



REPUBLIC OF KENYA



KENYA LAW
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**Kiamba t/a Oasis Resorts Club & another v Mutuku (Civil Appeal
E190 of 2024) [2025] KEHC 9216 (KLR) (Civ) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E190 OF 2024

AN ONGERI, J

JUNE 27, 2025

BETWEEN

JOSEPHINE WAYUA KIAMBA T/A OASIS RESORTS CLUB 1ST APPELLANT

THOMAS LUNANI 2ND APPELLANT

AND

JOHN MUEMA MUTUKU RESPONDENT

*(Being an appeal from the Ruling of Hon. Wendy Micheni (CM) in
Milimani CMCC No. 326 of 2003 delivered on 9th February 2024)*

JUDGMENT

1. The trial court delivered a Ruling on 9th February 2024 stating that it had no jurisdiction to hear and determine the two applications, the first dated 25th October 2023 by the Objector and the second dated 15th November 2023 by the Appellant Judgment Debtor.
2. The Objector filed the application dated 25th October 2023 seeking review and setting aside of the trial court's judgment and to allow the Notice of Objection dated 12th June 2023.
3. The Objector stated that the proclaimed goods were his assets stating that he is an innocent bystander in the original suit.
4. The Judgment Debtor (JD) in her application dated 15th November 2023 also sought to set aside the court's Ruling dated 18th August 2023 and to allow the Judgment Debtor to recall and cross-examine the Respondent and to allow her to recall and cross-examine the Respondent.
5. The trial court found that the Objector did not establish that the attached property belongs to him as the receipts were issued C/O Oasis Resort Club.



6. The trial court stated that it was functus official and could not review the orders of the court and it could not alter its own orders.
7. The trial court dismissed the two applications with no orders as to costs and the Respondent was allowed to proceed with execution.
8. The Objector and the Appellant (Judgment Debtor) have appealed on the following grounds:-
 - i. The learned Chief Magistrate erred in law and in fact in their ruling by failing to take into regard key issues raised by the 1st Appellant that go into the heard of the matter.
 - ii. The learned Chief Magistrate erred in law and in fact by disregarding key evidence filed showcasing that the 2nd Appellant was the actual owner of the property attached to the orders issued by the Honourable Court.
 - iii. The learned Chief Magistrate erred in law and in fact by making orders over the 2nd Appellants property even though he is an innocent bystander.
9. The parties filed written submissions as follows:-
10. The appellants in their submissions challenged the ruling delivered on 9th February in Milimani Chief Magistrate's Court Case No. 326 of 2003, which dismissed two applications: one dated 25th October 2023 (seeking to review and set aside a ruling on an objection) and another dated 15th November 2023 (seeking to set aside a prior ruling of 18th August 2023).
11. The appellants argued that the magistrate erred in failing to consider key issues, including the negligence of the 1st appellant's former advocate, who failed to prosecute the case or inform the appellant of court proceedings.
12. Citing precedents like *Selle v. Associated Motors Boat Co. Ltd.* (1968) and *Philip Chemwolo v. Augustine Kubede* (1982-1988), they contended that litigants should not be penalized for their advocates' mistakes and deserve a hearing on merit.
13. Further, the appellants asserted that the magistrate disregarded evidence proving the 2nd appellant's ownership of property attached in execution, despite receipts and documents bearing his name.
14. They referenced *Chotabhae M. Patel v. Chapraphi Patel* (1958) and *Benard Muia Kilovoo v. Kenya Fresh Produce Exporters* (2020), arguing that possession and interest in the property—not legal title—were the relevant considerations.
15. Further, that the magistrate's conclusion that the property's ownership was unclear, despite receipts showing the 2nd appellant's name, is criticized as a misdirection.
16. The appellants also highlighted that the 2nd appellant, a tenant at the 1st appellant's premises, was an innocent bystander with no connection to the judgment debtor, as supported by authorities like *Sarah Ambrose Achieng v. Dennis Ambrose Achieng* (2020).
17. In summary, the appellants argued that the magistrate's failure to properly evaluate evidence and apply legal principles led to an unjust dismissal of their applications.
18. They urged the court to allow the appeal, set aside the ruling, and grant them an opportunity to present their case on merit.
19. The Respondent opposed the appeal, arguing that the trial court properly exercised its discretion in dismissing the applications by both Appellants.



20. On the first issue—whether the trial court failed to consider key arguments raised by the 1st Appellant regarding their advocate’s mistakes—the Respondent contended that the court rightly held that a lawyer’s negligence does not automatically justify a review.
21. The 1st Appellant failed to demonstrate diligence in pursuing the case, and courts have consistently ruled that litigants bear responsibility for their cases, regardless of their advocates’ errors.
22. The Respondent cited case law, including Savings and Loans Limited v Susan Wanjiru Muritu, to support the principle that a party cannot rely solely on their advocate’s failures to excuse delays or seek relief.
23. On the second issue—whether the trial court disregarded evidence proving the 2nd Appellant’s ownership of the attached property—the Respondent argued that the court thoroughly examined the receipts and documents presented but found them insufficient to establish clear ownership.
24. That many receipts were either addressed to the 1st Appellant’s business (Oasis Resort) or lacked specificity, failing to prove the 2nd Appellant’s exclusive interest.
25. The Respondent relied on the case of Arun v C. Sharma and other cases to emphasize that an objector must definitively prove their legal or equitable interest in attached property, which the 2nd Appellant did not do.
26. They submitted that the trial court’s conclusion that the objection lacked merit was sound and based on evidence.
27. The Respondent urged the appellate court to uphold the trial court’s ruling, noting that appellate intervention is only warranted if the lower court misdirected itself on the law or facts, which the Appellants have not shown.
28. The appeal, they argued, is unmerited and an attempt to delay justice in a long-pending case.
29. They asked the court to dismiss it with costs.
30. The issue for determination in this appeal are as follows:-
 - i. Whether the trial court was right in dismissing Objection proceedings.
 - ii. Whether the trial court was right in declining to allow the Judgment Debtor to recall witnesses.
31. The trial court dismissed the Objector’s application on the grounds that he failed to prove ownership of the attached property.
32. An objector in execution proceedings must demonstrate a legal or equitable interest in the property to sustain an objection.
33. The Court of Appeal in Chotabhai M. Patel v. Chaprabhai Patel (1958) EA 316 held that possession or beneficial interest, rather than strict legal title, may suffice to support an objection.
34. In this case, the Objector (2nd Appellant) presented receipts bearing his name, albeit issued C/O Oasis Resort Club.
35. The trial court concluded that this did not conclusively establish ownership.
36. However, the principle in Benard Muia Kilovoo v. Kenya Fresh Produce Exporters (2020) eKLR emphasizes that an objector need not prove absolute ownership but must show a legitimate claim to the property.



37. The trial court's failure to evaluate whether the Objector had a possessory or equitable interest, despite the receipts, was a misdirection.
38. Moreover, the Objector's contention that he was an innocent bystander, as affirmed in *Sarah Ambrose Achieng v. Dennis Ambrose Achieng* (2020) eKLR, required deeper scrutiny.
39. The trial court's summary dismissal without assessing whether the attachment prejudiced a third party was erroneous.
40. I set aside the order dismissing the objection proceedings and I allow the objection.
41. The objector (2nd Appellant) presented receipts bearing his name, albeit issued C/O Oasis Resort Club.
42. On the issue as to whether the trial court was right in declining to allow the judgment debtor to recall witnesses, the Judgment Debtor (1st Appellant) sought to set aside the ruling of 18th August 2023 and recall witnesses for cross-examination, citing her former advocate's negligence.
43. The trial court held that it was functus officio and could not revisit its orders.
44. While the principle of functus officio generally bars courts from altering final orders (*Telkom Kenya Ltd. v. John Ochanda* (2014) eKLR), exceptions exist where justice demands review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
45. The Court of Appeal in *Philip Chemwolo v. Augustine Kubede* (1982-88) 1 KAR 103 emphasized that litigants should not suffer for their advocates' mistakes if they demonstrate diligence.
46. In this case, the 1st Appellant alleged that her advocate's failure to prosecute the case or inform her of proceedings prejudiced her rights.
47. The trial court's refusal to consider this, without assessing whether the advocate's negligence was excusable, was a misapplication of the law.
48. In *Selle v. Associated Motor Boat Co. Ltd.* (1968) EA 123, the court held that procedural technicalities should not override substantive justice.
49. The trial court therefore erred in dismissing the application without evaluating whether the Judgment Debtor deserved an opportunity to recall witnesses in the interests of fairness.
50. The ruling is set aside, and the application for recall of witnesses is remitted for reconsideration under the principles of natural justice.
51. The appeal is allowed and the trial court's ruling dated 9th February 2024 is set aside in respect of both the dismissal of the Objector's claim and the refusal to allow the Judgment Debtor to recall witnesses.
52. The objection is allowed and this matter is remitted back for the Judgment Debtor to recall witnesses.
53. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JUNE 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-



Court Assistants: Maina/Millicent

.....for the Appellants

.....for the Respondent

