



**Synergy Industrial Credit Limited v Landmark Concepts  
Company Limited & 2 others (Commercial Appeal E316 of 2023)  
[2025] KEHC 16204 (KLR) (Commercial and Tax) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16204 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E316 OF 2023**

**PM MULWA, J**

**NOVEMBER 6, 2025**

**BETWEEN**

**SYNERGY INDUSTRIAL CREDIT LIMITED ..... APPELLANT**

**AND**

**LANDMARK CONCEPTS COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT MUTHUMBI MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

**JANEFFER WAIRIMU MURIUKI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. This is an appeal challenging the ruling of the Learned Trial Magistrate in MC COMM SU No. E1447 of 2021, delivered on 31<sup>st</sup> October 2023. The appellant's Memorandum of Appeal dated 22<sup>nd</sup> November 2023 raises seventeen (17) grounds which may be condensed into three (3) broad issues for determination, namely:
  - i. Whether the Trial Magistrate erred in holding that no order could issue against the property Eldoret Municipality/block 14/284 on account of an alleged existing charge in favour of ABC Bank Limited;
  - ii. Whether the Trial Magistrate erred in holding that no order could issue against Pioneer/Ngeria Block 1 (EATC) 12477, alleged to have been sold to a third party and allegedly encumbered by a charge in favour of Family Bank Limited; and



- iii. Whether the Trial Court erred in dismissing the Appellant's Notice of Motion dated 31<sup>st</sup> July 2023.
2. The undisputed facts are that a partial judgment was entered on 19<sup>th</sup> July 2013 in favour of the Appellant for Kshs. 5,500,000/= plus costs and interest, against the Respondents jointly and severally. To satisfy the decree, the Appellant sought prohibitory and attachment orders over the two suit properties registered in the name of the 2<sup>nd</sup> Respondent. The learned magistrate declined to grant the orders sought, precipitating this appeal.

### **The Appellant's Case**

2. The Appellant contends that the learned magistrate misdirected himself in both law and fact by dismissing the application for attachment. It is argued that official searches dated 7<sup>th</sup> June 2023 confirm that the two suit properties remain registered in the name of the 2<sup>nd</sup> Respondent and that no valid encumbrances were proved to subsist.
3. The Appellant maintains that the purported sale to one Mike Kibet Bitok was never completed, no transfer has been registered, and the alleged purchaser has not asserted any proprietary interest through objection proceedings as required under Order 22 Rule 51 of the Civil Procedure Rules, 2010.
4. Reliance was placed on Section 44(1) of the *Civil Procedure Act*, which makes the property of a judgment debtor, whether held in his own name or by another on his behalf, liable to attachment and sale in execution of a decree. The Appellant further cited *Silvester Industries (Nairobi) Limited v Sagga Industries Limited [2007] KEHC 2485 (KLR)* to reinforce that property beneficially owned by a judgment debtor is available for execution.

### **The Respondents' Case**

5. The Respondents oppose the appeal, urging that the trial court's findings were proper in law and supported by evidence. They rely on *Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)* for the principle that an appellate court should not interfere with factual findings absent misdirection or misapprehension of evidence.
6. It is submitted that Eldoret Municipality/Block 14/284 was charged to ABC Bank Limited for Kshs. 6,950,000/= on 9<sup>th</sup> April 2014, which charge remains in force. Invoking Sections 59 and 87 of the *Land Act* and Section 28(g) of the *Land Registration Act*, the Respondents contend that a charge constitutes an overriding interest taking precedence over subsequent claims, rendering any attachment without the chargee's consent null.
7. As to Pioneer/Ngeria Block 1 (Eatc) 12477, the Respondents assert that the property was sold to Mr. Mike Kibet Bitok under a sale agreement dated 5<sup>th</sup> April 2018, with the 2<sup>nd</sup> Respondent retaining only bare legal title pending registration of transfer. They rely on Sections 36(2) and 37(2) of the *Land Registration Act*, which recognize that equitable or beneficial interests may arise from unregistered instruments.
8. The Respondents thus maintain that the Magistrate's ruling was sound in law, having found that the attachment of the charged or sold property would unjustly prejudice third parties not before the court.

### **Issues for determination**

5. Having considered the record, submissions, and authorities cited, the issues for determination are as identified above.



### **Whether the Trial Magistrate erred in finding that no order could issue against Eldoret Municipality/Block 14/284**

5. The Respondents allege that the property Eldoret Municipality/Block 14/284 is charged to ABC Bank Limited. The Certificate of Official Search dated 7<sup>th</sup> June 2023 and the entry on the title deed indeed indicate that the property was charged to African Banking Corporation Limited on 9<sup>th</sup> April 2014. However, the Respondents did not place before the Trial Court a copy of the charge instrument, any duly executed letter of offer, charge document, or the consent of the chargee to confirm the existence or subsistence of such encumbrance.
6. Under Sections 107 and 109 of the Evidence Act (Cap. 80), the burden of proof lies with the party alleging the existence of a fact. Mere reference to a charge entry without production of the charge instrument or proof of an existing debt cannot establish that the charge remains valid and enforceable.
7. The Court in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR held that:

“He who alleges must prove, and a party seeking to rely on a document must tender it in evidence to establish the rights claimed thereunder.”
9. In this case, there was no evidence to show that ABC Bank Limited retains an enforceable interest in the property or that the facility secured thereby remains outstanding. In the absence of such proof, this Court finds that the learned magistrate erred in law by treating the charge entry as conclusive evidence of a subsisting encumbrance. In the absence of such evidence, this Court cannot conclude that the charge is subsisting or that the chargee’s rights would be prejudiced by the issuance of a prohibitory order.
10. Pursuant to Section 44(1) of the Civil Procedure Act all property belonging to a judgment debtor, save for that exempted by law, is liable to attachment and sale in execution of a decree. The 2<sup>nd</sup> Respondent remains the registered owner, and the property, not having been proved to be validly encumbered, is available for execution.
11. Consequently, while the entry on the search may suggest a past charge, this Court cannot, without the underlying instrument, conclusively determine that the property is currently encumbered or that the rights of a third-party chargee would be prejudiced by execution.
12. I therefore find that the learned magistrate misdirected himself in holding that no order could issue against Eldoret Municipality/Block 14/284 merely because of a purported charge, the existence and validity of which was never proved before the trial court. The said property remains available for execution subject to compliance with the procedural requirements of the Civil Procedure Rules.

### **Whether the Trial Magistrate erred regarding Pioneer/Ngeria Block 1 (EATC) 12477**

5. The second property in issue is Pioneer/Ngeria Block 1 (EATC) 12477, which, according to the Certificate of Official Search dated 7<sup>th</sup> June 2023, remains registered in the name of the 2<sup>nd</sup> Respondent. The Respondents contend that the property was sold to one Mr. Mike Kibet Bitok pursuant to a sale agreement dated 5<sup>th</sup> April 2018, for valuable consideration, and that the 2<sup>nd</sup> Respondent presently holds the legal title in trust for the said purchaser pending registration of transfer.
6. The Appellant disputes this position, arguing that no instrument of transfer has been produced, nor has the alleged purchaser demonstrated possession, payment of the full purchase price, or registration of any interest capable of protection under the Land Registration Act (No. 3 of 2012). It is further



- urged that the alleged purchaser has not filed any objection proceedings under Order 22 Rule 51 of the Civil Procedure Rules, 2010, and therefore the property remains available for attachment.
7. The starting point in determining this issue is Section 24(a) of the *Land Registration Act*, which provides that registration confers upon the registered proprietor absolute ownership together with all rights and privileges appurtenant thereto. Similarly, Section 25(1) of the same Act stipulates that the rights of a registered proprietor shall not be defeated except as provided under the Act or by operation of law.
  8. The Respondents rely on Sections 36(2) and 37(2) of the *Land Registration Act*, which permit the creation of equitable interests through unregistered instruments. It is true that an executed sale agreement may, in equity, create an enforceable beneficial interest as between the contracting parties. The Court of Appeal in *Wreck Motors Enterprises v Commissioner of Lands & 3 others* [1997] eKLR affirmed that an unregistered sale agreement may give rise to a constructive trust or equitable ownership where consideration has passed.
  9. However, equitable interests arising from unregistered agreements are only binding as between the parties thereto and cannot defeat the statutory rights of a third party such as a decree-holder who seeks to execute a lawful judgment. This position was reaffirmed in *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253, where Madan J (as he then was) observed that while equity regards as done that which ought to be done, such equitable rights do not override the rights of third parties who act in good faith and without notice.
  10. In the present case, the alleged purchaser, Mr. Mike Kibet Bitok, was not a party to the proceedings before the trial court and did not file any objection proceedings to assert an independent claim to the property. No evidence was produced to demonstrate that the sale was completed, consideration paid in full, or possession taken. In the absence of such proof, the 2<sup>nd</sup> Respondent remains the registered owner, and by virtue of Section 44(1) of the *Civil Procedure Act*, the property is liable to attachment in execution of the decree.
  11. Consequently, I find that the Learned Trial Magistrate misdirected himself in treating the property as beyond reach of execution on the basis of an alleged unregistered sale to a third party. The finding that no order could issue against PIONEER/NGERIA BLOCK 1 (EATC) 12477 was therefore erroneous both in fact and in law.

### **The issue of dismissal of the application dated 31<sup>st</sup> July 2023**

5. An appellate court is guided by the principle stated in *Mbogo v Shah* [1968] EA 93, that interference with a lower court's discretion is justified only where the decision is based on a misdirection or is plainly wrong.
6. Having re-evaluated the record, I am satisfied that the trial court misapprehended the evidence and misapplied the law in finding that the suit properties were insulated from execution. No credible evidence was adduced to demonstrate subsisting third-party or chargee rights capable of defeating the decree-holder's entitlement.
7. This Court reiterates that a decree-holder is entitled to enjoy the fruits of a valid judgment, and the court should not, save for good and lawful cause, deny such enjoyment. The law permits attachment and sale of property belonging to a judgment debtor to satisfy a decree. The Respondents, having failed to establish the existence of valid and subsisting third-party or chargee interests, cannot shield the properties from lawful execution.



8. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal observed that execution proceedings are part and parcel of the realization of a judgment creditor's right, and the court should not unnecessarily obstruct or delay the same in the absence of clear legal bar. This principle aptly applies to the present matter.
9. Accordingly, and for the reasons set out above, I find that the appeal is merited and succeeds. Accordingly, I make the following orders:
  - i. The appeal is hereby allowed.
  - ii. The ruling and order of the learned trial magistrate delivered on 31<sup>st</sup> October 2023 in MC COMM SUIT NO. E1447 of 2021 are hereby set aside and substituted with an order allowing the Appellant's Notice of Motion dated 31<sup>st</sup> July 2023.
  - iii. Prohibitory orders shall issue against the following properties pending sale in execution of the decree, Eldoret Municipality/Block 14/284, and Pioneer/Ngeria Block 1 (Eatc) 12477.
  - iv. The Appellant is at liberty to proceed with the attachment and sale of the said properties.
  - v. The costs of this appeal and of the trial court are awarded to the Appellant, to be borne by the Respondents.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF NOVEMBER 2025.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Mr. Meeme for Appellant

N/A for Respondents

Court Assistant: Carlos

