



**Mwangi t/a Kimani Mwangi Advocates LLP v Malik & another; Auto Toyoma Limited
(Objector) (Commercial Case E036 of 2023) [2025] KEHC 12317 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E036 OF 2023
F WANGARI, J
JULY 31, 2025**

BETWEEN

KIMANI MWANGI T/A KIMANI MWANGI ADVOCATES LLP APPLICANT

AND

SAJID JAMSHED MALIK 1ST RESPONDENT

HUSSEIN JAVED MALIK 2ND RESPONDENT

AND

AUTO TOYOMA LIMITED OBJECTOR

RULING

1. The Objector filed a Notice of Motion application dated 11/02/2025 under Certificate of Urgency pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 Rule 51 (1) and (2) of the *Civil Procedure Rules*, and all other enabling provisions of the law.
2. The Objector seeks for orders that pending the hearing and determination of the objection proceedings, there be a stay of execution of the warrants of attachment and sale issued on 27/01/2025, and that this court be pleased to set aside the said warrants of attachment and sale. It was prayed that costs of this application be awarded to the Objector.
3. The application is based on grounds in the schedule and on the Supporting Affidavit of Ismail Hafiz sworn on 11/02/2025. It was stated that the Objector is the registered owner of motor registration number KDS 283H and the other unregistered motor vehicles in the Notice of Proclamation dated 07/02/2025. The Objector has a legal and beneficial interest in the said properties.
4. The Objector is neither a party in the subject suit nor has any Decree been issued against it, hence no legal basis for attaching the Objector's properties. That the warrants of attachment and sale ought to



be set aside as they have the effect of unlawfully converting the Objector into the Judgment Debtor. That it is in the interest of justice and fairness that the orders sought are granted.

5. On 18/02/2025 the matter herein came up for mention and the court gave directions for the Advocate/Applicant to file a response to the Objector's application herein by close of business on 19/02/2025 and for the application to be disposed off by way of written submissions.
6. As at the time of writing the ruling herein, the Advocate/Applicant had not filed their response. Parties had however filed their submissions. The submissions by the Applicant cannot not take the place of evidence and neither are they pleadings. The court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR stated as hereunder:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
7. The submissions filed by the Applicant are therefore disregarded.
8. The application is deemed not opposed. However, the application must be determined on its own merits.

Objector's submissions

9. The Objector in their submissions dated 20/02/2025 argued that it is the obligation of the Objector to prove that he/she has a legal or equitable interest in the goods proclaimed to justify a stay of execution as was held in the case of *Stephen Kiprotich Koech v Edwin K. Barchilei & Joel Sitienei (Objector)* [2019] eKLR which cited with authority the case of *Arun C. Sharma v Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 4 Others* [2014] eKLR. The Objector submitted that Section 44 of the *Civil Procedure Act* provides that in execution proceedings, only the property belonging to the Judgment Debtor is subject to attachment. That the Objector's application is therefore merited and should be allowed.

Analysis

10. After considering the Notice of Motion application dated 11/02/2025 and submissions by the Objector, the issues for determination are: -
 - a. Whether the Objector has met the threshold for grant of stay of execution of the warrants of attachment and sale dated 27th January 2025
 - b. Who should bear costs.
11. It has not been denied that the attached properties belong to the Objector. The Auctioneer was not enjoined in the suit to shed more light as to why the properties were deemed to be that of the Judgment Debtors.
12. By attaching the logbooks of motor vehicle registration no. KDS 283H, the Objector has proved ownership of the said vehicles. For the unregistered vehicles, there being no evidence challenging the legal or equitable interest over the same by the Objector.



13. In the case of *Joel Muga Opinja v East Africa Sea Food Ltd* [2013] eKLR the court held that;

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied.”

14. I find that the attachment of both the registered and unregistered vehicles has successfully been challenged.

15. As to the issue of costs, the same follows the event. That is what Section 27 of the *Civil Procedure Act* decrees. However, this court has the discretion to direct otherwise. The attachment having been done by the auctioneer who was not enjoined to the suit, I find no fault on the part of the Applicant and should not be condemned to pay costs. Each party to bear its own costs.

Determination

16. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. That the Notice of Motion dated 11/02/2025 has merits and is allowed on terms that the Warrants of Attachment and Sale dated 27/01/2025 are hereby lifted.
- b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 31ST DAY OF JULY, 2025.

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HON. F. WANGARI

JUDGE

In the presence of:

Ms. Kiendi Advocate h/b for Mr. Kimani Advocate for the Applicant

N/A by the Objector

Ms. Norah, Court Assistant

