Waweru v Njuguna (Civil Appeal 616 of 2019)
[2023] KEHC 399 (KLR) (Civ) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 399 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 616 OF 2019

CW MEOLI, J

JANUARY 24, 2023

BETWEEN

GABRIEL G. WAWERU ..... APPELLANT

AND

SALOME GRACE MUNJIRU NJUGUNA ..... RESPONDENT

(Being an appeal from the ruling of E.Wanjala, SRM delivered on 15th October, 2019 in Nairobi Milimani CMCC No. 3438 of 2005)

JUDGMENT

1. This appeal arose from the ruling of the lower court delivered in Nairobi Milimani CMCC no 3438 of 2005 on 15.10.2019. The background to the appeal is as follows. On 04.04.2005, Salome Grace Munjiru Njuguna (hereafter the Respondent) filed a suit in the lower court against Gabriel G. Waweru (hereafter the Appellant) seeking damages. The suit arose from a road traffic accident that occurred on 12.10.2003 involving the Respondent and motor vehicle registration number KAA XXXS (hereafter the accident motor vehicle) along Kangundo-Outering Road.

2. It was averred that at all material times the Appellant was the registered owner of the accident motor vehicle which was being driven by himself, his driver, employee servant and or agent for whom the Appellant was vicariously liable. That the Respondent was lawfully travelling aboard the accident motor vehicle as a fare paying passenger when the Appellant himself, his driver, servant and or agent so negligently drove, controlled and or managed the accident motor vehicle that he caused it to be involved in an accident as a result of which the Respondent sustained injuries.

3. Upon request by the Respondent, interlocutory judgment was entered on 03.08.2005 against the Appellant who, despite being duly served with summons failed to enter appearance and or file a defence within the prescribed time. Thereafter the matter proceeded to formal proof hearing on 03.07.2006.

Judgment was delivered on 20.07.2006 in favour of the Respondent against the Appellant for a sum of ksh 60,600/- plus costs and interest. Apparently prompted by subsequent execution proceedings, the Appellant moved the lower court vide a motion dated 26.01.2018 seeking inter alia to stay execution and the setting aside of the judgment entered on 20.07.2006. The said motion seems not to have been prosecuted by the Appellant and was presumably abandoned.

4. The Appellant thereafter filed a motion dated 11.09.2018 seeking inter alia that pending hearing and determination of the suit the Respondent, her agents, servants and or anyone acting through her be restrained from selling the goods attached by Nasioki Auctioneers. On 09.10.2018 the motion proceeded for hearing and pursuant to a ruling delivered on 15.10.2018 the lower court dismissed the motion with no orders as to costs.

5. The Respondent then took out a notice to show cause dated 07.08.2019 seeking the arrest and committal to civil jail of the Appellant in execution of the decree. The Appellant again moved the court by yet another motion dated 13.08.2019 seeking that the court be pleased to issue temporary orders staying the hearing of notice to show cause for hearing on 10.09.2019 pending hearing and determination of the motion and; that the court be "pleased to set aside the order" restraining Nasioki Auctioneers, their servants and or agents from harassing the Appellant pending hearing and determination of the motion. The gist of the Appellant's affidavit supporting the motion was that he had on 02.02.1994 sold the accident motor vehicle to Samuel Kiarie Gikere, surrendered the logbook and duly executed transfer documents in favour of the said Samuel Gikere. He deposed that Samuel Gikere had died on 27.08.2019.

6. That despite the foregoing, Nasioki Auctioneers had on 28.06.2018 proceeded to proclaim and cart away his household goods; that he learned on that date that accident motor vehicle had been involved in an accident yet he was never served with the notice of the judgment entered against him on 20.07.2006. He disputed the affidavit of service concerning service upon him of the summons, through which the Respondent had obtained the interlocutory judgment. He further took issue with the fact that the Respondent had taken more than 12 years to execute the decree and asserted that she had the option of filing a declaratory suit as she was aware that the accident motor vehicle was insured.

7. Further that, although an auction was conducted pursuant to proclamation and attachment of his goods, he had never been issued with a certificate of sale and was therefore unaware of the sums realized from the sale of his personal property. He therefore contended that it was unfair that the Respondent appeared hell-bent on seeking his committal to civil jail and therefore urged the court to set aside the notice to show cause. The Respondent opposed the motion by way of grounds of opposition dated 09.09.2019.

8. As directed by the court, the Appellant's motion dated 13.08.2019 and Respondent's notice to show cause dated 07.08.2019 were simultaneously heard by way of oral submissions. In the ruling delivered on 15.10.2019 the lower court dismissed the Appellant's motion and allowed the Respondent's notice to show cause dated 07.08.2019, provoking the instant appeal which is based on grounds in the lengthy memorandum of appeal dated 25.10.2019: -

> " 1. The hon Magistrate erred in law and in finding that the contested notice to show cause issued against the Appellant had merit and prejudiced the Appellant by ordering that he does pay the demanded sum or face a jail term.
>
> 2. The hon Magistrate erred in law and fact in grounding her ruling on a judgment that had been entered without proper or any service of summons

upon the Appellant to enable him file a defence to the claims in the Plaint within stipulated period.

3. The hon Magistrate erred in law and fact by deliberately failing and or refusing to consider the Appellant's opposition of the affidavit of service sworn by the court process server named Solomon Mbugua on 26th July 2005 (altered from 2004) which was a sham as the averments contained there were pure lies and deliberately meant to mislead the court as the Appellant was never served as misrepresented.

4. The hon Magistrate erred in law and fact in deliberately failing to summon the court process server for cross examination by the Appellant once the affidavit of service was opposed and rejected.

5. The hon Magistrate erred in law and fact by refusing to adhere to the law and question how an execution could proceed on an exparte judgment despite the fact the Respondent through her advocates on record deliberately and mischievously refused and failed to issue the Appellant with the mandatory ten days entry of judgment notice as required by law.

6. The hon Magistrate erred in law and fact in denying the Appellant his constitutional right to be heard, get a fair hearing and be accorded a chance to file a defence and defend the claims against him giving the Respondent an undue advantage over him.

7. The hon Magistrate erred in law and fact in denying the Appellant the chance to explain himself and confirm that the motor vehicle that caused the accident Registration Number KAA XXXS was not in his physical ownership or possession at the time of the accident as for a fact he had sold it to Samuel Kiarie Gikere on 2nd February, 1994 and an agreement produced in court to confirm this.

8. The hon Magistrate erred in law and fact in passing the burden of the paying off the amount in the decree to the Appellant despite the fact that he was not liable and responsible of an accident caused by a motor vehicle he had sold to a third party 11 years before the lower court case was filed.

9. The hon Magistrate erred in law and fact in failing to consider that the Appellant did file an application to enjoin the real owner of the motor vehicle as a co-defendant an action that was not possible as he had passed away and heirs to his estate had not filed a succession cause to appoint an administrator to his accident.

10. The hon Magistrate erred in law and fact in failing to find it fair and justified that the exparte judgment entered without following due process of the law should have been set aside in the interest of justice.

11. The hon Magistrate erred in law and fact in allowing the notice to show cause despite the fact the same was granted without following the due process.

12. The hon Magistrate erred in law and fact in making pronouncements that were in totality biased against the Appellant.

13. The hon Magistrate erred in law and fact in failing to deliver a ruling based on facts and laws not based on real facts as stated and giving the Respondent a free hand to run the proceedings without question despite there being glaring illegalities.

14. The hon Magistrate erred in law and fact in failing to consider that the decree in the appealed case was issued on 20th July 2006 and was illegally executed on the 28th June, 2018 an inordinate delay of exactly 12 years.

15. The hon Magistrate erred in law and fact in failing and or deliberately ignoring the legal fact that a decree of more than 1 year old cannot be directly executed without adhering to the due process of the law.

16. The hon Magistrate erred in law and fact in failing to appreciate and consider the legal fact that the civil procedure rules demand that a 1 plus year old decree cannot be executed until the decree debtor had been issued with a notice to show cause why execution should not proceed which action was never served by the Respondent.

17. The hon Magistrate erred in law and fact in allowing an illegal execution to proceed by the auctioneers who deliberately executed and expired decree making the whole process of the execution null and void and it should have been terminated.

18. The hon Magistrate erred in law and fact in allowing an execution by the auctioneers while it had been pointed out to the court that the auctioneer deliberately failed and or ignored to serve the Appellant with a proclamation giving him 7 days to redeem his proclaimed goods.

19. The hon Magistrate erred in law and fact in failing and ignoring to consider the fact that the auctioneers using an expired decree and without issuing a proclamation catered away the Appellant's house hold goods on the 28th June 2018 and to-date their whereabouts is not known.

20. The hon Magistrate erred in law and fact in refusing and repudiating to demand that the auctioneers disclose the whereabouts of the attached goods disclose if and whether they were ever sold and what happened to the money that was realized from the auction as the same was never accounted for in the application for execution filed in court seeking payment in the contested notice to show cause.

21. The hon Magistrate erred in law and fact by delivering a ruling that lacked direction, disclosure of facts, failed to address very pertinent legal procedural issues and was deliberately meant to prejudice the Appellant.

22. The hon Magistrate erred in law and fact in undermining the basic principle of law that demands that any disregard of the due process of the law makes any action so taken to be fatally defective and the preceding and future actions should be declared null and void." (sic)

9. The appeal was canvassed by way of written submissions. On the part of the Appellant, he reiterated his affidavit material and asserted that the lower court proceedings greatly prejudiced him as he was not

accorded an opportunity to be heard before judgment. He contended that service of summons in the instant matter was irregular and disputed, hence the court had the discretion of setting aside the exparte judgment to facilitate his right to have his case heard on the merits. Concerning the exparte judgment the Appellant argued that rules of procedure require that upon entry of an exparte judgment, service of the notice of entry of judgment be effected before execution. That the Respondent failed to serve the said notice but proceeded with execution to the detriment of the Appellant.

10. Regarding the process of execution, the Appellant contended that where a decree is more than one year old, it is mandatory that the judgment debtor be served with a notice to show cause (NTSC) why execution should not proceed, which procedure was disregarded in his case. Further, that judgment having been entered on 26.07.2006, the process of execution in October 2017 was an illegality. On the issue of arrest and committal to civil jail the Appellant submitted that arresting and committing a judgment debtor to civil jail ought to be a matter of last resort. He asserted that the Respondent failed to tender evidence that the Appellant had deliberately refused to settle the decretal sum and as such it was unfair and unlawful to proceed to seek execution in a manner that may curtail the Appellant's constitutional freedom. In conclusion the Appellant urged the court to exercise its discretion and find in his favour by allowing his appeal.

11. The Respondent naturally defended the trial court's decision and in so doing, counsel identified four issues for this court's determination. Addressing the court on whether the default judgment ought to be set aside, he called to aid the decision in *Victoria Pumps Ltd & Another v Kenya Ports Authority & 4 Others* [2004] eKLR to reiterate that service of summons was duly effected upon the Appellant who was only prompted to action by execution proceedings. That the trial court observed due procedure as the Respondent proved that service of court processes was duly effected upon the Appellant. Concerning ownership of the accident motor vehicle counsel relied on the Uganda decision in *Osapil v Kaddy* (2001) 1EALA 187 to submit that the search conducted in respect of the accident motor vehicle, showed the Appellant to be the owner of the said motor vehicle as at the date of the accident. That the Appellant's claims to have sold the accident motor vehicle to a third party were not supported by evidence.

12. Responding to the Appellant's submissions on committal to civil jail, it was contended that the initial execution by attachment had not realized enough funds to satisfy the decree and that the Appellant had not made any attempts to settle the outstanding decretal sum. That the instant appeal is a delaying tactic, and the Respondent is yet to receive the fruits of successful litigation 17 years after judgment was delivered, hence committal of the Appellant to civil jail was the most appropriate mode of execution, the Appellant having willfully refused to settle the decretal sum.

13. The Respondent pointed out that the Appellant had premised his entire appeal on the court's failure to accord him an opportunity to be heard yet the lower court observed the rules of natural justice by according the Appellant opportunity to be heard, but which he squandered. In conclusion it was submitted that the appeal is an abuse of the court process and ought to be dismissed with costs.

14. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon [Kenya] Limited* [2000] 2EA 212, Peters v Sunday Post Ltd [1958] EA 424; *Selle and Anor. v Associated Motor Boat co Ltd and Others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.

15. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & co Advocates* [2013] eKLR that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way".

16. As earlier observed, the Appellant's motion and the Respondent's notice to show cause dated 13.08.2019 and 07.08.2019 respectively, were simultaneously canvassed in the lower court. The lower court in dismissing the Appellant's motion and allowing the Respondent's application for execution stated in part that:-

> " Application dated 13.8.2019.
>
> .....the Defendant does not dispute that there is judgment against him, but argues that the judgment is erroneous against him and ought to be against Samuel Kiarie the purchaser of his vehicle who is not a party to these proceedings and has never been a party to the proceedings herein, the defendant never sought to enjoin the said purchaser of the suit vehicle to the proceedings despite being served with court process and if the purchaser died the Applicant never sought to enjoin the administrators of his estate, the said alleged purchaser is a stranger to these proceedings, and as it is there is a valid judgment against the defendant applicant which has not been satisfied and the defendant has not demonstrated sufficient grounds why he should not satisfy the judgment and decree herein.
>
> Notice to show cause application dated 7.8.2019
>
> .....I have considered the rival submissions and as stated above there is a judgment against the defendant herein and not any other party which judgment has not been satisfied, the defendant has not given any proposal on settlement, in the circumstance I find that the notice to show cause application dated 7.8.2019 is merited. I will allow it as present however in the interest of justice suspend the immediate committal of the defendant to civil jail for 30 days to allow him make payments and or make a reasonable proposal on the payment of the decretal amount failure to which he shall be arrested and committed to civil jail." (sic)

17. The Appellant's motion dated 13.08.2019 and expressed to be brought under Article 50 of the *Constitution*, section 1A,1B 3A and 63(e) of the *Civil Procedure Rules* sought two key but temporary prayers:-

> " That the court be pleased to issue temporary orders of stay of the Hearing of the Application for Execution of decree listed for hearing on 9th day of September 2019 pending the hearing and determination of the application.
>
> That the court be pleased to set aside the Order restraining Nasioki Auctioneers, their servants and /or agents from harassing the Applicant pending hearing and determination of this Application". (sic)

18. The motion was filed under certificate of urgency and was therefore placed before Orenge, SRM, the learned magistrate presumably on duty on the same date. Neither this magistrate nor Wanjala, SRM before whom the matter was listed for hearing on 27.8.2019 allowed the interim orders, which means that the said prayers were rendered spent. However, seemingly oblivious of the fact, Wanjala SRM

directed that the motion be heard alongside the NTSC on 10th September 2019. The Respondent had correctly stated in her grounds of opposition dated 9th of September 2019 that the prayers in the motion were spent and taken issue with the erroneous framing of the prayer for setting aside a restraining order which according to her did not exist. The learned magistrate in his ruling did not address these objections.

19. It appears from the material canvassed before the lower Court that the Appellant was primarily raising issues that belonged to the unprosecuted motion that had sought to set aside the judgment against him as well as issues that had been determined in connection with his motion dated 11.9.2018 and *vide* a ruling dated 15.10.2018. This was erroneous. The Appellant has similarly improperly raised the same matters on this appeal by his grounds and in his submissions. That said, considering the nature of the prayers in the Appellant's motion dated 13.08.2019, the hearing in respect of the said motion was an exercise in futility as there was no live prayer subsisting as of the hearing date. The lower court ought to have declared the motion spent as early as 27.8.2019 instead of setting it down for hearing.

20. Pursuant to the NTSC, the Appellant was required to show cause why he should not be committed to civil jail. Instead of responding appropriately, he expended his energies at the hearing on his spent application and canvassed issues relating to earlier execution, enforceability of the decree (an issue already determined by the ruling dated 15.10.2018) and his liability for the decree as he has also done on this appeal. Having failed to prosecute his application to set aside the judgment, or to apply for the decree holder to render accounts in respect of the previous execution, the Appellant could not hope to find succor in these issues.

21. Nevertheless, Order 22 Rule 34 of the *Civil Procedure Rules* provides that:

> "(1) Where a judgment-debtor appears before the court in obedience to a notice issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.
>
> (2) Before making an order for the committal of the judgment-debtor to prison, the court, for reasons to be recorded in writing, shall be satisfied—
>
> (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the court; or
>
> (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or
>
> (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or

neglected, to pay the same, but in calculating such means there shall be left out of account any property which is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

(3) ....

(4) ....

(5) Where the court does not make an order under subrule (1), it shall cause the judgment-debtor to be arrested, if he has not already been arrested, and, subject to the provisions of this Act, commit him to prison."

22. It seems to me that, generally speaking, the onus of establishing prima facie the matters envisaged in sub-Rule (1) above would logically lie with the judgment debtor while the judgment creditor would bear the burden of demonstrating matters under sub-Rule (2) in support of his execution application. I say so because the bulk of the matters specified therein relate to facts expected to be within the knowledge of the respective parties, and not the court itself. The parties before the lower court appear to have gone on a tangent at the hearing and did not bring their respective positions within the ambit of the above Rule.

23. Thus, while the lower court was entitled to ignore the irrelevant matters raised by the Appellant at the hearing of the NTSC and the Appellant's application, the court appears to have paid scant attention in its brief ruling to the foregoing provisions, and the only apparent reason given for the committal of the Appellant to civil jail was the Appellant's failure to give payment proposals in settlement of the debt. The rationale behind the provisions and the discretion given to the Court by Order 22 Rules 31 and 34 is rooted on the recognition of the primacy of the right to individual freedom and security of the person as protected by the Constitution. Perhaps, that is why execution by committal to civil jail is often viewed as an execution mode of last resort. On that score, the Appellant's complaints are valid.

24. Equally, it seems that the order for the simultaneous hearing of the NTSC and the spent motion was inappropriate, especially because the Appellant was acting in person. Whatever the case, the obligation was on the court to ensure not only that the NTSC proceedings were conducted as anticipated in Order 22 Rules 31 and 34 of the *Civil Procedure Rules*, but also that the exercise of the court's discretion was guided by the said provisions. I notice that the NTSC had been issued under Order 22 Rule 18 of the *Civil Procedure Rules* instead of Order 22 Rule 31 which was the applicable Rule in this instance, but nothing turns on the anomaly.

25. Reviewing all the foregoing, it is my considered view that the lower court erred not only by combining two separate proceedings, one of which was spent, but also for giving short shrift to the important considerations stipulated in Order 22 Rule 34 of the *Civil Procedure Rules*. It is not lost on the court that the Respondent has waited since 2006 to enjoy the fruits of her judgment, but the execution process in respect of the decree in her favour must be carried out in accordance with the law.

26. The Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated:

> "'This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial

discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (*supra*):

"A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".

See; *United India Insurance co Ltd v East African Underwriters (K) Ltd* [1985] EA 898: -

27. I think I have said enough to demonstrate that the lower court misdirected itself in the exercise of its discretion and an injustice resulted, for there can be no worse injustice than the peremptory loss or threat of loss of personal freedom. The lower court's orders in respect of the execution application by arrest and committal to civil jail of the Appellant cannot be allowed to stand. Consequently, the court will allow the appeal by setting aside the ruling delivered on 15th October 2019 to the extent that it granted orders for the arrest and committal of the Appellant to civil jail. The court substitutes therefor an order disallowing the Respondent's execution application by way of arrest and committal to civil jail of the Appellant, dated 17th July 2019, based on which the NTSC dated 7th August 2019 had been issued.

28. For the avoidance of doubt, this judgment is specific to the stated execution process, and in no way bars the Respondent from levying further lawful execution against the Appellant, including by arrest and committal to civil jail, should he fail to satisfy the decree against him. In view of the circumstances of the case, each party shall bear their own costs in the lower court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: N/A

C/A: Carol