



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ganesh Engineering Works Limited & 3 others v Yamini Builders Limited; Makandi (Objector)  
(Civil Suit 179 of 2014) [2024] KEHC 2643 (KLR) (Civ) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2643 (KLR)

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

**CIVIL  
CIVIL SUIT 179 OF 2014**

**JN NJAGI, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**GANESH ENGINEERING WORKS LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
BANSONS HOLDINGS (KENYA) LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
BHANDERI ENTERPRISES ..... 3<sup>RD</sup> PLAINTIFF  
DIPAK BHADERI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**YAMINI BUILDERS LIMITED ..... DEFENDANT**

**AND**

**WINFRED MAKANDI ..... OBJECTOR**

**RULING**

1. The Objector/Applicant has filed an application dated 28<sup>th</sup> April 2022 seeking for orders that:
  1. Spent
  2. Spent
  3. Spent
  4. That the Honourable Court be pleased to grant an order prohibiting the Plaintiffs/ Respondents, either themselves or their agents, servants and/or auctioneers or persons acting under their name or on their behalf from advertising for sale, Maisonette No.11, Executive Estate, erected on the parcel of land known as LR Number 209/20076 located along Mombasa Road in Nairobi City County pursuant to a Notification of Sale dated 7<sup>th</sup> April, 2022.



5. That the Honourable Court be pleased to lift the Proclamation of Attachment and the notification of Sale dated 7<sup>th</sup> April, 2022 issued by the Plaintiffs/Respondents and relating to Maisonette No.II, Executive Estate erected on a parcel of land known as LR Number 209/20076 located along Mombasa Road in Nairobi City County.
  6. That the Honourable Court be pleased to issue a Declaration that the Objector/Applicant is the legal and beneficial owner of Maisonette No.II, Executive Estate erected on a parcel of land known as LR Number 209/20076 located along Mombasa Road in Nairobi City County.
  7. That the costs of this Application be provided for.
2. The application is supported by grounds on the face of the application and the affidavit of the Objector/ Applicant, Winfred Makandi, sworn on the 25<sup>th</sup> April 2022 and a further affidavit sworn on 23<sup>rd</sup> May 2022. The gist of the application is that the Objector is the legal and beneficial owner of the suit property herein, having bought it from the Defendant/Respondent herein, which property is now under attachment by the plaintiffs/ Respondents in execution of a decree. The Objector seeks for the lifting of warrants of attachment against the property and for a declaration that she is the legal and beneficial owner of the property.
  3. The application was opposed by the Defendant/Respondent through the Replying affidavit of the Director of the said Defendant/Respondent, Joshnaben Dipak Kerai, sworn on 25<sup>th</sup> May 2022 in which she denied that the Objector is the legal owner of the said property.
  4. The application was also opposed by the Plaintiffs/Respondents vide grounds of opposition dated 27<sup>th</sup> May 2022 whereby they contend that the application revolves around ownership of the suit property and to that extent this court lacks jurisdiction to entertain it. Further that the dispute between the Objector and the Defendant should be adjudicated upon in a different forum without the Plaintiffs being dragged into it.

### **Case for Objector**

5. It is the case for the Objector that she was working with the Defendant/ Respondent. That in the year 2014 the Defendant/Respondent sold her the suit property for a consideration of Ksh.11,000,000/= that she paid through mortgage. That in 2016 the Defendant handed over to her the original Certificate of Title, duly executed Transfer and the Discharge of Charge to enable her transfer the property to her name. That she leased the property to tenants and has been collecting rent and paying rates to Nairobi City County since the year 2016. However, that she has not registered the property in her name due to inability to raise the requisite funds.
6. The Objector contends that she was not a party to the suit between the Plaintiffs/Respondents and the Defendant/Respondent. Therefore, that the attachment is unlawful. The Objector attached to the objection the documents alluded to above that includes lease agreement with the tenants to the property.

### **Case for Defendant/Respondent**

7. The Director of the Defendant deposed that the Objector was the Defendant's Secretary/ Administrator for many years. She denied that the Defendant gifted the suit property to the Objector. She wondered how the company could have gifted such property to the Objector yet the company owed huge debts to creditors. She averred that the property was charged to I&M Bank and could therefore not be gifted to anyone. She averred that the Objector has never taken possession of the suit property and could only have procured the original title of the suit property through fraud.



8. The objection was canvassed by way of written submissions.

### Judgment Debtor's Submissions

9. The JD submitted on three issues as hereunder:

- a. Whether the Objector/Applicant has established a legal and beneficial interest in the property attached in execution of the Decree herein?
- b. Whether Objector/Applicant legally obtained ownership rights to the Suit Properly?
- c. Whether the Objector/Applicant should be granted prayer 6 of the application.

10. The JD in the first place submitted that it is the duty of an Objector under Order 22 Rule 51 to prove and establish his right to have the attached property released from the attachment. In this respect they relied on the case of *Precast Portal Structures v Ken a Pencil Com and Limited & 2 others* (1993) eKLR where the court held that 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 but where the Court is satisfied that the property was, at the time of attachment, held by the judgment - debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-debtor, or that ownership has changed whereby the judgment - debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the Court shall dismiss the objection. The Court takes into account the grounds of objections raised, and the contentions of the respective parties to the objection proceedings, Any special features evident in the proceedings which throw light on the controversy must be regarded. ”

11. It was submitted that it is the duty of the Objector to demonstrate that he has an ascertainable interest in the attached property and must demonstrate so by attaching the relevant documents and receipts.

12. The Court was referred to the case of *Stephen Kiprotich Koech v Edwin K. Barchilei & Joel Sitienei (Obector)* (2019) eKLR where the court while citing the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR 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.”

13. On jurisdiction the JD submitted that the Judgement-Debtor/Respondent is the registered proprietor of the subject property as confirmed by the Certificate of Title annexed to the JD's Supporting Affidavit dated 28<sup>th</sup> April, 2022.

14. It was submitted that Section 26(1) of the *Land Registration Act* 2012 gives a registered owner absolute right over the property which right cannot be defeated except on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme.

15. It was submitted that this court lacks Jurisdiction to grant a declaration that the Objector/Applicant is the legal and beneficial owner of the suit property. It was submitted that the proper court to determine



that issue under Article 162(2)(b) of the [Constitution](#) and section 13 of the [Environment and Land Court Act](#), 2011 is the Environment and Land Court and which is by way of a hearing and not by way of an application and affidavit evidence as done by the Objector/Applicant in this matter.

16. It was submitted that the purported Sale Agreement marked 'WN-3' is not dated, signed by any director or witnessed by an advocate. That the Objector/Applicant has also not produced the Judgement-Debtor/Respondent's Resolution allowing it to sell the Subject Property. Further that the Sale Agreement provides that the Objector/Applicant paid for the said property but there is no evidence of payment of consideration to the JD and no payment of stamp duty to the transaction.
17. The JD urged the court to dismiss the Objection with costs.

### **Plaintiffs/Respondents' Submissions**

18. The Plaintiffs identified 3 issues for determination:
  1. Whether the Objector/Applicant has demonstrated that she has a legal/equitable interest in the suit property.
  2. Whether there are inconsistent and unrealistic claims by the Objector/Applicant relating to her alleged ownership documents.
  3. Whether this Honourable Court has jurisdiction to issue a declaration that the Objector/Applicant is the legal and beneficial owner of the suit property.
19. The plaintiff's/decree holders submitted that the Certificate of Title exhibited by the Objector/Applicant indicates that the Judgment Debtor is still the registered owner of the suit property. That being the case they relied on the provisions of sections Section 24, 25 and 26 of the [Land Registration Act](#) No 3 of 2012 to submit that the Judgment debtor is the lawful owner of the property.
20. It was submitted that there was no evidence that the Objector was gifted the property nor that she purchased it from the Objector. It was submitted that the Objector has not offered any convincing grounds on why the suit property has never been formally transferred to her name since she allegedly purchased it through a 2014 sale agreement. Further that payment of land rates alone is not proof of ownership of the suit property.
21. The plaintiffs dismissed the averment by the Objector that she was issued with a Discharge in view of contrary evidence presented by I & M Bank Limited that no discharge of charge has ever been issued.
22. The Plaintiffs submitted that the Objector has given contradictory statements on ownership of the suit property. That when she appeared as a witness for the Defendant in the main suit, she stated that the suit property belonged to the judgment debtor (Yamini Builders) but is now claiming that the land belongs to her. It was submitted that the contradiction impeaches her credibility.
23. On the issue of jurisdiction, the Plaintiffs/decree holders submitted that matters of ownership of land lies with the Environment and Land Court as provided Article 162(2)(b) of the [Constitution](#) and section 13(1) of the [Environment and Land Court Act](#). They cited the case of [Abdullahi Ali Abdi & Another v Ministry of Lands & 6 others](#) [2021] eKLR Petition E 255 of 2020 where the court held that :-
  - “ 24. Article 162(2)(b) and Section 13(2) of the [ELC Act](#) confer exclusive jurisdiction to ELC in respect of disputes relating to environment and the use, occupation of and title to land. The High Court jurisdiction is explicitly ousted under Article 165(5)(b) of the [Constitution](#), although both are courts of juridical



status. The High Court therefore cannot hear and determine disputes within Environment and Land Court's jurisdiction."

24. It was submitted that allowing the present application would be tantamount to making a determination on ownership when no such jurisdiction exists.
25. It was submitted that the ownership dispute between the Objector/Applicant and the Judgment Debtor over the suit property is not genuine but rather a decoy meant to cause further delay to the execution. That it is for this Court to stop them by dismissing the application so as to allow execution to proceed.

### **Analysis and Determination**

26. The application is made pursuant to the provisions of Order 22 rule 51 of the [Civil Procedure Rules](#) that provides as follows:

“ 51

- (1) A person claiming to be entitled to or to have a legal or equitable interest in the whole of 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."

27. I have considered the objection and the submissions. The issues for determination are:
  - (a) Whether the Objector/Applicant has demonstrated that she has a legal/equitable interest in the suit property.
  - (b) Whether this court has jurisdiction to issue a declaration that the Objector is the legal and beneficial owner of the suit property.
  - (c) whether the Applicant deserves the orders sought.
28. The test to be applied in determining such an application was laid out in the case of *Chotabhai M. Patel v Chaprabhi Patel* [1958] EA 743, it was stated that;
  - a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.
  - b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.
  - c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust



for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.

- d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.

29. It is the Objector who bears the burden of establishing that he/she has legal and equitable interest in the property on a balance of probability as stated in the cases of *Kenya Oil Company Ltd v Fuaad Mahmood Mohammed & Others* HCCC No. 886 of 2002 and *Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 Others* (2014) eKLR. That was the same finding in the case of *Precast Portal Structures v Kenya Pencil Company Ltd & 2 Others* (1993) eKLR where the Court observed 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.”

Title may be part of the inquiry.

30. Further, in *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR, it was held: -

“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?”

31. The question in this case is whether the Objector has established that she had at the time of attachment some legal or equitable interest in the property.

32. It was the evidence of the Objector that she is the one in possession of the property and that she has been collecting rent from tenants. Further that she is in possession of the original certificate of title to the property.

33. In paragraph 16 of her replying affidavit, the director of the Judgment Debtor says that the objector has illegally been pocketing the rent income. The record shows that she on the 25<sup>th</sup> May 2022 filed an application seeking that the Objector be ordered to release the original title deed of the subject property. In the same application she sought for orders that the objector do furnish the court with statement of accounts of all rental proceeds collected from the subject property. This is proof enough that the Objector is the one in possession of the property. I find that the objector is the one in possession of the suit property and has been collecting rent from the premises. The fact that the objector has been collecting rent from the premises proves her legal interest in the property. Contrary to the submissions by the Plaintiffs//Respondents there is no evidence placed before this court to demonstrate that the Objector has colluded with the Judgment Debtor in order to defeat the attachment of the property by the Judgment Creditors.



34. Whether or not the objector bought the property from the Judgment Debtor and whether she is the lawful owner of the property is an issue that should be canvassed in another forum and not in this court as this court has no jurisdiction to determine issues related to ownership of land. In that case it has no power to grant the orders of declaration sought by the objector that she is the legal and beneficial owner of the suit property.
35. In view of the foregoing, I am satisfied that the Objector has established on a balance of probabilities that she has legal interest in the suit property and the same was not available for attachment. Accordingly, I grant Prayer 4 of the Notice of Motion thereby prohibiting the Judgment Creditors herein from advertising the subject property for sale and prayer 5 thereby lifting of the proclamation of attachment of the suit property. Prayer 6 that seeks for declaratory orders is declined.
36. Orders accordingly. The Objector to have the costs of the application.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> FEBRUARY 2024.**

**J N NJAGI**

**JUDGE**

In the presence of:-

Mr Nderitu for Objector/Applicant

Mrs Rotich for Decree Holder

Mr Gomba for Judgment Debtor

Court Assistant Amina

30 days right of appeal.

