



Kiruki & Kayika Advocates v Monarh Insurance Company LTD; Anglo African Property Holdings LTD (Objector) (Miscellaneous Application E113 of 2023) [2025] KEHC 14345 (KLR) (11 March 2025) (Ruling)

Neutral citation: [2025] KEHC 14345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E113 OF 2023
NIO ADAGI, J
MARCH 11, 2025**

BETWEEN

KIRUKI & KAYIKA ADVOCATES DECREE HOLDER

AND

THE MONARCH INSURANCE COMPANY LTD JUDGMENT DEBTOR

AND

ANGLO AFRICAN PROPERTY HOLDINGS LTD OBJECTOR

RULING

Introduction

1. This ruling is in respect to Objector/Applicant's (hereinafter referred to as "the Applicant") notice of motion application dated 6th September 2023. The Applicant is seeking the following orders:
 - a. Spent.
 - b. That pending the hearing of the application inter parties, interim orders staying the execution, proclamation, attachment and/or sale of the property of the Objector described on the schedule of movable property to the proclamation for levied on 6/08/2024 and served on 16/08/2024.
 - b. That this court sets aside and quashes the proclamation, attachment and intended sale of the said property of the objector.
 - b. That the proclamation and attachment for sale of the objector's said property in execution of the decree herein be lifted and declared null and void in entirety.



- b. A declaration that the proclaimed moveable assets of the objector are not attachable in execution of the decree in this matter.
 - b. That costs of the application be awarded to the objector.
2. The Plaintiff/Decree Holder (hereinafter referred to as “the Respondent”) has opposed the objector’s notice of motion application vide a replying and Supplementary affidavit sworn by Mr. Enoch Kamau Muriuki on 17th October 2024.

Brief Facts

- 3. On 14th December 2023, the Advocate/ Clients Bill of Costs dated 26th May 2023 in Machakos Misc Appl E113 of 2023 was taxed by the taxing officer against the Respondent/ Judgement Debtor at Kenya Shillings Five Hundred and Ninety Two Thousand, Three Hundred and Fifty Five shillings (Kshs.592,355).
- 4. The Applicant then commenced the process of execution and obtained Warrants of Sale of property in Execution of the decree for money and engaged the services of Betabase Auctioneers to proceed with attachment and sale of the Judgment Debtor’s property.
- 5. On 16/8/2024he said Auctioneers levied Proclamation against the assets believed to belong to the Judgement Debtor towards execution of the Warrants of attachment and sale of movable property of the Judgement Debtor issued on 05/8/2024.
- 6. The Applicant issued a Notice of objection to the attachment dated 22/8/2024 on the grounds that the attached items belong to the Applicant who is not party to this suit.
- 7. The Respondent opposed the Objection and filed a Notice of intention to proceed with the execution and attachment dated 17/10/2024.
- 8. The Respondent also filed a Replying Affidavit in opposition to the instant notice of motion application sworn by Mr. Enoch Kamau Muriuki on 17th October 2024.
- 9. The application was canvassed through written submissions. The Applicant’s submissions are dated 18/11/2024 whilst the Respondent filed submissions dated 05/12/2024.

Applicant’s Submissions

- 10. The Applicant submitted that the moveable assets targeted are wholly owned by it. The Judgment Debtor has no interest whatsoever in the proclaimed property hence the necessity of the instant Application to protect the interests of the Applicant in the said proclaimed assets.
- 11. That the proclaimed assets consist of office chairs, office cabinets, reception desks, photocopy machines, computers, office server machines, printers, assorted stationaries, water dispensers, binding machines and office tables particularly described on the Proclamation Form levied on 6.08.2024 and served on 16.08.2024 and any other moveable attachable assets of the Objector. The proclaimed assets are primarily office equipment and stationery.

The property proclaimed and attached are also tools of trade and therefore exempted from attachment in the Execution of Decree.

- 12. The Applicant set out issues for determination on the application
 - a. Whether proclamation has been levied against the Objector’s property;



- b. Whether the Objector has demonstrated legal or equitable interest in the property/assets proclaimed for attachment;
 - c. Who should bear the costs of the instant application?
13. On whether Proclamation has been levied against the Applicant's Property, the Applicant submitted that, it is a Limited Liability Company separate from the Judgment Debtor in this matter. Indeed Mr. Samson Macharia Munene in his Affidavit in support of the application confirms that he is the Company Secretary of the Applicant's Company.
 14. That it is not in dispute that the Applicant and the Judgment Debtor are 2 distinct legal entities and capable of suing or defending in litigation. With the Decree not being against the Objector, it is not liable to settle the decree against the Judgment Debtor.
 15. The Applicant cited Section 44(1) of the Civil Procedure Act provides that in execution proceedings, only the property of the Judgment Debtor is liable to attachment. The said section stipulates that: -

“All property belonging to a Judgment Debtor including property over which or over the profits of which he has disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.

Provided that the following shall not be liable to attachment or sale;

 - (ii) the tools and implements of a person necessary for the performance by him of his trade or profession.
 16. The Applicant submitted that in the Supporting Affidavit sworn by Samson Macharia Munene, it annexed the Lease Agreement dated 7th March 2023 demonstrating ownership of the proclaimed goods. The Applicant also provided evidence of payment of leasing charges being Consideration for the Agreement/Contract of Lease and thereby legally binding on the parties and against any third-party interests in this case, the Decree-holder/Respondent.
 17. Its the Applicant's submissions that the Agreement dated 7th March 2023 and the evidence of payment for the leased goods is sufficient proof of ownership.
 18. Primarily, the entire moveable assets at the premises of the Judgment Debtor are subject of the Lease Agreement between the Judgment Debtor and the Objector. The assets belong to the Applicant and unless the Respondent has demonstratable evidence to the contrary, which the Applicant submit that none has been filed.
 19. It is the moveable assets subject of the Agreement dated 7.03.2023 that have been proclaimed.
 20. On whether the Applicant has demonstrated Legal or Equitable Interest in the Property/assets Proclaimed, the Applicant submitted that an Applicant is only required to demonstrate an interest, legal or equitable in the attached property as required under Order 22 Rule 51 (1) of the Civil Procedure Rules.
 21. That the Applicant may also demonstrate that the goods proclaimed are among the items listed under the proviso to Section 44(1) of the Civil Procedure Act Applicant states that it has demonstrated legal and/or equitable in the attached assets by showing the following; That by virtue of the Agreement dated 7.03.2023 and the consideration tendered thereof, the proclaimed/attached property are wholly owned by the Applicant herein, and the Judgment Debtor has no interest and/or claim



whatsoever over the same. The Applicant also provided evidence of payment of leasing charges being the consideration mandatory under contract law for the agreement to be binding. The Agreement is sufficient proof of ownership.

22. The Applicant submitted that by the preceding, it has placed itself within the ambit of Order 22 Rule 51 (1) of the CPR by meeting the condition as demonstrated in its submissions above on the issues. The conditions were set out in the case of *Boleyn Magic Wall Panel Ltd vs. Nesco Services Limited and Boleyn International (K) Ltd* where it was stated that the Objector has to first prove that he is not the person against whom the decree was issued therefore not liable in respect thereof. Second, he must prove that execution has been levied against his property for the execution of the said decree. Third, he must prove that he is entitled to or to have a legal or equitable interest in the whole or part of any property attached in the execution of the decree. Fourth, he must prove that no payment out of the proceeds of sale of such property has been made.
23. The Applicant submitted that it has met all the requisite conditions and has discharged the burden of proof required thus far and as such, the instant Application is merited and ought to succeed.

With regard to costs, the Applicant submitted that it is trite law that costs follow the event, in this case, the decree holder once this court rules that the Application herein is merited and proceeds to grant the sought orders, they prayed for costs to be assessed by this honourable court.
24. The Applicant also submitted on issues arising from the Replying Affidavit sworn by Enock Kamau on 17.10.2024.

That the Respondent has alleged collusion between the judgment debtor and the Applicant in bringing the application.

The Respondent also made reference to CR-12, Searches annexed to the affidavit as EMK-5 and EMK-6. The CR-12s are with respect to the Judgment Debtor and Applicant Companies. However, the Respondent has misrepresented the information in the Searches.

For instance, the Respondent has stated that the deponent of the supporting affidavit to the instant application, Samson Macharia Munene, is a Director and Shareholder of the Applicant's Company.
25. The truth is that Mr. Munene is only the company secretary for the companies and nothing in law prohibits him from serving in the two companies which are distinct legal persons.
26. That despite the CR-12s being explicit on the Shareholding and Directorship of the 2 companies, the Respondent has deliberately decided to lie on oath to mislead this court. The other common names between the 2 companies are Jared Benson Kangwana and Biki Kangwana who are merely directors and not shareholders as can be clearly be seen from the searches annexed by the Respondent.
27. Directorships are merely managerial positions. Limited liability companies are owned by shareholders and it is the shareholders who pass important resolutions of the company at Company meetings. Castigating individuals who are merely employees of the companies and who cannot make major decisions for the company is misleading to this court.
28. The two companies are mutually exclusive as regards their legal status and nothing bars them from contracting with each other. The assertion of collusion or intention to defeat execution is imaginative and not backed by any substantive proof and is meant to throw this honourable court into speculating rather than deciding this application based on facts, evidence and the law.
29. Further, the Respondent states that the Applicant has not provided proof of ownership of the assets subject of the lease. The Applicant contends that the assets include equipment that are not registrable



for ownership titles. The Applicant has furnished the agreement and receipts of payment indicating that consideration was furnished.

30. The Applicant further submitted that schedule 1 of the Agreement indicates that all the moveable assets in the listed offices of the judgment debtor are the property of the Applicant and are held by the Judgment debtor on the basis of the Lease Agreement. The Lease Agreement at page 2 states that the Lessor is the beneficial owner of the assets specified at Schedule 1 to the agreement.

31. The Agreement also states that the assets are leased for 10 years and that upon the expiry of the lease period the Lessee shall deliver to the Lessor the leased items in the condition they were in at the time of the lease save for ordinary wear and tear.

That, there are conditions and obligations placed upon the Lessee regarding the maintenance of the assets. The preceding is because the parties to the agreement concede that the assets belong to the Applicant.

32. Furthermore, the Applicant filed corroborative invoices and receipts of payment for March-May 2023 and June-August 2023 to corroborate the Lease Agreement.

The receipts filed by the Applicant are sufficient proof of confirmation of consideration even in the absence of bank statements with are confidential.

33. The Applicant submitted that the it has proved its case on a balance of probabilities and demonstrated equitable interest in the assets proclaimed. The Respondent has not successfully rebutted this. The Applicant urged that this court to find as such.

Respondent's submissions

34. The Respondent submitted that the Applicant is in collision with the Judgment debtor and the application is only meant to hoodwink the court.

35. The Respondent cited Order 22 Rule 51 of the Civil Procedure Rules provides as follows:

“Objection to attachment [Order 22, rule 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 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.

36. The Respondent submitted that, the conditions for objector proceedings are set out in the case of Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR . 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?”

37. The Respondent submitted under the following issue;
- a. Whether the objector is entitled to or has legal or equitable interest on the whole or part of the attached property.
38. As to whether the Applicant is entitled to or has legal or equitable interest on the whole or part of the attached property, the Respondent submitted that the Applicant has not produced any ETR receipts proving purchase and that indeed the movable properties listed in the proclamation of attachment belong to Anglo African Property Holdings.
- That the Applicant has not produced tax invoices for the months of March, April, May, June, July and August 2023. The invoices indicate Value Added Tax of Khs. 57,600/= each however, the objector has failed to produce evidence of payment to the Kenya Revenue Authority. The tax invoices are therefore cooked up documents.
39. The Respondent submitted that the Moveable Assets Operational Lease Agreement dated 7th March 2023 between Anglo African Property Holdings Limited and the Monarch Insurance Company Limited does not specifically list the moveable assets and therefore there is ambiguity on whether the properties listed in the proclamation of attachment form part of the Agreement. The Respondent relied on the cases of Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector) [2019] eKLR, Grace Wanjiru Mbugua v Philip; Karumi Matu [2009] eKLR and Precast Portal Structures v Kenya Penal Co. Ltd & 2 Others [1993] eKLR the courts observed that,
- “The burden is on the objector to prove and establish his right to have attached property released from 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 judgement debtor for himself or by some other person in trust for the judgement debtor; or
 2. That the objector holds that property on his non account. But where the court is satisfied that the property was, at the time of attachment, held by the judgement 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 judgement debtor or that ownership has changed, whereby the judgement debtor has been divested of the property in order to evade execution, on the change is tainted with fraud, the court shall dismiss the objection.”
40. The Respondent submitted that the burden is upon the Applicant to prove that the moveable assets were purchased by themselves however the objector has not put any evidence on record.
41. That as to whether an objection lies, the broad perspective the court is expected to take into account is as provided for in the cases of Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743 and David Muhenda & 3 Others v Margret Kamuje Succession Cause No. 9 of 1999 in which the court stated as follows:
- “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 a party to the suit. The objector shall adduce evidence to show that



at the date of attachment he has some interest in the property attached. 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 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.”

42. The Respondent maintained that it is clear that the Applicant is in collusion with the judgment debtor and the application is only meant to hoodwink the court. This is due to the fact that Samson Macharia Munene, the company secretary of the objector is a director and shareholder of Anglo African property holdings Limited, the Applicant herein and also the company secretary, director and shareholder of the Monarch Insurance Company Limited, the judgment debtor in the matter. The Respondent invited the court to see EKM5 and EKM56 attached to the replying affidavit sworn by Enoch Kamau Muriuki.
43. That further to the collusion the stamp duty for the Moveable Assets Operational Lease Agreement dated 7th March 2023 was paid on 11th May 2023 and therefore the date of the Agreement was backdated due to the fact that Monarch Insurance Company Limited has been having financial issues and a lot of execution procedures have been instituted against them.
44. The Respondent submitted also that the Movable Assets Operational Lease Agreement was witnessed by Samson Macharia Munene on behalf of the objector and Rosemary G. Kangwana on behalf of the judgment debtor clearly related to the three directors of the Applicant Company being Tabitha Bochareri Kangwana, Jared Benson Kangwana and Biki Monyenye Kangwana.
45. That from the above, the Applicant has failed to prove legal or equitable interest by failing to produce receipts. The objection is only meant to delay enjoyment of fruits of judgment of the Judgment Creditor.
46. The Respondent concluded that in view of the foregoing, it is evident that the Applicant has no prima facie case with a probability of success and therefore, prayed that the Applicant’s notion of motion application dated 22nd August 2024 herein be dismissed and/or struck out

Analysis and Determination

47. I have carefully considered the objection Notice, objection application, Replying Affidavit, Supplementary Affidavit and the respective rival submissions by the parties. In my view, the main issues for determination is whether the Applicant/Objector has established legal and/or equitable interests over the proclaimed goods.
48. Order 22 Rule 51 (1) of the Civil Procedure Rules stipulates as follows on the steps to be taken by a party claiming interest over proclaimed goods: -

“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.”



49. Under the above cited provision, the court the court is required to determine is whether an objector has an interest, legal or equitable in the attached property. In *Arun C. Sharma vs Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR 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.”

50. In *Precast Portal Structures vs Kenya Pencil Company Ltd & 2 Others* [1993] eKLR it was held: -

“The burden is on the objector to prove and establish his right to have 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.

- i) 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.
- ii) That the objector holds that property on his own account.

The court further observed that: -

“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 Judgement-Debtor has been divested of the property in order to evade execution on 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.”

51. The principle that emerges from the above cited decisions is that once the Objector proves his interest in the attached property, the Court then makes an order raising the attachment as to the whole or a portion of the property subject to the attachment.

52. In the present case, I note that the Applicant/Objector produced a Lease Agreement dated 7th March 2023 demonstrating ownership of the proclaimed goods. The Applicant also provided evidence of payment of leasing charges being Consideration for the Agreement of Lease and thereby legally binding on the parties and against any third-party interests in this case, the Decree-Holder.

53. Its the Applicant’s submissions that the Agreement dated 7th March 2023 and the evidence of payment for the leased goods is sufficient proof of ownership.

54. Primarily, the entire moveable assets at the premises of the judgment debtor are subject of the Lease Agreement between the Judgment Debtor and the Objector. The assets belong to the Applicant and the Respondent has not adduced demonstratable evidence to the contrary.

55. The Applicant contend that it is the moveable assets subject of the Agreement dated 7.03.2023 that have been proclaimed.

56. On the other hand, the Respondent contend that, Applicant is in collision with the Judgment Debtor and the application is only meant to hoodwink the court. This is due to the fact that Samson



Macharia Munene, the company secretary of the Objector is a director and shareholder of Anglo African property holdings Limited, the Applicant herein and also the company secretary, director and shareholder of the Monarch Insurance Company Limited, the judgment debtor in the matter. The Respondent invited the court to see EKM5 and EKM56 attached to the replying affidavit sworn by Enoch Kamau Muriuki.

That further to the collusion the stamp duty for the Moveable Assets Operational Lease Agreement dated 7th March 2023 was paid on 11th May 2023 and therefore the date of the Agreement was backdated due to the fact that Monarch Insurance Company Limited has been having financial issues and a lot of execution procedures have been instituted against them.

57. The Respondent submitted also that the Movable Assets Operational Lease Agreement was witnessed by Samson Macharia Munene on behalf of the objector and Rosemary G. Kangwana on behalf of the judgment debtor clearly related to the three directors of the Applicant Company being Tabitha Bochareri Kangwana, Jared Benson Kangwana and Biki Monyenye Kangwana.
58. That from the above, the Applicant has failed to prove legal or equitable interest by failing to produce receipts. The objection is only meant to delay enjoyment of fruits of judgment of the Judgment Creditor.
59. As regards the Respondent's argument that the three directors shown in CR-12 Forms are the same for both the Applicant company and the Monarch Insurance Company Limited, it is my opinion that Directorships are merely managerial positions. Limited liability companies are owned by shareholders and it is the shareholders who pass important resolutions of the company at Company meetings.
60. The two companies are mutually exclusive as regards their legal entities and nothing bars them from contracting with each other. I am persuaded to agree with the Applicant that the assertion of collusion or intention to defeat execution is not backed by any substantive proof by the Respondent.
61. In addition, the Respondent argued that the Applicant has not produced any ETR receipts proving purchase and that indeed the movable properties listed in the proclamation of attachment belong to Anglo African Property Holdings.
62. That the Applicant has not produced tax invoices for the months of March, April, May, June, July and August 2023. The invoices indicate Value Added Tax of Kshs. 57,600/= each however, the objector has failed to produce evidence of payment to the Kenya Revenue Authority. The tax invoices are therefore cooked up documents.
63. Similarly, it is my position that the Respondent has not demonstrated at all that the tax invoices are cooked up documents.
64. The Respondent observed that the attached goods were in the possession of the Judgment Debtor at the time of the proclamation which, according to Respondent, meant that the Judgment Debtor owned the said goods.
65. Section 44(1) of the Civil Procedure Act provides that in execution proceedings, only property of the judgment debtor is liable to attachment. The said section stipulates that:

“ All property belonging to a Judgment Debtor including property over which or over the profits of which he has disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.”
66. The objector's claim in the attached goods is based on the Lease Agreement stated herein.



67. This court is of the opinion that title documents for the premises including Tenancy and Lease Agreements alone are not enough proof of ownership of goods within the premises therefore; there must be ample documentation on ownership of the attached items. All these things have not been sufficiently explained by the Objector and one may be tempted to agree with the attaching creditor/ Respondent that these objection proceedings are a scheme by the judgment debtors to defeat the process of execution. But despite these reservations, the court has no forensic foresight on the documents as to doubt them. Except, it is important to note that, where the attaching creditor has doubted documents like they have done here with the Lease Agreement produced, they should subject them to forensic and other authentication examination. The court will not do that for the parties. In the circumstances, I will give the benefit of doubt to the Objector/Applicant and find that:

- a. The Objector/Applicant has proved on a balance of probabilities that the attached goods legally belonged to it at the time of the decree, subsequent proclamation and attachment by Betabase Auctioneers is untenable.
- b. I hereby set aside the proclamation, attachment and intended sale of the said property of the Objector/Applicant and order return of all the attached goods to the Objector/Applicant forthwith.
- c. The court will not make any order as to costs in this application because of the mix of things I have discussed above.

68. It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 11TH MARCH 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY VIA TEAMS COURT AT MACHAKOS THIS 11TH MARCH 2025

In the presence of;

.....

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..... Court Assistant.

