

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO 71 OF 2015

RANJEET SINGH SAGOO 1st PLAINTIFF

ADRIAN SAGOO 2nd PLAINTIFF

VERSUS

MARIA DEL MAR BELLO MESA DEFENDANT

AND

SURENDAR KAUR SAGOO OBJECTOR

RULING

1. Before this Court for determination are two applications, being the Plaintiffs' Motion dated 23rd May, 2023 and the Objector's Motion dated 27th October, 2023
2. The Plaintiffs' application dated 23rd May, 2023 has been brought pursuant to the provisions of **Article 159** of the **Constitution of Kenya, 2010**, **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act**, and **Orders 12 Rule 7**, and **51 Rule 1** and **15** of the **Civil Procedure Rules**, seeking for the following reliefs:
 - i. *Spent.*
 - ii. *Spent*
 - iii. *That this Honourable Court be pleased to set aside the Order issued on the 16th September, 2020 dismissing the Plaintiffs/Applicants suit hereof for non-attendance and reinstate the same.*
 - iv. *That the costs of this Application be provided for.*

3. The application is based on the grounds on the face thereof and supported by the Affidavit of Geoffrey Kinoti Mbobua and Supplementary Affidavit of Evans Wachira of an even date. Mr. Mbobua deposed that he is an Advocate of the High Court who, until recently, had personal conduct of the matter on behalf of the Plaintiffs.
4. Mr. Mbobua deposed that when the matter came up for a mention on 12th November, 2019, Mr. Evans Wachira held his brief and took a hearing date being 16th September, 2020; that Mr. Wachira duly notified him of the date which he noted on the Client's file awaiting availability of the 2020 diary and that due to an unfortunate oversight, his legal assistant failed to diarize the matter during the bring up of the 2020 files.
5. It was deposed by the Plaintiffs' counsel that the issue was compounded by the fact that the office remained closed for a greater part of 2020 due to Covid 19; that as a result of the aforesaid, when the matter came up for hearing on 16th September, 2020, neither him nor the Plaintiffs were in Court and that the suit was dismissed for non-attendance.
6. According to Mr. Mbobua, he was nonetheless aware that during this time, the parties were engaged in negotiations and he was waiting for feedback from the 1st Plaintiff on the same; that the litigants herein are closely related in that the 1st Plaintiff and the Defendant are husband and wife and the 2nd Plaintiff is their son and that the interests of justice dictate that the matter be reinstated and be heard on its merits or the parties be given an opportunity to amicably resolve their differences.
7. Vide the Supplementary Affidavit, Mr. Wachira made identical depositions as Mr. Mbobua, to *wit*, that he held his brief and took a

hearing date; that Mr. Mbobua's failure to attend Court was on account of an unfortunate oversight and that the litigants are related.

- 8.** Counsel deposed that when he took over the conduct of the matter, the parties were in the process of negotiating, which negotiations were at an advanced stage; that he was shocked to learn that his predecessor had been informed of a Ruling on Taxation signifying the matter had been concluded without his knowledge; that his attempts to establish the circumstances under which the matter was concluded between September, 2022 to April, 2023 were futile and that he only managed to peruse the file on 25th May, 2023.
- 9.** Mr. Wachira deponed that the 1st Plaintiff has routinely kept him abreast of the progress of the negotiations between the parties and he is aware that in 2022, the Defendant, together with her son, the 2nd Plaintiff, relocated to Spain causing a delay in the talks; that while he sought to unravel what happened, the 1st Plaintiff was served with an application to show cause why execution should not issue and that the 1st Plaintiff has been denied an opportunity to be heard and explore a settlement.
- 10.** The Defendant filed a Replying Affidavit on 15th June, 2023. She deponed that as advised by Counsel, the Motion is incurably defective and incompetent having been supported by affidavits sworn by Advocates and officers of this Court, on record for the Plaintiffs, on contentious matters of fact and that she is aware that the 1st Plaintiff left Kenya to Tanzania in December 2022 and the 2nd Plaintiff lives with her and has not given any instructions to file the present Motion.
- 11.** The Defendant deponed that there is no merit in reviving the Plaintiffs' hopeless case that sought to override the Memorandum of

Understanding dated 6th October, 2010 between her and the 1st Plaintiff and that the Plaintiffs ought not to be permitted to approbate by saying that there are negotiations to settle the matter which are at an advanced stage, and at the same time reprobate by seeking to revive this suit.

- 12.** Ms Mesa deponed that after filing the suit in 2015, the Plaintiffs took no further action until the Court, on its own motion initiated the progression of this suit by fixing the suit for mention for directions on 16th July, 2018 and issued the notice to the parties and that she filed the Notice of appointment on 11th July, 2018 and pleadings on 14th August, 2018.
- 13.** According to Ms Mesa, neither the Plaintiffs nor Counsel attended court on 15th October, 2018 despite having been in Court on 16th July, 2018 when the date was given; that on the aforesaid date, the Court set a hearing date being 8th May, 2019; that on this date, the Plaintiffs sought an adjournment seeking to file a statement on behalf of the 2nd Defendant, file further documents and attempt negotiations and that the Plaintiffs were granted the adjournment and asked to ensure compliance within 30 days.
- 14.** Ms Mesa averred that as at the time the matter was due on 12th June, 2019, the Plaintiffs had not complied with the directions aforesaid; that the Plaintiffs were granted a further 30 days and a mention set for 12th November, 2019 by which time they had still not fully complied; that the matter was thereafter set down for hearing on 16th November, 2020 and that on the aforesaid date, Counsel for the Plaintiffs called her Counsel informing him that they were having a technical hitch but affirmed that he was ready to proceed and that their absence thereafter was deliberate.

15. She deponed that after the dismissal of the suit, she filed a party-party bill of costs and served the same upon the Plaintiffs; that while the Plaintiffs' Counsel was in Court, he did not place himself on record and that the Court was nonetheless satisfied with the service and gave a Ruling date and the Taxation Officer delivered the Ruling on 11th October, 2022.
16. The parties filed submissions and authorities which I have considered.
17. The Objector's application dated 27th October brought pursuant to the provisions of **Section 3A** of the **Civil Procedure Act, Orders 22 Rule 51(2)** and **52** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** seeks the following reliefs;
- i. *This Honourable Court be pleased to make an order raising the attachment with respect to the Objector's/Applicant's household goods attached in execution of the warrants issued herein.*
18. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Surendar Kaur Sagoo, the Objector of an even date, who deponed that the Plaintiffs are her son and grandson respectively whereas the Defendant is her daughter in law and that she owns a private residential house erected on the property known as L.R No 209/403/1 situated along Ngong Road.
19. The Objector deponed that the Plaintiffs are adults and persons of full age residing in their own respective residences with the 1st Plaintiff residing in Tanzania and the 2nd Plaintiff in Spain and that on 26th October, 2023, Auctioneers from the firm of High Class Auctioneers

went to her residence with warrants of attachment and proclaimed her assorted household goods.

20. It is her case that she has exclusive rights in the household goods wrongfully attached in execution of the decree; that she has nothing to do with the motor-vehicle stated in the proclamation but is aware that the same is used by her son where he works and that unless restrained, the Auctioneers will cart away her goods in execution of a decree in this matter in which she has no claim.
21. The Defendant filed a Replying Affidavit in which she deponed that to recover costs awarded to her in the suit on 26th October, 2023, High Class Auctioneers proclaimed M/V KAW 842V and household goods belonging to the Plaintiffs/Judgement Debtors and that as per the records held by the Registrar of Motor-vehicles, as at 18th August, 2023, the aforesaid Motor vehicle belonged to the 1st Judgement Debtor.
22. According to the deponent, as advised by Counsel, the Judgement Debtor resides in the house in which the Auctioneers proclaimed the household goods; that the auctioneers did not proclaim L.R 209/403/1 or any developments thereon and that the Objector has no locus to object to the proclamation.
23. The parties filed submissions and authorities which I have considered.

Analysis and Determination

24. Having considered the Motions and the pleadings in respect thereof, the following are the issues that arise for determination;
 - i. *Whether the Court Order of 16th September, 2020 should be set aside and the suit reinstated?*

ii. *Whether the Court should raise the attachment as per the proclamation dated the 26th October, 2023?*

25. Vide the Motion of 23rd May, 2023, the Plaintiff seeks to have this suit reinstated. The Defendant is opposed to the Motion and asserts that not only is it unmerited, but it is fatally defective on account of the fact that the Affidavits in support thereof were sworn by Advocates, deposing to contested matters. The Court will address this contention first.

26. **Order 19 Rule 3 (1)** of the **Civil Procedure Rules, 2010** sets out the law on Affidavits as follows;

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

27. Further, **Rule 8** of the **Advocates (Practice) Rules (rev 2012)**, states as follows:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

- 28.** The rationale for the foregoing rules is to prohibit and insulate Advocates from intervening in disputes between their clients and adverse parties. Nonetheless, the Courts have held that it is not always improper when an Advocate deposes an Affidavit. The Court of Appeal in Hakika Transporters Services Ltd vs Albert Chulah Wamimitaire [2016] eKLR, citing its decision in Salama Beach Ltd vs Mario Rossi, CA. No. 10 of 2015 held as follows;

*“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04)*). Rule 9 of the *Advocates (Practice) Rules* however permits an advocate to swear an affidavit on formal or non-contentious matters.”*

- 29.** In this instance, the Affidavits deal with the circumstances under which Counsel failed to attend Court leading to the dismissal of the suit, a

matter solely within their knowledge. The Court is not convinced that the averments were improper.

30. Moving on to the merits of the Motions, the suit herein was dismissed for non-attendance. The basis of this dismissal is found under **Order 12, Rule 3(1)** of the **Civil Procedure Rules** which stipulates thus:

“(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

31. **Order 12 Rule 7** of the **Civil Procedure Rules, 2010** provides relief and stipulates as follows;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

32. The discretion granted to this Court under **Order 12 Rule 7** is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was stated in the case of *Shah vs Mbogo & Another (1967) EA 116*, where the Court of Appeal of East Africa held that;

“The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable

mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

33. More recently, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu [2018] eKLR* stated that;

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

34. In the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) vs Hannah Wanjiru Kiniti & Another [2021] eKLR*, the Court rendered a detailed exposition on what constitutes sufficient cause warranting the setting aside of an order such as that of dismissal sought herein. The Court noted as follows:

“For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and

subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in Parimal vs Veena which was cited with approval in the case of Wachira Karani v Bildad Wachira [2016] eKLR. In the case, the said Supreme Court stated that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial

justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

35. In the present case, the Plaintiffs’ suit was dismissed on 16th September, 2020. When the matter came up for hearing on the aforesaid date, neither the Plaintiffs, nor Counsel was present. Counsel for the Defendant had the matter placed aside to try and reach the Plaintiffs’ Counsel. He was unable to do so and asked that the suit be dismissed, noting that the date was taken by consent. The Court dismissed the suit for non-attendance.
36. The dismissal aforesaid triggered the present application and the question that lends itself to the Court is whether the reasons advanced by the Plaintiffs’ counsel amount to ‘sufficient reason’ to justify the exercise of the Court’s discretion in their favour.

- 37.** The Plaintiffs' Counsel has stated that his failure to attend Court was occasioned by the fact that the matter had not been diarized by his Court clerk and that this was compounded by the fact that for most of 2020, being the Covid 19 era, his offices remained largely closed and his employees worked from home.
- 38.** This is disputed by the Defendant who states that on the aforesaid date, Counsel for the Plaintiffs initially reached out to her Counsel intimating that they had technical difficulties but were ready to proceed; that when the Court gave a time allocation, neither the Plaintiffs nor Counsel were present and Counsel was unreachable and that the absence of the Plaintiffs and their Counsel was deliberate.
- 39.** The Court has analyzed the record. The matter was instituted vide a Plaint filed on 30th December, 2015 where the Plaintiffs sought *inter-alia*, a declaration that the Defendant holds the suit property in trust for the 2nd Plaintiff and the trust should be dissolved, and an order directing the Registrar of Titles to amend the register and register the suit property in the joint names of the 1st Plaintiff and Defendant.
- 40.** The matter was first in Court on 29th May, 2017 and set down for pre-trial conference. None of the parties were present on 13th September, 2017 and 1st February, 2018. On 16th July, 2018, the Court was informed that the Defendant had not been served with pleadings and the matter was set down for 15th October, 2018 by which time the Defendant ought to have been served and parties complied with pre-trial. The matter was certified ready for hearing on the aforesaid date in the absence of the Plaintiffs' Counsel and set down for hearing on 8th May, 2019.

41. On 8th May, 2019, the matter was adjourned at the instance of the Plaintiffs. Counsel stated that the 2nd Plaintiff was of old age and wanted to testify in person. Counsel also requested that the matter be sent for mediation and the matter was set down for mention on 12th June, 2019. On the said date, the Defendant's Counsel indicated that the Defendant was not amenable to mediation.
42. The matter was then set down for another mention on 12th November, 2019. Both parties were present on 12th November, 2019 and agreed to take a date for hearing of the main suit being the 16th September, 2020.
43. The Plaintiffs have stated that their absence on the date in issue was caused by failure to diarize the matter. No evidence has been adduced in this respect. Similarly, no explanation has been rendered as to why the Plaintiffs were absent. Counsel has not indicated that he did not inform the Plaintiffs' of the same excusing their absence.
44. The foregoing is aggravated by the general laxity in the manner in which the Plaintiffs have been conducting their case as revealed in the proceedings. It has been argued, and it is indeed noted that the Motion was filed approximately 3 years after the dismissal of the suit.
45. Mr. Wachira deponed that he took up instructions when negotiations between the parties were ongoing and was only prompted to look into the matter when Mr. Mbobua informed him that a Ruling had been delivered on taxation.
46. According to Mr. Wachira, he started perusing the file in September, 2022 which efforts only bore fruit in May, 2023 after which he filed the present application. What is clear from this narration is that the

Plaintiffs had essentially abandoned their case because no attempts were made to try to establish its position after the last time it was in Court. The Plaintiffs only roused from their slumber when they became aware that execution proceedings in respect of the costs granted to the Defendant was underway.

47. The fact of the ongoing negotiations, which is in any event disputed, does not warrant abandonment of the suit and the Court does not accept it as an excuse to the inordinate delay in filing the Motion. Similarly, any negotiations are not dependent on the pendency of the case and cannot in themselves constitute a reason to reinstate the matter.
48. In the end, the Court finds that the lack of evidence supporting the averment that Counsel's and Plaintiffs' absence was inadvertent, lax attitude towards prosecution of the suit and inordinate delay in filing the suit, all militate against the Court exercising its discretion in favour of the Plaintiffs.
49. The law with respect to objection proceedings is found under **Order 22 Rule 51(1), (2) & (3)** of the **Civil Procedure Rules** which provide as follows;

“51. 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 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.

(3)”

50. In *Odhiambo Owiti & Company Advocates vs Dominion Farms Limited; Sukari Industries Limited (Objector) 2021/eKLR*, the Court persuasively stated thus;

*“The law is clear that the onus lies on the Objector to establish its legal or equitable interest in the properties which are subject matter of the proclamation and attachment objected to, and not for the decree holder to prove that the goods belong to the Defendant. This position was affirmed in the case of *Simba Colt Motors Ltd v Lustman & Co. (1990)*, HCCC No. 729 of 2002 that:*

“The purpose of Rule 57 is to provide the objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the Judgement-Debtor.”

26. Further 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.”

- 51.** It is clear from the foregoing that for a person to properly bring himself within the ambit of **Order 22 rule 51(1)** above, he has to meet certain conditions. First, he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof. Second,

he must prove that attachment of his property has been levied in execution of the said decree. Third, he must prove that he is entitled to, or he has legal or equitable interest in the whole or part of any property attached in execution of the decree.

- 52.** In the present case, the Objector objects to the attachment vide the proclamation dated 26th October, 2023 of the household goods indicated therein. She avers that the household goods belong to her and that she is not a party to the case nor does she owe the Defendant any monies. The Objector however lays no claim to the attached motor-vehicle.
- 53.** The Objector has adduced into evidence a copy of the proclamation notice and the vesting deed dated 11th April, 1990, vesting the property into her names.
- 54.** The Defendant contends that the Motion is unmerited; that the Auctioneers did not proclaim the Objector's parcel of land or the developments thereon; that the mere fact that the Objector owns the property does not mean that the household goods proclaimed for attachment where the Judgement Debtors lives are the Objector's goods and that no evidence of ownership of the household goods has been demonstrated herein.
- 55.** The Defendant adduced into evidence a copy of the proclamation as well as a copy of the records from the Registrar of Vehicles in respect of M/V KAW 842V.
- 56.** In the present circumstances, it is not disputed that the household goods in question were proclaimed from the Objector's house. Her ownership of the house is supported by evidence.

57. What the Defendant alleges is that the Judgement Debtor's reside with the Objector and as such, the Objector is obligated to prove her ownership of the goods. The Defendant averred that, "*as a general rule ownership of the house does not necessarily extend to ownership of the household goods therein.*"
58. The Courts have reiterated that the onus lies on the Objector to prove legal and equitable interest in the proclaimed goods. This has been upheld even where the goods in question were family property. In the case of *Michael Kwena vs Raza Properties Limited & Another[2008]eKLR*, the Court, while acknowledging the difficulty in differentiating property belonging to a husband vis a vis a wife set the test of whether the Objector has demonstrated ability to acquire.
59. The above notwithstanding, it is noted that the Objector herein denies living with the Plaintiffs. She contends that the 1st Plaintiff lives in Tanzania whereas the 2nd Plaintiff resides with his mother in Spain. In response to this, the Defendant maintains that "as advised by Counsel, the Plaintiffs live in the cream coloured house off Ngong Road and that the Plaintiffs live in the house where the items were proclaimed."
60. Before putting the Objector to the test as to whether the goods proclaimed were hers or her child's/grandchild's, the Defendant ought to have first demonstrated that the Plaintiffs did indeed reside there. The Court is not convinced they have done so. This having not been demonstrated, it is apparent that there was no basis for any proclamation on the household goods inside the Objector's home considering that she is not a party to the proceedings.

61. The Court therefore finds that the proclamation was out rightly erroneous.

62. In the end, the Court makes the following final determination;

- i. **The Application dated 23rd May, 2023 be and is hereby dismissed with no order as to costs. For avoidance of doubt, the suit stands dismissed as at 16th September, 2020.**
- ii. **Application dated 27th October, 2023 is allowed as prayed, but with no order as to costs.**

Dated, signed and delivered in Nairobi this 22nd day of April, 2024.



**O. A. Angote
Judge**

In the presence of;

No appearance for Plaintiff

Mr. Wesonga for Defendant

Court Assistant – Tracy