REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELCA NO. E066 OF 2024

PAUL MUNENE KABIRO ..... APPELLANT

VERSUS

PETER MAINA KAGWI ..... 1ST RESPONDENT

AND

ELIZABETH WANJIRA NJERU ..... 2ND RESPONDENT

JUDGMENT

(Being an appeal against the ruling and order of Hon. Munyendo M.N, PM, in Gichugu MCELC No. 8 of 2021 delivered on 25.10.2024)

1. This appeal arises from the ruling and order of **Hon. Munyendo M.N, PM**, delivered on **25th October 2024** at **Gichugu in MC ELC No. 8 of 2021**, in which the learned trial magistrate found merit in the application dated 4th June 2024, and consequently set aside the orders for attachment and sale of **Land Parcel Number Ngariama/Nyengeni/2193** issued in execution of the decree in that matter, and directed the decree-holder to pursue alternative modes of execution.

2. Aggrieved and dissatisfied with that decision, the appellant lodged the present appeal vide a memorandum of appeal dated 7th November 2024. In essence, the appellant faults the learned Principal Magistrate for setting aside the orders of attachment and sale of **Land Parcel Number Ngariama/Nyengeni/2193**, contending that at the time of the ruling, the property remained registered in the name of the 1st respondent and was therefore amenable to execution. The appellant further challenges the trial court's computation of time, arguing that the objection proceedings were filed and served after an inordinate delay, which was erroneously treated as negligible.

3. It is also the appellant's grievance that the learned trial magistrate, having found that the judgment debtor held an interest in the suit property jointly with the applicant and a third party, nonetheless proceeded to set aside the attachment, thereby reaching a conclusion inconsistent with her own findings.

   The appellant further contends that the impugned decision was made in disregard of the provisions of **Section 44 of the Civil Procedure Act** on property liable to attachment, as well as binding judicial authority in **Kerugoya High Court Civil Appeal No. E030 of 2021**, and that the court failed to appreciate that the registered

proprietor retained disposing power over the property, rendering it liable to attachment in execution of the decree. On that basis, the appellant prays that the appeal be allowed, the ruling and order of 25th October 2024 be set aside, and be substituted with an order dismissing the 2nd respondent's objection to the attachment and sale of the suit property, with costs.

4. The 2nd respondent lodged objection proceedings together with a Notice of Motion, both dated 4th June 2024, seeking to set aside the orders for attachment and sale of **Land Parcel Number Ngariama/Nyengeni/2193** issued in execution of the decree herein, and to have the decree-holder directed to pursue alternative modes of execution, with costs of the application.

   The application was supported by her affidavit in which she deponed that the 1st respondent, who is her husband, had entered into an alleged sale agreement with the appellant without her knowledge or consent. She asserted that the suit property constituted matrimonial property and that upon discovering her husband's intention to dispose of the same, she instituted proceedings against him in **Gichugu MCELC No. E015 of 2022**, wherein a decree was issued in her favour and in favour of her children. It was her position that, in light of those circumstances, the property ought not to be subjected to attachment and sale in execution of the decree, and that

the appellant should instead pursue alternative modes of execution.

5. In opposition, the appellant filed a replying affidavit dated 6th August 2024, contesting both the objection proceedings and the Notice of Motion, and affirming his intention to proceed with the attachment of **Land Parcel Number Ngariama/Nyengeni/2193** pursuant to the orders issued by the trial court on 21st May 2024. He deponed that he was not a party to **Gichugu MCELC No. E015 of 2022**, and therefore not bound by the proceedings or decree therein.

   While acknowledging the objector's reliance on that decree to assert that the judgment debtor had been divested of ownership of the suit property, the appellant maintained that the said decree had not been registered against the title at the Kirinyaga Land Registry. He emphasized that, as at the time the orders of attachment were issued on 21st May 2024, the 1st respondent remained the registered proprietor of **Land Parcel Number Ngariama/Nyengeni/2193**, rendering the property liable to attachment.

6. The appellant further pointed out that the decree in **Gichugu MCELC No. E015 of 2022**, dated 23rd May 2024, appeared to have been recorded by consent between the parties in that suit, and notably, two days after the orders of attachment had already been made in

the present matter. In his view, the said proceedings and resultant decree were a calculated scheme between the objector and the judgment debtor designed to defeat execution and evade settlement of the decretal sum, which he stated stood at **Kshs.702,792/=** together with auctioneers' charges and accruing interest.

7. The appeal was canvassed through written submissions. The learned counsel for the appellant filed their submissions dated 4th August 2025 and 30th September 2025 in support of the appeal.

   On the first ground counsel submitted inter alia that the certificate of official search on record showed that a prohibitory order issued on 15th September 2023 in **Gichugu ELC No. 8 of 2021** was duly registered against **Land Parcel Number Ngariama/Nyengeni/2193** on 17th October 2023 and served upon the 1st respondent on the same date. It was argued that the learned trial magistrate erred in law and fact in giving effect to a subsequent consent order dated 1st November 2023 purporting to redistribute ownership of the suit property, in disregard of the subsisting prohibitory order. Counsel contended that upon service of the prohibitory order, the 1st respondent lacked the legal capacity to enter into any transaction affecting the suit property, including the consent relied upon by the objector, and that any such purported redistribution was unlawful. In that regard,

counsel maintained that the consent order in **Gichugu MCELC No. E015 of 2022** was a calculated scheme designed to defeat the execution process that had already commenced.

8. On the second ground, counsel submitted that the objection proceedings, though dated 4th June 2024, were only served on 31st July 2024, well outside the mandatory timelines prescribed under **Order 22 Rule 51(3) of the Civil Procedure Rules**, which requires service within seven days of filing. It was contended that the learned trial magistrate erred in treating the delay as minimal, whereas in fact the delay was inordinate and fatal to the objection.

9. With respect to the third ground, counsel took issue with the trial court's finding that the judgment debtor had come to hold the suit property jointly with the objector and a third party, one Purity Wangui Maina. It was submitted that no sufficient explanation or evidential basis had been laid to justify the alleged transfer of interests in the property, and that the purported dealings were intended to defeat execution. Counsel further argued that having found that the judgment debtor retained an interest in the property, the trial court fell into error in nevertheless setting aside the attachment, as such interest remained liable to execution.

10. On the fourth ground, counsel relied on **Section 44(1) of the Civil Procedure Act**, submitting that all property belonging to a judgment debtor, including property over which he has a disposing power for his own benefit, is liable to attachment and sale, whether held in his own name or in the name of another on his behalf.

It was argued that no evidence had been produced to demonstrate any lawful change in the register at the Kirinyaga Land Registry, and that the only material relied upon by the objector was the court order in **Gichugu MCELC No. E015 of 2022**, which, in counsel's view, could not override the registered status of the property. In conclusion, counsel maintained that the learned trial magistrate misapprehended both the facts and the applicable law, and urged that the appeal be allowed on those grounds.

11. The learned counsel for 2nd respondent filed their submissions dated 26th August 2025 but filed on 27th January 2026 opposing the appeal and supporting the decision of the trial court. Counsel began by outlining the background to the dispute, noting that in **Gichugu MCELC No. E008 of 2021**, the appellant had sought specific performance for transfer of a portion of **Land Parcel Number Ngariama/Nyengeni/2193,** or in the alternative a refund of the purchase price. The trial court, however, declined to grant specific performance and

instead awarded a monetary decree in favour of the appellant.

It was submitted that despite the nature of the decree being purely monetary, the appellant proceeded to execute the same against the very land which the court had declined to subject to specific performance. Upon learning of the intended attachment and sale, the 2nd respondent lodged objection proceedings on the basis that the suit property constituted matrimonial property in which she and her children had an interest. Counsel emphasized that the 2nd respondent had previously instituted **Gichugu MCELC No. E015 of 2022**, wherein a court of competent jurisdiction issued orders recognizing her and her children's interest in the property and directing its subdivision and joint ownership.

12. On grounds 1 and 4 of the appeal, counsel submitted that the appellant misapprehended the law governing objection proceedings under **Order 22 Rule 51 of the Civil Procedure Rules**.

It was argued that an objector need not be the registered proprietor of the attached property, but only needs to demonstrate a legal or equitable interest therein. In that regard, counsel pointed out that the 2nd respondent's interest as a spouse and beneficiary of a trust had been asserted from the outset and was subsequently affirmed

by the court in **Gichugu MCELC No. E015 of 2022**. Reliance was placed on **Section 28 of the Land Registration Act**, which recognizes spousal rights and trusts as overriding interests.

Counsel further submitted that the existence of a prohibitory order did not bar the filing of objection proceedings, as the law permits such objection at any time before the proceeds of sale are paid out. At the time of filing the objection, the property had not been sold, and therefore the objection was properly before the court.

13. With respect to ground 2, counsel argued that the issue of delay in service of the objection was raised belatedly and ought to have been taken as a preliminary objection before the trial court. It was further submitted that the record did not clearly establish the date of filing, and in any event, the appellant was able to respond to the application by filing a replying affidavit prior to the hearing. Counsel maintained that no prejudice was occasioned, and the trial court properly exercised its discretion in entertaining the objection.

14. On ground 3, counsel submitted that the orders issued in **Gichugu MCELC No. E015 of 2022** recognizing the interests of the 2nd respondent and her children remain valid and binding, having been issued by a court of competent jurisdiction. It was contended that if the

appellant considered those orders irregular, the proper recourse would have been to challenge them in that suit, which he did not do.

Counsel further argued that in light of the joint ownership of the property, the judgment debtor lacked unilateral disposing power, as **Section 91(4) of the Land Registration Act** provides that dealings in jointly owned property require the concurrence of all joint proprietors.

15. Finally, counsel submitted that the trial court did not err in directing the appellant to pursue alternative modes of execution. It was emphasized that the decree was for payment of money, and the appellant was at liberty to execute against other assets of the judgment debtor, including movable property or through committal to civil jail. Counsel maintained that the 2nd respondent, as a spouse, was entitled to protect her matrimonial property, particularly where she had not been involved in the underlying transaction.

In conclusion, the 2nd respondent urged the court to find that the appeal lacks merit and to dismiss it with costs.

16. The issues arising for the court's determinations in the appeal are as follows:

a. *Whether the objection proceedings by the 2nd respondent were competently before the trial court,*

particularly in light of the timelines for service under ***Order 22 Rule 51 of the Civil Procedure Rules****.*

b. *Whether, on the material placed before it, the trial court properly found that the 2nd respondent had established an interest sufficient to warrant setting aside the attachment*
c. *Who pays the costs?*

17. The court has carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel and come to the following findings:

a. On whether the objection proceedings by the 2nd respondent were competently before the trial court, particularly in light of the timelines for service under **Order 22 Rule 51 of the Civil Procedure Rules,** the appellant's challenge on this issue is twofold: firstly, that the objection was not served within the prescribed timelines; and secondly, that the delay was inordinate and fatal. The 2nd respondent, on the other hand, maintains that the objection was properly before the court and that no prejudice was occasioned.

b. The starting point is the governing law under **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 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 notices shall be accompanied by an application supported by an 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 applications shall be served within seven days from the date of filing on all the parties."

Two points emerge clearly from the above provision: firstly, the right to lodge an objection is available *"at any time prior to payment out of the proceeds of sale"* , secondly, once filed, the notice and application must be served within seven days; the language of **Rule 51(3)** being couched in mandatory terms.

c. From the record, it is not disputed that the objection proceedings were dated 4th June 2024. The appellant's position is that the same were only served upon him on 31st July 2024, which would place service well outside the statutory seven-day window.

   The 2nd respondent does not controvert the date of service but instead contends that the issue was not raised timeously and that no prejudice was suffered, given that the appellant filed a replying affidavit and participated in the proceedings. The question that therefore arises is whether non-compliance with **Rule 51(3)** is fatal to the objection proceedings.

d. While the rule is framed in mandatory language, it must be read alongside the broader procedural framework, particularly the principle that procedural rules are handmaidens of justice. The purpose of service within seven days is to ensure that the decree-holder is promptly notified and afforded an opportunity to respond before execution proceeds.

e. In the present case, the record shows that the appellant was served, filed a replying affidavit dated 6th August 2024, and opposed the application on its merits. There is no indication that the delay in service impeded his ability to respond or occasioned any identifiable prejudice.

Further, the objection was lodged before the sale of the property, thus satisfying the substantive threshold under **Rule 51(1).** In those circumstances, the learned trial magistrate's decision to entertain the objection proceedings, notwithstanding the delay in service, cannot be said to have been an outright error of law. Rather, it falls within the permissible exercise of judicial discretion in procedural matters, particularly where the ends of justice so demand.

f. Accordingly, this Court finds that although there was non-compliance with the timelines stipulated under **Order 22 Rule 51(3)**, the objection proceedings were nonetheless competently before the trial court, and this ground of appeal does not, of itself, warrant interference with the impugned ruling.

g. The issue on whether, on the material placed before the trial court, it properly found that the 2nd respondent had established an interest sufficient to warrant setting aside the attachment, turns not on a final determination of ownership of **Land Parcel Number Ngariama/Nyengeni/2193**, but on whether the 2nd respondent, as an objector, discharged the burden placed upon her in law so as to justify the setting aside of the attachment in execution.

As I have already noted above, the governing framework is outlined under **Order 22 Rule 51(1) of the Civil Procedure Rules**. The jurisprudential position emerging from that provision is that an objector bears the burden of demonstrating, to the satisfaction of the court, the existence of a legal or equitable interest in the attached property.

h. This principle was articulated in the case of ***Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others*** **(2014) eKLR**, where the court held as follows:

> ***"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?"***

In the case of ***Precast Portal Structures versus Kenya Pencil Company Ltd & 2 Others*** **(1993) eKLR,** 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."***

i. In the present case, the 2nd respondent based her objection on the decree issued in **Gichugu MCELC No. E015 of 2022**, which recognized and enforced her interest in the same. The trial court accepted that position and proceeded to set aside the attachment. The question is whether that conclusion was supported by the material on record. The material before the court indicated that, as at the time of attachment, the suit property remained registered in

the name of the 1st respondent. No evidence was placed before the court to demonstrate how the decree in **MCELC No. E015 of 2022** had been translated into the register so as to affect the proprietary status of the land. While a court decree is binding upon the parties thereto, its effect on title to land, particularly as against third parties and in execution proceedings, ordinarily calls for a demonstration of its legal operation in relation to the register.

j. Further, the record shows that there existed a prohibitory order registered against the suit property prior to the decree relied upon by the 2nd respondent. While this Court does not make a definitive pronouncement on the validity or effect of subsequent orders issued in another suit, the existence of such an encumbrance was a material factor requiring careful consideration in evaluating whether the objector had established an interest capable of defeating execution. Viewed holistically, and within the limited scope of objection proceedings, this Court is not persuaded that the material placed before the trial court met the threshold required to demonstrate a legally cognizable interest sufficient to warrant the setting aside of the attachment. The learned magistrate appears to have placed decisive weight on the

existence of the decree in **MCELC No. E015 of 2022** without adequately interrogating its legal effect within the context of execution, or whether the objector had discharged the evidentiary burden imposed by law.

Accordingly, this Court finds that the trial court erred in concluding that the 2nd respondent had established an interest sufficient to defeat the attachment. The court therefore finds the appeal is merited and should be allowed.

k. Under **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya** costs follow the event unless where for good reasons the court directs otherwise. I find no cause to direct differently, and the appellant shall have costs.

18. Flowing from the above listed conclusions, the court finds and orders as follows:

a. That the appeal has merit and is allowed.

b. That the trial court's ruling and order of 25th October 2024 is hereby set aside, and substituted with an order dismissing the 2nd respondent's objection to the attachment and

sale of land parcel Ngariama/Nyangeni/2193, with costs.

c. **The appellant is granted costs in the appeal**.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF APRIL 2026.

S. M. Kibunja

ELC JUDGE

In the presence of:

Appellant – Mr. Muchiri

Respondents – Mr. Mwagiru for Maina Kagio for 2nd Respondent

Kinyua - Court Assistant.

S. M. Kibunja

EL C JUDGE