



Ndumia & another v Oyugi t/a Meroka & Company Advocates; Tony (Objector) (Environment & Land Case E166 of 2023) [2025] KEELC 696 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E166 OF 2023
CG MBOGO, J
FEBRUARY 13, 2025**

BETWEEN

BONIFACE GITHINJI NDUMIA 1ST APPLICANT

ALICE RWAMBA GITHINJI 2ND APPLICANT

AND

**ISAAC MEROKA OYUGI T/A MEROKA & COMPANY
ADVOCATES RESPONDENT**

AND

KIPROTICH BETT TONY OBJECTOR

RULING

1. Before this court is an objection and an application, both dated 11th December, 2024, and filed by the Objector, Kiprotich Bett Tony, with respect to the attachment of the property being M.V. Registration KDL 502 Q, Toyota Fielder, Station Wagon, attached by Hazara Auctioneers on 7th December, 2024 in execution of the decree of this court.
2. The grounds of the objection are that the Objector is the sole owner of the M.V. Registration KDL 502 Q, Toyota Fielder, Station Wagon which he bought with finance from Stanbic Bank Kenya Ltd, which loan he continues to service. The Objector asserts that he is not and has never been a party to this suit and that the motor vehicle has never been a subject of proclamation in this suit and has never belonged to the judgement debtor herein.
3. The Objector/Applicant has filed the application dated 11th December 2024 pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 22 Rules 51(2) and Order 50 Rule 1 of the Civil Procedure Rules and Rule 12(b) of the Auctioneer's Rules. The Objector/Applicant has sought the following orders:



- a. Spent
 - b. Spent
 - c. Spent
 - d. That this honourable court be pleased to raise/ set aside the attachment of the Objector's motor vehicle registration KDL 502Q, Toyota Fielder, Station Wagon by Hazara Auctioneers on 7th December, 2024.
 - e. That the costs of this application and the attachment be paid by the decree holder/ Hazara Auctioneers.
4. The grounds of this application are set out on its face, and in the three supporting affidavits sworn by the Objector, Kiprotich Bett Tony, by Thomas Joshua Onchangu and by the Respondent, Isaac Meroka Oyugi.
 5. The Objector, Kiprotich Bett deponed in his supporting affidavit, that he is carrying on the business of buying, selling and hiring out cars under the business name of York Cars. He asserts that he owns motor vehicle registration KDL 502Q Toyota Fielder Station Wagon, which he bought under finance from Stanbic Bank Kenya Ltd.
 6. He stated that on 28th November, 2024 he leased the said motor vehicle to one Thomas Joshua Onchangu for a period of one month at the daily rate of Kshs. 5500/-. He deponed that on 7th December, 2024, Thomas Joshua Onchangu informed him that the said motor vehicle had been attached by Hazara Auctioneers on a decree of this court, and despite his efforts to have the motor vehicle released to him, his efforts have yielded no fruits.
 7. The Objector deponed that he has never been a party to this suit, that the said motor vehicle has never been a subject of proclamation in this suit and neither has it ever belonged to the judgement debtor herein.
 8. In his supporting affidavit, Thomas Joshua Onchangu deponed that he leased motor vehicle registration KDL 502Q Toyota Fielder Station Wagon, silver in color from Tony of York Cars for a month from 28th November, 2024. He deponed that such lease was necessary as in the week of 18th November, 2024, while in Mombasa with his family, his car, a Mercedes KBX had broken down and was in repair.
 9. Thomas Joshua Onchangu deponed that on 7th December, 2024, using KDL 502Q, he drove his family to Kisii, with assorted household goods in the car. When he arrived in Kisii, he averred that his relative, Isaac Meroka Oyugi, requested that he lends him the car for a quick errand in town. The deponent obliged and gave him the car with all the household stuff in the car. He asserted that about 30 minutes later, Isaac Meroka called him in distress and when he went to where he was, outside Mwalimu Hotel, Isaac Meroka then informed him that the said vehicle had been attached by Hazara Auctioneers on a decree of this court.
 10. Mr. Onchangu deponed that though he called the auctioneer, Mr. Jared Ombata, the auctioneer declined to meet him and the said Mr. Ombata only released his household items to him upon payment of Kshs. 15,000/- directly to the auctioneer and Kshs. 1500/- to his agents. He then reported the matter to Kisii Police Station and his complaint was recorded under OB No. 77 of 07/1/2024.
 11. The Respondent, Isaac Meroka Oyugi, deponed in his supporting affidavit that on 22nd October, 2024, he received a message from a person requesting his assistance in a case in Milimani Nairobi. The



- Respondent indicated that he was then in Kericho but would be in Nairobi in two weeks' time. He later came to learn that the person was Jared Ombata, an auctioneer who had warrants from court arising from this case. The Respondent sought time from Mr. Ombata and from Mr. Ndumia, the 1st Applicant, to put his finances in order to pay him.
12. Isaac Meroka Oyugi subsequently received a call on 6th December, 2024, while he was in Nyamira County, by a person who requested the Respondent to take up a murder case in Kisii. The said person requested to meet the Respondent in Kisii on 7th December, 2024. The Respondent then requested his relative to use his car for the quick errand in town. His relative gave him the keys to M.V. Registration KDL 502Q Toyota Fielder and he went to Mwalimu Hotel in Kisii town with the car, which was laden with his relatives' household goods.
 13. When the Respondent arrived at Mwalimu Hotel, he stated that Mr. Jared Ombata introduced himself and gave him the warrant of this court dated 18th October, 2024. He deponed that though he informed Jared that the motor vehicle was not his, the car was taken to Moco Auctioneers yard where Jared filled a notification of sale of movable property Serial No. 143. The Respondent signed the said form and indicated that the car and the items in it were not his, and that the car was borrowed. He attached a copy of the notification of sale of movable property.
 14. The Respondent deponed that he then called Thomas Joshua Onchangu and requested him to meet him outside Mwalimu Hotel, where he informed him what had happened. Though Thomas spoke to Jared Ombata for the release of the car, he declined to release the car.
 15. The Respondent deponed that the subject motor vehicle could not have been proclaimed on 22nd October, 2024. He further deponed that the Objector has never been a party to this suit and that the motor vehicle has never been a subject of proclamation in this suit and it has never belonged to him.
 16. It was the Respondent's averment that he was keen on settling this judgement which he entered by consent and that as soon as he gets the funds, he will settle it. He stated that it would however not be just for innocent parties to suffer for his failure to settle the decree in time. He contended that what the auctioneers have done is unlawful and against the Auctioneer's Rules. He prayed that the attachment herein be set aside and raised with costs to be borne by the auctioneer personally.
 17. The 1st and 2nd Applicants have opposed this application through a replying affidavit dated 15th January, 2025. They deponed that the Respondent, in a clear scheme to defeat his just debts, has locked his properties in his relatives' name. They contend that both Objector and the purported lease of the attached motor vehicle are the Respondent's pawns in this scheme.
 18. The Applicants aver that the attachment of the subject motor vehicle was preceded by careful tracing over a period of two months, during which time the motor vehicle was in the custody of the Respondent. They argue that the claim that the motor vehicle was leased out to the Respondent's relation is therefore a factual misrepresentation.
 19. According to the Applicants, the Respondent has no intention of ever honoring the consent order recorded in court over a year ago and thereby discharging the judgement debt herein. They highlight that the Respondent is committed to protect the interests of the purported Objector but has availed no reason of why he did and has been in default and violation of the recorded consent terms herein.
 20. It is the Applicants position that the Objector, who is admittedly a car dealer, stands to suffer no real loss if they proceed to execute the decree by sale of his motor vehicle as the Respondent could and should pay for the motor vehicle, which would be an amount less than the judgement debt. They stated that he should let the due process take place as he cannot claim innocence in the whole scheme of things.



21. The Applicants assert that they have been victims of the Respondent's conmanship for over four years, and have suffered and stand to suffer even more than the Objector, if the court were to countenance the grand scheming by the Objector and Respondent. It was asserted that the Objector's interest in the motor vehicle, if any is largely pecuniary, being a chattel for hire and sale, which the Respondent should recompense him.
22. The Applicants deponed that their agents, Hazara Auctioneers proclaimed subject motor vehicle on 22nd October, 2024 and subsequently attached the same vehicle on 7th December, 2024, and on both occasions, the vehicle was in the Respondent's possession. It however took the actual attachment of the motor vehicle for the Objector to surface, after the Respondent had offered to issue some post-dated cheques to them. They contend that the Respondent may as well issue these cheques to the Objector and purchase the vehicle.
23. They contend that it would be unconscionable for a party in violation of court orders to use proxies to defeat his just legal obligations under such court orders.
24. The Objector responded through a further affidavit dated 6th January, 2025. According to the Objector, the affidavit sworn by the Applicants is incurably defective and should be struck off the records as the affidavit is not dated at the jurat and the said affidavit is jointly made in the 1st Person plural and sworn by both applicants, which offends the Civil Procedure Rules and practice relating to affidavits.
25. The Objector denied any knowledge of this and averred that he did not know the Judgement Debtor nor his relatives. He denied that his motor vehicle was proclaimed by Hazara Auctioneers on 22nd October, 2024 as at that time, the car was in a garage, 1 Naiorbi (ACE AUTO) awaiting repairs after it was involved in an accident. He asserts that it was released from the garage on 25th November 2024. He annexed photos of the car in its accident state, photos of the car being removed from the scene of an accident aboard a flat bed, and a release letter from his insurer, Cannon General Insurance dated 25th November, 2024, giving them the care after repairs.
26. This application was canvassed by way of written submissions.
27. Counsel for the Objector filed written submissions dated 25th January, 2025. On the first issue of the validity of the Applicant's replying affidavit, Counsel submitted that the Objector's application was unopposed, as the Replying Affidavit filed by the Applicants was defective. They submitted that the replying affidavit was not dated at the jurat and the said affidavit was sworn by both applicants, which offends the Civil Procedure Rules and practice relating to affidavits.
28. Counsel submitted that the affidavit was in violation of Section 4 of the [Oaths and Statutory Declarations Act](#). The relied on the cases of *Caltex Oil (Kenya) Limited v New Stadium Service Station and Another* [2002] eKLR, *Kenya Federation of Labour and Another v Attorney General & 2 others* Case No. 735 of 2012, *Stephen M. Mogaka v Independent Electoral and Boundaries Commission* [2017] eKLR, *Charles Muturi Mwangi v Invesco Assurance Co. Ltd* [2014] eKLR, *Justus Achinga Kebari & 25 others v The Attorney General* [2018] eKLR, *Maureen Nyambura v Board of Directors KPLC Ltd* [2020] eKLR and the Supreme Court's decision in *Patricia Cherotich Sawe v Independent Electoral and Boundaries Commission (IEBC) & 4 others* [2015] eKLR.
29. Counsel alternatively argued that even if the affidavit were to be spared under Article 159 of [the Constitution](#), the averments do not answer the accusations by the Objector that the decree holders, through their agents, Hazara auctioneers, have without any color of right attached the Objector's motor vehicle, which Objector is not a party to this suit and whose motor vehicle has never been subject



- of proclamation in this suit. They assert that the Objector has exhibited a copy of the logbook and motor vehicle lease agreement as evidence which proves ownership of the car.
30. It was Counsel's submission that the Objector had discharged their onus of proof legally upon him. Counsel relied on the cases of *Awo Shariff Abdirahim t/a Mohammed Investments v Abdulkadir Shariff Mohammed & Anor* [2006] eKLR, *Akiba Bank Ltd v Jetha & Sons Ltd* [2005] eKLR, *Equatorial Commercial Bank v Bubacon Agencies Ltd* [2013] eKLR, and *Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co. Ltd*.
 31. With respect to the conduct of the auctioneer, the Objector's Counsel submitted that the auctioneer did not conduct himself in a manner befitting an officer of the court, contrary to the duties of auctioneers set out in Section 23 of the Auctioneer's Act. He submitted that the Auctioneer has also failed to file the proclamation sale Form 2 as per Rule 12 of the Auctioneer's Rules 1997. They therefore prayed that this court raise/ set aside the attachment of the Objector's motor vehicle. They also sought that the auctioneer do bear the costs as provided under Section 26 of the Auctioneer's Act.
 32. Counsel for the Applicant filed written submissions dated 3rd February 2025. On the first issue of whether the applicant's replying affidavit is defective, Counsel submitted that the Objector's assertions are devoid of merit, as it is trite law that procedural technicalities should not be elevated above substantive justice. They relied on Article 159(2) (d) of *the Constitution* of Kenya.
 33. They further argued that the alleged omission of the date at the jurat does not prejudice the Objector nor affect the validity of the affidavit as it substantially complied with the requirements of the *Oaths and Statutory Declarations Act*. They quoted the Court of Appeal case of *Microsoft Corporation v Mitsumi Computer Garage Ltd* [2001] KLR 470.
 34. As to the assertion that the Applicant's affidavit is improperly sworn by the Applicants jointly and in first person plural, Counsel submitted that no legal provision prohibits multiple deponents from swearing an affidavit together. They contend that Rule 9 of the Oaths and Statutory Declarations Rules only requires that an affidavit clearly indicates the deponents and their averments, which the impugned affidavit does. They relied on the case of *Sammy Mbugua & 6 others v Kenyatta University & 3 others* [2019] eKLR, where the court dismissed objections to jointly sworn affidavits as such objection was purely technical and untenable under the current constitutional dispensation.
 35. The Applicants' Counsel submitted that the evidence provided by the Applicants clearly establish that the execution process was conducted properly and lawfully. They contend that the Objector's blanket denial is devoid of any substantive evidence and falls short of the threshold required to rebut the Applicants' assertions. Counsel relied on the case *Kenya Power & Lighting Company Limited v Alliance Media Kenya Limited* [2021] eKLR, where the court emphasized denials cannot override evidence that is clear, credible and uncontroverted.
 36. It was Counsel's further submission that the Objector had failed to furnish any plausible explanation or documentary proof to refute the Applicant's assertions regarding the careful tracing and possession of the motor vehicle by the Respondent at the material time. They contend that the Respondent was in possession of the motor vehicle during the proclamation on 22nd October, 2024, which fact is supported by Mr. Onchangu's conduct of paying Kshs. 15,000/- to the auctioneer and Kshs. 1500/- to their agents. They argue that this indicates an element of truth to the Respondent's control and use of the motor vehicle.
 37. Moreover, Counsel asserts that the Respondent, being an Advocate, had ample opportunity to approach this court to contest any perceived grievance or injury arising from the proclamation and/ or subsequent attachment. Counsel urges that this underscores the Applicants' position that the



- objection is baseless and intended to frustrate lawful execution. They additionally submit that the Objector has failed to discharge his burden to demonstrate that he has a superior proprietary interest in the attached property.
38. It is the Applicants' submission that their detailed account and supporting evidence remain unimpeached, rendering the Objector's denials untenable. They submitted that the alleged lease fee of Kshs. 165,000/- for a single month far exceeds the reasonable market rate for leasing of a vehicle of such class and the figure is inconsistent with commercial realities. They argue that the objection is a calculated maneuver by the Respondent to shield his assets from lawful execution under the guise of third-party ownership or control. Counsel relied on the case of *Abdi v Muruli* [1997] eKLR and the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others*.
39. This court has considered the Objector's objection, application, the replying affidavit filed by the Applicants and the submissions filed by the parties in this suit. The issues that arise for the determination of this court are:
- a. Whether the Applicant's Replying Affidavit is defective.
 - b. Whether the objection to the attachment of the subject motor vehicle is merited.
 - c. Whether the Auctioneer acted in breach of Section 12(b), Auctioneer's Rules
 - d. Who should bear the costs of this application.
40. This objection and application herein have been filed pursuant to Order 22 Rule 51 of the Civil Procedure Rules, which provides that a person claiming legal interest in a whole or part of any property attached in execution of a decree may object to such attachment prior to payment out of the proceeds of sale of such property. It provides that :
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 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.
41. It is trite that the burden of proof to establish proprietary ownership lies with the Objector. This was held in *Awo Shariff Abdirahim t/a Mohammed Investments v Abdulkadir Shariff Mohammed & Anor* [2006] eKLR. In the same vein, the court in *Akiba Bank Ltd v Jetha & Sons Ltd* [2005] eKLR posited that an Objector must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree.
42. The undisputed facts are that on 7th December, 2024, Hazara Auctioneers, who were appointed by the Applicants, attached motor vehicle registration KDL 502Q, Toyota Fielder, Station Wagon in satisfaction of the decree of this court in this suit, ELC E166 of 2023. The said decree is pursuant to a consent entered between the Applicants and the Respondent on 16th May, 2024, under which the Respondent, Isaac Meroka Oyugi, agreed to pay the Applicants the decretal sum of Kshs.1,250,000/-.



43. Before considering the merits of the application, this court shall first consider whether the Applicant's replying affidavit is defective. The Objector has contested the validity of the replying affidavit sworn by the Applicants as the same was not dated at the jurat and was sworn in first person plural. The Applicants argue that pursuant to Article 159(2) of *the Constitution*, procedural technicalities should not be elevated above substantive justice.
44. This court takes notice that the Applicants filed a replying affidavit and uploaded the same on the Judiciary Case Management System (CTS) on 15th January, 2025. The said affidavit is indeed not dated at the jurat and is sworn by both Applicants. The Applicants later on filed and uploaded a similar replying affidavit which was dated 15th February, 2024 at the jurat. The Commissioner of Oaths on both replying affidavits is indicated to be one Kairu Kimani.
45. The Objector contends that the replying affidavit is defective and infringes Section 4(1) of the *Oaths and Statutory Declarations Act*, which provides that:-
- A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:
- Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.
46. The Objector has however not argued or established that the said Kairu Kimani is an advocate of any of the parties or clerk to either of the parties' advocates. They have therefore not established that the affidavits were drawn contrary to Section 4 of the *Oaths and Statutory Declarations Act*.
47. The Objector has however raised that the affidavit is not dated at the jurat, which requirement is provided for under Section 5 of the *Oaths and Statutory Declarations Act*, which states:
- Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
48. Indeed, the first replying affidavit filed by the Applicants did not comply with Section 5 of the *Oaths and Statutory Declarations Act*. To their credit, the Applicants swiftly remedied this error and filed an affidavit dated accordingly at the jurat.
49. As to the jointly sworn affidavit, Order 19 Rule 5 of the Civil Procedure Rules prescribes that an affidavit must be drawn in the first person. The Court of Appeal in Francis Kariu Gakumbi & another v Piliska Njoki Maina [2008] KECA 328 (KLR) however found that two or more people can indeed swear an affidavit at the same time. This court is guided accordingly.
50. In the circumstances herein, the Applicants have each signed the said affidavit and no apparent prejudice stands to befall the Objector should this court decline to strike out the replying affidavit.
51. Having found that the Applicant's replying affidavit is valid, the court shall now proceed to consider the merits of the application herein. The Objector, Mr. Kiprotich Bett Tony, has asserted that he has full proprietary ownership of KDL 502Q, as he purchased the same through financing from Stanbic Bank



- Kenya Ltd. He asserts that he leased the car to the one Thomas Joshua Onchangu on 28th November 2024 and that the car has erroneously been attached in execution of the decree in this suit. He contends that that he has never been a party to this suit, that the said motor vehicle has never been a subject of proclamation in this suit and neither has it ever belonged to the Judgement Debtor.
52. In support of this application, the Objector has annexed the car hire agreement with respect to the subject motor vehicle between himself and Thomas Joshua Onchangu dated 28th November, 2024 and a copy of the logbook for car registration KDL 502Q which is registered in the name of Kiprotich Bett Tonny.
 53. The Objector has also adduced supporting affidavits sworn by Thomas Joshua Onchangu and Isaac Meroka, the Respondent in this matter. The deponents assert that Thomas Joshua Onchangu briefly loaned the Respondent the subject matter vehicle while in Kisii town, and that it was during such time that the auctioneer, Jared Ombata, attached motor vehicle KDL 502Q, despite the Respondent protesting that the motor vehicle did not belong to him.
 54. The Respondent has produced a copy of the Notification of Sale of Movable Property filled by the auctioneer on 7th December, 2024. The Respondent signed the said notification and indicated thereon that the car and the items inside were not his, and that he had borrowed the car. The Respondent has also adduced texts exchanged between himself and the auctioneer, Jared Ombata.
 55. The Applicants have not opposed the Objector's ownership of the subject motor vehicle nor have they challenged the validity of the ownership documents presented. They have also failed to draw a nexus between the Respondent and the Objector in this matter. Accordingly, on the weight of the evidence presented by the Objector, this court is satisfied that the Objector has proved his legal ownership his motor vehicle registration KDL 502Q.
 56. On the third issue, the Objector has asserted that the auctioneer acted in breach of Rule 12(b) of the Auctioneers Rules, as the subject motor vehicle has never been a subject of proclamation. Rule 12(b) states as follows:
 1. Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
 - a. record the court warrant or letter of instruction in the register;
 - b. prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
 57. While the Applicants have argued that the subject motor vehicle was the subject of proclamation on 22nd October, 2024, they have not adduced any evidence of such proclamation, specifically Sale Form 2. In the absence of this document, and any other evidence, this court must agree with the Objector that the Auctioneer acted in breach of Rule 12(b) of the Auctioneers Rules.



58. The final matter is with respect to the costs of this application. The Objector has sought that the Auctioneer be found liable to bear the costs of this application. They have relied on Section 26 of the *Auctioneers Act*, which provides as follows:

Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action.

59. Section 26 of the *Auctioneers Act* is, however, not applicable in these circumstances as the Objector has not made a claim for damages against the said auctioneer. Furthermore, the auctioneer is not party to this suit, as he acted as agents of the Applicants. The Objector's application in this respect must therefore fail.

60. The upshot of the foregoing is that this court finds merit in the Objector's application and the following application which is allowed as follows:

1. That an order is hereby issued that the attachment of the Objector's motor vehicle registration KDL 502Q, Toyota Fielder, Station Wagon by Hazara Auctioneers is hereby raised/ set aside.
2. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

HON. MBOGO C.G.

JUDGE

13/02/2025

In the presence of:

Benson – court assistant

Mr. Mwanzia holding brief for Mr. Karanja for the Plaintiff/Applicant

Mrs. Ombongi holding brief for Mr. Kiplagat for the Objector

Mr. Meroka for the Defendant /Judgement debtor

