



**Gichuhi v Kimani & 2 others (Environment & Land Case  
55 of 2017) [2023] KEELC 16708 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16708 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 55 OF 2017**

**LN GACHERU, J  
MARCH 28, 2023**

**BETWEEN**

**ALLAN KAMAU GICHUHI ..... PLAINTIFF**

**AND**

**SAMUEL GICHUHI KIMANI ALIAS SAMUEL MAINA  
GICHUHI ..... 1<sup>ST</sup> RESPONDENT  
ARTHUR KIMANI GICHUHI ..... 2<sup>ND</sup> RESPONDENT  
SAMSON NGAHU GICHUHI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion Application dated 25<sup>th</sup> November 2021, the Plaintiff/Applicant sought for the following orders:
  1. That this Honourable Court be pleased to grant an order permitting the sale of the Defendants property on land Parcel No. Loc. 13/Karunge/3179,3180 and 3181 located in Karunge in Murang'a County for payment of the outstanding decretal amount in the decree now standing at Kshs. 215,250/= including interest at the Court's rate, and the auctioneer's costs of execution;
  2. That this Honourable Court be pleased to order the attachment and sale of the properties in execution of the decree and warrant to issue to Hippo General Merchant, licensed auctioneers.
  3. That the sale be advertised in the dailies once;
  4. That this court be pleased to issue a prohibiting order against the Respondents from transferring or charging the properties in any way and any other person(s) from taking any benefit from such purported transfer or charge;



5. Costs of the application be awarded to the Applicant.
2. The application is premised on the grounds stated thereon and the Supporting Affidavit of the Applicant, Allan Kamau Gichuhi, who averred that he obtained judgement on 11<sup>th</sup> December 2019, for the sum of Kshs. 175,000/= against the Respondents herein, who have refused or neglected to pay the said decretal sum. The Applicant further averred that the Respondents are the registered owners of land parcels No. Loc. 13/Karunge/3179, 3180 and 3181 (the suit properties), which ought to be attached and sold to settle the decretal sum. Lastly, the Applicant averred that the Respondents filed a Memorandum of Appeal, out of time, which is an abuse of the court process.
3. The 1<sup>st</sup> Respondent, Samuel Gichuhi Kimani, opposed the application through his Replying Affidavit dated 13<sup>th</sup> May 2022, wherein he deponed that the application is unnecessary, given that execution is governed by the law. He further averred that the amount sought differed from that awarded by the Court and that the Court did not award any interest. He stated that the Applicant ought to have specified the amount he wishes to recover. Lastly, that the Applicant seeks to unjustly enrich himself to the disadvantage of the Respondents. The Respondents prayed that the application be dismissed with costs.
3. The said Application was canvassed by way of Written Submissions.
4. The Applicant through the Law Firm of Karweru & Co. Advocates, filed his submissions in support of the application on 20<sup>th</sup> February 2023. He submitted that judgement was delivered in this favour on 11<sup>th</sup> November 2019, wherein the Defendants/Respondents were ordered to pay in equal share of Kshs. 175,000/= plus interest. The Applicant further submitted that he seeks an order for sale of the suit properties to satisfy the judgement debt. Lastly, he submitted that it is in the interest of justice that he should be allowed to reap the fruits of his judgment against the Defendants/Respondents, who are owners of the suit properties.
5. In response and in opposition to the Plaintiff/Applicant's submissions, the Defendants/Respondents through the Law Firm of Mwaniki Warima & Co. Advocates filed their submissions dated 6<sup>th</sup> February 2023. The Respondents submitted that the amount sought is not the same as that awarded by this Court in its judgement. Further, that no interest was awarded to the Applicant, and thus the same should not be allowed. The Defendants/Respondents further submitted that they filed an appeal vide Nyeri Court of Appeal Civil Application No. E089 of 2022, seeking stay of execution of the judgement and subsequent orders issued on 4<sup>th</sup> February 2020 pending the hearing and determination of the appeal. The Respondents also submitted that the ruling is due to be delivered on 17<sup>th</sup> March 2023.
6. Lastly, the Respondents submitted that if the application is allowed, they stand to suffer great prejudice if their properties are sold, as they reside on said suit properties. With their families, and have developed the same with permanent structures. They further submitted that the application is silent on what decretal amount is recoverable from each of the Respondents herein. They prayed that the application be dismissed, with costs.
7. Having analyzed the Application, the responses thereto and rival written submissions, this Court finds that the main issue for determination is whether the application as sought is merited?
8. It is not in doubt that a Judgment was entered against the Defendants/Respondents who were then ordered to pay Kshs. 175,000/= to the Plaintiff/Applicant herein. It is the Court's considered view that the Plaintiff/Applicant is entitled to the execution in satisfaction of the said Judgment. The award was compensation arising from trespass and damage to property involving the Plaintiff/



Applicant's property. Damage to which was valued at Kshs. 270,000/= although a concessionary sum of Kshs.150,000/= was sought by the Plaintiff.

9. This Court is asked to determine an application for the execution of a Judgment dated 11<sup>th</sup> December 2019, by ordering the attachment and sale of the Defendant/Respondents' respective land parcels in particular land parcel No. Loc. 13/Karunge/3179, 3180 and 3181, in Murang'a County for payment of the outstanding decretal amount in the decree now standing at Kshs. 215,250/= including interest at the Court's rate, and the auctioneer's costs of execution. Further that this Court order that execution of the decree and warrant to issue to Hippo General Merchant, licensed auctioneers.
10. In its judgment dated 11<sup>th</sup> December 2019, this Court ordered as follows:
  1. Kshs 150,000/- being damages for destroyed crops and developments;
  2. General damages for trespass in the sum of Kshs 10,000/-;
  3. Permanent injunction is hereby ordered against the Defendants, their agents, servants or anybody working or claiming under them from in any way interfering, committing acts of waste or tampering with the Plaintiffs quiet possession of all land measuring approximately 0.7 acres now occupied by the Plaintiff;
  4. Kshs 15,000/- being valuation fees is allowed;
  5. All payments are payable in equal share by the Defendants to the Plaintiff.
11. This Court has noted that despite interest and costs being included in the prayers in the main suit, neither was costs nor interest awarded by the Court in the judgment dated 11<sup>th</sup> December 2019. The Plaintiff/Applicant however included interest in his prayers in the present application. Lastly, the amount awarded in the judgement totalled Kshs. 175,000/= in contrast to the Kshs. 215,250/= presently sought which includes interest at the Court's rate, and the auctioneer's costs of execution.
12. Section 38 of the Civil Procedure Act provides for the Powers of court to enforce execution; it states:

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

  - (a) by delivery of any property specifically decreed;
  - (b) by attachment and sale, or by sale without attachment, of any property;
  - (c) by attachment of debts;
  - (d) by arrest and detention in prison of any person;
  - (e) by appointing a receiver; or
  - (f) in such other manner as the nature of the relief granted may require:
13. Order 22 rule 6 of the Civil Procedure Rules provides for an application for execution. It states:

"Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less



than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”

14. Rule 7(2) further provides for written application for execution. It states:

“Save as otherwise provided by subrule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
- (f) whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
- (g) the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross- decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs, if any, awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the court is required, whether—
  - (i) by the delivery of any property specifically decreed;
  - (ii) by the attachment and sale of any immovable property, or by the sale without attachment or by proclamation and sale immovable property;
  - (iii) by the arrest and detention in prison of any person;
  - (iv) by the appointment of a receiver;
  - (v) otherwise, as the nature of the relief granted may require.”

15. In the present case, the Plaintiff/Applicant has sought the attachment of immovable property. These provisions for execution thereof are provided for under order 22 rule 9 of the *Civil Procedure Rules* which provides for particulars to be contained in an application for attachment of immovable property. It states:

“Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same, and, in case such property can be identified by boundaries, or numbers in Government records or surveys, a specification of such boundaries or numbers; and



- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same."

16. Further order 22 rule 10 of the *Civil Procedure Rules* provides:

"Where an application is made for the attachment of any land which is registered in the Land Registries, the court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing, any transferable interest in the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors."

17. This Court notes that the objections raised by the Defendants/Respondents are catered for under the *Civil Procedure Rules*, when applying for execution meaning that this Court ought to determine whether the application meets the requirements set out under the said *Civil Procedure Act* and Rules in order to allow or deny the attachment for the sale of the suit properties.

18. The Defendants/Respondents opposed the application on the grounds that the application is unnecessary, given that execution is governed by the law. They further averred that the amount sought differed from that awarded by the Court and that the Court did not award any interest. The Respondents also stated that the Applicant ought to have specified the amount he wishes to recover. Lastly, they submitted that if the application is allowed, the pending appeal will be rendered nugatory if the appeal is successful.

19. As this Court determines this matter, it will consider the holding in the case of *James Wangalwa & Another vs. Agness Naliaka Cheseto* (2012)eKLR, wherein the Court observed as follows;

"No doubt in law, the fact that the process of execution has been in motion or is likely to be put in motion, by itself does not amount to substantial loss.....This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.."

20. A look at the Application reveals that the description of the property to be attached has been set out by the Applicant as Loc. 13/Karunge/3179, 3180 and 3181. Further, the Applicant has produced before this Court three official searches dated 13<sup>th</sup> June 2016, indicating that the Defendants/Respondents are indeed the registered owner of the suit properties, that all sought to be attached.

21. The Respondents have objected to the said Application and they claimed that they have filed an Appeal in Nyeri Court of Appeal, and that they also filed an Application for stay. It is noted that there is no stay yet and the Court cannot deny the Applicant herein what is due to him because of an intended Ruling whose outcome is not certain. The Applicant has satisfied the Court that he has complied with the Law and thus his Application is found merited.

22. However, considering that the value of the said property is unknown, the Court finds it necessary to order for a valuation report to be prepared so that the properties are sold at the right market value. Thereafter the Applicant can settle his claim and the Respondents can have the remaining amount if any.

23. The amount due shall be the amount as awarded in the Judgement of 11<sup>th</sup> December 2019, being Kshs. 175,000/= without interest. This amount is due from the three Defendants/Respondents equally. For clarity the amount is Kshs. 58,333.40/= from each Respondent herein.



24. Consequently, the Court orders that a Valuation Report be prepared for purposes of valuing the suit properties at the Respondents costs and the Plaintiff/Applicant should recover the amount due to him from the proceeds of sale and the remainder if any should be submitted to the Defendants/ Respondents. The said valuation to be done within the next 14 days from the date hereof and the Valuation Report to be filed in Court.
25. The Plaintiff/Applicant will additionally comply with the provisions under Order 22 Rule 30, of the Civil Procedure Rules, which provides for decrees for delivery of immovable property when in occupancy of tenants.
26. In a nutshell, the Notice of Motion Application dated 25<sup>th</sup> November 2021, is allowed in terms of prayers No. 2, 3 and 5, while taking into account the above directions by the Court. Prayer No. 4 will have to await the filing of the Valuation Report.
27. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28<sup>TH</sup> DAY OF MARCH, 2023**

**L. GACHERU**

**JUDGE**

In the presence of;

M/s Miriti for the Plaintiff/Applicant

M/s Waititu for Respondents

