Movable properties.



- xii. The trial Magistrate erred in law and facts in proceeding to determine the Appellant's Objection Application despite giving directions that the Notice of Preliminary Objection filed by the 1st Respondent dated 14th September, 2023 be determined first.
 - xiii. The Learned Magistrate erred in law and fact by failing to consider the Appellant's submissions which were duly filed.
 - xiv. That the Learned Magistrate erred in law and fact in disregarding the evidence by the Appellant and /or failing to consider the said evidence in its totality.
 - xv. That the learned Magistrate erred in law and fact in arriving at conclusions and inferences which are not supported by evidence and/ or based on any documentation.
 - xvi. The Learned Magistrate erred in law and facts in making outright prejudicial substantive conclusions, applying selective justice and disregarding the evidence tendered by the Appellant.
 - xvii. The Learned Magistrate erred in law and facts by holding in favour of the 1st Respondent without adequate evidence.
 - xviii. The Learned Magistrate considered extraneous issues which vitiated his ruling thus arriving at an erroneous finding.
3. The Appellant prayed that:
 - a. The appeal be allowed, Ruling delivered on 3rd May 2024 in Milimani Chief Magistrate's Court in CMEL No. 525 of 2018 consolidated with CMEL 526-530 of 2018 be set aside with costs to the Appellant.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant through its Advocates Kang'ari Ngandu Advocates filed written submissions dated 2nd August, 2024. On the issue of whether the Appellant's Objection application was heard on merit by the trial court, counsel submitted that the 1st Respondent had filed a Notice of preliminary objection in the trial court and the Honourable court directed that the Preliminary Objection be heard first and there was no direction given on the hearing of the Appellant's Objection Application. A ruling on the Appellant's Objection Application was delivered as opposed to its directions that it would render a Ruling on the Notice of Preliminary Objection by the 1st Respondent first and the Appellant's Objection application which was never heard but was dismissed. Counsel submitted that the Appellant was denied an opportunity to be heard on its objection application on merit.
6. Counsel further submitted that the trial court held that the Appellant's movable property should be attached and blamed the Appellant for the 2nd Respondent failure to participate in the objection proceedings and held that the same was done in attempt to defeat the decree. That there was evidence on record that the 2nd Respondent was at all material times served with the application and the directions of the court and thus blaming the Appellant for the failure of the 2nd Respondent to participate in the proceedings was an error on the face of it.
7. On the issue of whether the Appellant discharged its obligation by demonstrating that it owned the property known as KAJIADO/ NOONKOPIR/ TOWNSHIP/28 together with the fixtures and movable properties attached to the land, counsel submitted that the said fixtures on the said property were specifically provided for in the sale agreement between the Appellant and the 2nd Respondent.



8. Counsel further submitted that the fixtures and all the moveable property in the land were sold in 2017 long before the 1st Respondent instituted his Employment Cause in 2018. Six years later the 1st Respondent came back claiming to execute the decree on the Appellant's property yet the 1st Respondent confirmed that the 2nd Judgment Debtor was still in the country undertaking other business but did not wish to execute his decree against it but insists on executing it against an innocent party who was not a party to the proceedings in which the decree was issued.
9. Counsel submitted that the Appellant and the 1st Respondent were never in any contractual relationship. There was no evidence that was ever filed by the 1st Respondent to show that the Appellant was holding the fixtures in trust for the 2nd Respondent or there was any nexus between the two entities. Counsel relied on the case of *Grace Wanjiru Mbugua v Philip Karumi Matu* [2009] eKLR on burden of the objector to prove and establish his right to have attached property released from attachment. Counsel also relied on section 44(1) of the *Civil Procedure Act* that only property of judgment debtor is liable for attachment.
10. Counsel submitted that the trial court made an error by holding that the 1st Respondent can only attach the Appellant's movable goods on the land owned by the Appellant. Counsel relied on the cases of *Murtahar Ahamed Dahman & Another v Athuman Sudi* [2013] eKLR and *Waribu Chongo v Benson Maina Gathithi* [2014] eKLR that things attached to land/soil become part of the Land/soil.
11. On the issue of whether the Respondents were opposed to the Appellant's notice to have the intended attachment lifted as provided for in order 22 rule 51 (1) of the Civil Procedure rules, counsel submitted that the said order stipulated the steps to be taken by a party claiming interest over proclaimed goods.
12. Counsel submitted that at the time of filing the Objection proceedings in the trial court, the Appellant served the Respondent's with Notice of Objection to the Attachment of its properties. That Order 22 Rule 54 of the Civil Procedure Rules stipulated that if the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.
13. Counsel submitted that the Respondents having been served with the Notice of Objection never filed a notice to proceed with the attachment. Counsel relied on the case of *Registered Trustee of Kenya Episcopal Conference vs Preps International Limited* [2009] eKLR and submitted that in the absence of a Notice of Intention to proceed with the attachment, the trial court should have lifted the attachment.

1st Respondent's Submissions

14. The 1st Respondent John Caleb Yonge acting in person filed his submissions dated 12th August, 2024 and submitted that the Appellant main issue was the trial court ruling that the property known as Kajjado/Noonkopir Township/28 was sold in an attempt to defeat the 1st Respondent's claim despite there being evidence demonstrating that the suit property was sold before the 1st Respondent instituted his claim in the trial court and the Applicant was not a party to the proceedings and further that the Applicant provided evidence demonstrating that it's the registered and beneficial owner of the property and has no connection with the 2nd Respondent.
15. It was the 1st Respondent's submission on the above issue that the assertions were brought in bad faith because a third party by the name Primebank Kenya Limited whose interest in this matter have been kept hidden by the Appellant to mislead the court because the said Primebank Kenya limited is the custodian of the 2nd Respondent who was well aware of the dispute before the transaction of the subject property where they financed 100%.



16. The 1st Respondent submitted that earlier on or about 13th June,2017 it had requested the 1st Respondent to forward their letters of appointment, pay slips and their identity cards in order to be paid. That the CEO of the Primebank Kenya Limited was mediating the matter before it was filled in court when they failed to pay as promised. That the sale was done hurriedly within the same time and in secrecy.
17. On the issues raised by the Appellant in its submission the 1st Respondent on the first issue of the Objection not being heard on merit he submitted that the same was heard on merit where parties filled responses and submissions on the same and a ruling on the 1st Respondent's PO and the Appellant's Objection delivered on the two applications. That he raised a PO on point of law based on new information/evidence obtained from Competition Authority of Kenya which confirmed that the sale of the subject property was not approved by their office and the parties did not inform them accordingly as required by the law hence the transaction was unenforceable.
18. The 1st Respondent relied on the Order 22 Rule 51(1) of the Civil Procedure Rules and the cases of *Arun v C Sharma Astana Raikundaha t/a Raikundaha & Co. Advocates & 4 Others* [2014] eKLR, *N Grace Wanjiru Mbugua v Philip Karumi Matu*[2009] eKLR and *Precast Portal Structures v Kenya Penal Co. Ltd & 2 Others* [1993] eKLR on burden of proof of the objector to prove and establish his right to have the attached property released from attachment . That the Appellant only annexed two documents in his affidavit to prove his legal or equitable interest that is the sale agreement dated 27th July,2017 and a copy of certificate of title/title deed.
19. It was the 1st Respondent's submissions that the change of ownership was tainted with fraud because the Appellant ignored the law and failed to seek clearance with the Competition Authority of Kenya as required under section 41 and 422 of *Competition Act* hence the sale was illegal and unlawful and the Act prohibited the courts from enforcing illegal contracts. Further that Primebank Kenya Limited who charged the property was not joined in the proceedings to show the appellant was holding the property in trust with the bank and that there was no proof of stamp duty payment or valuation report from Government valuer who valued the property before the transfer; the objector did not produce bank statements to illustrate its loan repayments advanced by the bank now that the bank financed 100% and finally that the claimed land had been lying idle since 2017 and all the machineries worth Kshs. 5,000,000, the movable properties being claimed, were intact and rotting to illustrate that the Appellant did not own the land but a proxy to the Judgment Debtor.
20. It was the 1st Respondent's submission that the registration of the property to the Appellant was done to defeat execution of the decree while relying on the case of *Abdalla Ali Hassan v Clement A. Ojiambo & Others CA No 118 of 1997* on criteria in determining the objection to attachment in execution of the decree that the court should investigate the title and make inferences from the material before it where the objector files application.
21. On the third issue of Respondents opposition to the Appellant's Notice to have the intended attachment lifted as provided for under Order 22 Rule 51(1) of the civil Procedure rules the 1st Respondent submitted that the court considered their prayers under Article 159 of *the Constitution* on avoiding of technicalities while relying on the case of *Philip & Another vs Augustine Kibede* 1982-88 KLR 103 on the issue of the court excusing mistakes done by parties more so those acting in person who do not have benefit of knowledge of interpreting the law.

Determination

22. This court has considered the pleadings and submissions filed by the parties herein and proceeds to analyse them as follows.



23. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. In this case, the trial court held that the sale of the judgment Debtor’s property was done in order to defeat the claim and in the process occasion miscarriage of justice. That attachment proceeds only in respect to the movable property situated on all the property known as Kajiado/NoonKopir/Township/28 in execution of the decree issued herein. The trial court dismissed the Objector’s application with costs to the Respondent.
25. The issues placed by the parties for determination in the appeal are with regard to the lower court’s finding that the attachment could proceed only in respect to the Appellant’s movable property situated on all that property known as Kajiado/NoonKopir/Township/28 in execution of the decree issued herein.
26. The court notes that the trial court addressed the Appellant’s application on merit as the parties had filed their respective responses and submissions on the same. The Appellant alleged that it was the owner of the movable properties attached in the subject property as per the sale agreement dated 27th July, 2017 where the Appellant bought the land at Ksh 70,000,000/= and the fixtures at Kshs 5,000,000/= making it a total of Kshs 75,000,000/=. The Appellant also produced a title deed to the said property.
27. The 1st Respondent on the other hand alleged that the sale was made to defeat execution of the decree because no approval was sought from Competition Authority and Primebank Limited was not made a party and further that no evidence of payment of stamp duty and valuation was produced and further that the property had been idle since then.
28. Whereas the court notes that under section 44(1) of the *Civil Procedure Act* one can only attach property belonging to the Judgment debtor, Order 22 Rule 51(1) provides that;

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.



29. This court notes that such burden is on the Objector to illustrate why attached property should be lifted and the trial court found that the Objector did not discharge that burden. In *Arun v C. Sharma Astana Raikundaha t/a Raikundaha & Co. Advocates & 4 Others* [2014] eKLR the court stated 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 or to have a legal or equitable interest in the whole or part of the property.

30. On the evidential material to be considered by a court prior to a court granting an objector a release from warrants of attachment, the court in the cases of *Grace Wanjiru Mbugua v Philip Karumi Matu* [2009] eKLR and *Precast Portal Structures v Kenya Penal Co. Ltd & 2 Others* [1993] eKLR observed 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 own 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, or the change is tainted with fraud, the court shall dismiss the objection.”

31. The court has the mandate to interrogate the evidence before it. As was appreciated by the Court of Appeal in *Abdalla Ali Hussein Mohamed v Clement A. Ojiambo & Others Civil Appeal No. 118 of 1997*:

“Where the Decree holder does not intimate his intention to proceed with the attachment the objector may request by way of a letter, for the attachment to be lifted but where he instead files an application then the Court is obliged to investigate the title and make inferences from the material before it...

32. This court agrees with the lower court for the reasons that the Appellant did not join the Primebank Kenya Limited in these proceedings as an interested party having financed the property at Kshs 75,000,000/=, no valuation report by government valuer was filed to show the property was for that amount charged, no proof of stamp duty payment or Appellant’s bank statement to show how it has been making repayments to the Bank for the financed amounts.

33. In addition, the court notes that the Appellant never sought the approval from Competitions Authority as per section 41 and 42 of the *Competition Act*. The fact that the Appellant has not taken real possession of the property as alleged by the 1st Respondent and that the movable property is rotting which fact was not rebutted, the Appellant is to the Court, a proxy used by the Judgment debtor to hide the truth.

34. The court therefore agrees with the trial court that the change of ownership was done in a hurry to defeat execution of decree since the said Primebank Kenya Limited was said to be engaged in mediating



the matter on behalf of the Claimants to pay them their dues but failed and went on charging the property with the Appellant where it had initially charged it with the judgment debtor for the same amount. It is interesting that the Judgment debtor has failed to take part in these proceedings in order to avoid execution despite being served.

35. The appeal therefore is found without merit and is hereby dismissed with costs to the 1st Respondent.

36. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

