



**Munene v Mizizi Africa Homes Limited (Civil Appeal E074 of 2025)
[2026] KEHC 1396 (KLR) (Commercial and Tax) (12 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E074 OF 2025
JWW MONG'ARE, J
FEBRUARY 12, 2026**

BETWEEN

ELVIS KIAMA MUNENE APPELLANT

AND

MIZIZI AFRICA HOMES LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. S.N. Muchungi, PM dated 7th February 2025 at the Magistrates Court at Nairobi, Milimani in Civil Case No. E478 of 2022)

JUDGMENT

Introduction and Background

1. This is an appeal by the Appellant against the ruling of the subordinate court dated 7th February 2025 where the said court dismissed the Appellant's application dated 14th October 2024 that sought a prohibition order to attach against the property known as Title No. Donyo Sabuk/Komarock Block 1/20788. The subordinate court noted that the property had already been subdivided and either sold to third parties or was in the process of being sold and that the same may not be available for attachment to satisfy the decree. The appeal is grounded on the Memorandum of Appeal dated 6th March 2025 which has been canvassed by way of written submissions by the Appellant which I have considered and I will be making relevant references to the same in my analysis and determination below. There was no response from the Respondent despite service.

Analysis and Determination

2. Since this is the first appeal, the court is enjoined by the provisions of section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well



settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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...

3. In his submissions, the Appellant distills the grounds of appeal to three issues for the court's determination:
 - i. Whether the Appellant met the formal and procedural requirements for grant of the Orders sought in the Application;
 - ii. Whether the Learned Magistrate erred in law and in fact in finding that the Property known as Title No. Donyo Sabuk/Komarock Block 1/20788 was unavailable for attachment and sale in execution of the Decree; and
 - iii. Whether this Honourable Court should set aside the Ruling of the Subordinate Court and issue the Orders sought in the Memorandum of Appeal.

Procedural Compliance

4. The Appellant submits that he complied with the procedural requirements for execution of a decree by attachment of immovable property, as provided under the Civil Procedure Rules. That the necessary ten-day notice of entry of judgment was duly issued, and the application for execution was properly made in accordance with Order 22 Rules 6, 7, and 9, providing all requisite details, including a precise description of the property and the Respondent's interest therein. Going through the record, I agree that the Appellant did comply with the procedural requirements for execution of a decree by attachment of immovable property under the Rules. On 26th August, 2024, the Appellant's advocates sent a Notice of Entry of Judgment to the Respondent via email and the Notice clearly stated the judgment amount of Kshs.3,315,809.49/= and certified costs of Kshs.134,800.00/=, and gave the Respondent 10 days to pay before execution would commence. This satisfies Order 22 Rule 6, which requires such notice before execution can proceed after a default judgment.
5. In compliance with Order 22 Rules 7, 8 & 9 of the Rules, the Appellant filed inter alia the application dated 14th October, 2024 and specifically sought attachment and sale of the subject property where he provided a precise description of the property and the Respondent's interest. He annexed supporting documents that he deemed necessary including the decree and office search of the property. Therefore, the Appellant met the formal and procedural requirements for grant of the orders sought in his application.

Findings of the subordinate court

6. As stated in the introductory part, the learned magistrate found that the property had been subdivided and either sold to third parties or was in the process of being sold and may not be available for attachment to satisfy the decree. That the Respondent had exhibited sale agreements and offer letters in favour of third parties who were not present in the suit and that the same had been executed prior to the application being filed. Thus, the learned magistrate held that granting the orders sought by the Appellant may affect the property rights of third parties who were not parties to the suit. On



his part, the Appellant submits that he provided a Certificate of Official Search dated 8th October 2024, proving the property is still registered to the Respondent, is unencumbered, and has not been subdivided. He relies on the late Majanja J.,’s decision in *Tripple Eight Construction Limited v China Petroleum Limited & another* [2020] KEHC 3432 (KLR) where he issued a Prohibition Order after finding that “a copy of the certificate of title shows that the Plaintiff is the registered proprietor. The subject property remains unencumbered as things stand and it is a property owned by the Plaintiff capable of being attached. A Judgment Creditor has the right to select the mode of execution it deems fit and cannot be directed to forebear execution merely because an alternative mode is preferred by the Judgment Debtor.”

7. It is indeed correct that for the court to acquiesce to an application for attachment, the court must be satisfied that the property sought to be attached belong to the respondent (see *Eco Bank Kenya Limited v Harvey Engineering Limited, Stanley Nduati Mwangi & Joseph Mburu Muigai* [2018] KEHC 5359 (KLR)). I am in agreement with the Appellant’s submission and the holding of the late judge above that a copy of the certificate of title and an official search showing that the Respondent is the registered proprietor and that the property remains unencumbered is sufficient proof that the property is capable of being attached. Ownership of immovable property is proved by registration, not by sale agreements and the Official Search dated 8th October 2024 clearly shows the Respondent is the registered proprietor, that there are no encumbrances and no subdivisions had been registered. Sale agreements do not amount to registered interests, and until transfer is registered, the property remains the Respondent’s property in law. In weighing evidence, the learned magistrate should have given primacy to the Official Search as proof of current ownership and encumbrance status.
8. I am in further agreement with the Appellant’s submission and the late Judge’s holding that a party prejudiced by attachment is entitled to apply for interim order of relief in the pending suit. Further, any party with a legal or equitable interest in the subject property attached has the right to lodge objection proceedings under Order 22 Rule 52 and the learned magistrate’s refusal on grounds of “third-party interests” ignores the statutory procedure that allows affected third parties to file objections after attachment. Even if the Respondent had sold plots to third parties, unless those transfers were registered, the property remained in the Respondent’s name and was available for attachment. Allowing the learned magistrate’s reasoning would allow judgment debtors to frustrate execution by waving unregistered sale agreements, a practice the law does not condone.
9. The learned magistrate also disregarded the Appellant’s right to choose mode of execution as allowed by section 38(b) of the *Civil Procedure Act* gives the decree holder the right to choose the mode of execution. The Respondent’s offer to settle the decree in a different manner is irrelevant as the Appellant is entitled to execute against known, available assets of the judgment debtor and as held in *Tripple Eight*(supra), the judgment debtor cannot dictate an alternative mode of settlement to avoid attachment of a registered asset.

Conclusion and Disposition

10. In the upshot, I find merit in the Appellant’s appeal and the same is allowed. The Ruling of the subordinate court delivered on 7th February 2025 is hereby set aside in its entirety and substituted with the following orders:
 1. A Prohibitory Order be and is hereby issued prohibiting the Respondent/Judgment Debtor either by itself or its agents from transferring, charging or in any way dealing with the property known as Title No. Donyo Sabuk/Komarock Block 1/20788 and this Order shall be registered by the Chief Land Registrar in the relevant Land Register until further orders of this court.



2. The subordinate court is directed to issue a warrant of attachment in respect of the said property for the realization of the decretal sum of Kshs.3,474,663.98/=-, together with any interest and costs accruing.
3. The costs of this appeal and of the application before the subordinate court are awarded to the Appellant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2026

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J.W.W. MONG'ARE

JUDGE

In The Presence Of

Mr. Simon Peter holding brief for the Appellant.

N/A for the Respondent.

Amos - Court Assistant

