



**Mwaniki v Thangari (Civil Appeal 1 of 2018)
[2023] KEHC 26752 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 1 OF 2018
CM KARIUKI, J
DECEMBER 20, 2023**

BETWEEN

RICHARD MWANGI MWANIKI APPELLANT

AND

JASON MUITA THANGARI RESPONDENT

RULING

1. The Respondent herein vide the Notice of Motion dated 28th February 2023 sought the following orders: -
 - I. That the sum of Kshs. 1,200,000/- deposited into court by the Respondent towards the decretal sum herein be refunded forthwith.
 - II. That costs of this application be in the cause.
2. Which application is supported by the affidavit of Jason Muita Thangaru and the grounds set forth on the face of the application as follows: -
 - I. The Respondent deposited a total sum of Kshs. 1,200,000/- towards the decretal sum herein.
 - II. The land parcel subject matter was transferred pursuant to the judgement of the honourable court delivered herein on 3rd February 2022 thereby defeating the purpose of the said deposit.
 - III. It is only mete and just that the said amount be ordered refunded to the Respondent.



3. The Respondent filed a replying affidavit dated 20th March 2023 sworn by Richard Mwangi Mwaniki and deponed that: -
- i. That the Respondent is yet to fully pay the decretal amount awarded to him in Nyahururu CMCC No. 216 of 2014 where he is the plaintiff and the Respondent is the defendant and he is thus opposed to the refund of the Kshs. 1,200,000/-
 - ii. That vide a decree dated 20/8/2015, the decretal amount then was a total of Kshs. 2,743,896/- and that he executed the decree by way of sale and attachment of the Respondent's Plot No. Laikipia/Mutitu Ngoru 4/233 (Manguo) of 0.135ha (0.33 acre) and the plot was on the 29/3/2016 sold through a public auction at a sum of Kshs. 1,200,000.
 - iii. That it thus follows that there is an outstanding balance of Kshs. 1,543,896 less interest and further costs and which balance the Respondent is yet to pay and therefore the amount of Kshs. 1,200,000 should be released to him in settlement of part of the outstanding balance and not to the Respondent.
 - iv. That a sum of Kshs. 264,587- which is part of the Kshs. 1,200,000 sought to be refunded was paid on 9/5/2018 in Nyahururu CMCC No. 216 of 2014 as judgement on admission and the said amount has no connection at all to the orders of 3/2/2022.
 - v. That Nyahururu CMCC No. 216 of 2014 is scheduled for mention on the 13/4/2023 there he sought for change of mode of execution to attachment of the Kshs. 1,200,000/- deposited in court by the Respondent and it's only fair and just that the decree issued therein be settled first.
4. In response, the Respondent filed a supplementary affidavit dated 11th April 2023.

Respondent/ Applicant's Submissions

5. The Respondent contended that he intends to challenge the purported sale of the suit land at a consideration of Kshs. 1,200,000/- before the trial court as the same was grossly undervalued since the terms of sale of each plot measuring 50×100 feet had a fixed reserve price of Kshs. 700,000/- as can be seen in the subordinate court's proceedings of 21st January 2016.
6. It was stated that the suit plot measured 0.135 hectares which is equivalent to 3 plots of 50×100 feet each and ought to have been sold at a reserve price of Kshs. 2,100,000/-. It was the Respondent's case that the interest charged on the decretal sum is exaggerated, unconscionable and flies in the face of the in duplum rule which prohibits charging interest beyond 100% of the original debt. Reliance was placed on *Mugure & Others vs. Higher Education Loans Board* [2022] KEHC 11951 (KLR)
7. The Respondent argued that in the instant case, the subordinate court found that there was no proper service of summons to enter appearance and other court processes before the ex parte judgement and decree was entered against the Respondent and proceeded to set it aside. The honourable court further upheld the order for setting aside the said judgment on condition that a sum of Kshs. 1,200,000/- be deposited into court failing which transfer of the Respondent's land parcel would take place.
8. That although belatedly the Respondent complied with the said condition, the Appellant rushed the process of transfer of the suit land thereby defeating the Respondent's attempt to forestall the



same. That he cannot come back to demand release of the conditional amount paid into court by the Respondent on the basis of a decree that had already been set aside by the subordinate court and this court. That the said amount was meant to act as security during the hearing and determination of the subordinate court case.

9. The Respondent therefore urged the court to allow the application and clarify whether the subordinate court case shall proceed to hearing on merit of the *ex parte* judgement shall remain intact for execution purposes.

Appellant/ Respondent's Submissions

10. The Appellant reiterated the grounds on his replying affidavit and further stated that he has vide an application dated 16/3/2023 approached the lower court for the attachment of the sum of Kshs. 1,200,000/- deposited in court by the Respondent under circumstances explained in the replying affidavit and the application is yet to be determined.
11. Further, the Appellant submitted that the attachment of amount held by the court is provided for under Order 22 Rule 46 of the *Civil Procedure Rules*. That no appeal or application for review is pending before this court challenging the decree issued on 20/8/2015. It was asserted that the Respondent is trying to reopen the already finalized case through the issues raised in his supplementary affidavit sworn on 11/4/2023 and that those issues are not for determination by this court at this stage of the appeal which was concluded on 3/2/2022.
12. It was averred that a sum of Kshs. 264,597/- deposited on 9/7/2018 which was not deposited through orders of this court as alleged and the sum was deposited as an admission of indebtedness by the Respondent in his statement of defence filed in the lower court. That ordering a release of the amount deposited by the Respondent when the decree is yet to be fully settled shall be tantamount to aiding him escape payment of the decretal amount noting that the only property known to be belonging to him by the Appellant was sold.
13. They therefore urged the court to dismiss the application with costs and to order for the file to be marked as closed as the appeal was long determined.

Analysis and Determination

14. Having considered the application herein, the affidavits thereto and the annexures and the submissions from the respective parties; the only issue that arises for determination is whether the sum of Kshs. 1,200,000/- deposited into court by the Respondent towards the decretal sum herein should be refunded forthwith.
15. Having gone through the record, the decretal sum herein was 2,743,896/-. The same was executed by way of sale and attachment of the Respondent/Applicant's Plot No. Laikipia/Mutitu Ngoru 4/233 (Manguo), measuring 0.135ha (0.33 acre), the suit land hereinafter. The plot was on the 29/3/2016 sold through a public auction at a sum of Kshs. 1,200,000 translating to Kshs. 400,000/- per plot. The suit plots were sold for Kshs. 300,000/- less the reserve price as set and ordered by the trial court on 21st January 2016 where the court ordered that the suit land be sold by way of public auction and the reserve price be set at Kshs. 700,000/- per 50 × 100 plot.
16. So, in the circumstances can the Appellant/ Respondent be heard to be claiming a balance of Kshs. 1,543,896/- of the decretal sum when he sold the land for less than the reserve price as set and ordered by the court on 21st January 2016?



17. I do not think so. The suit land measured 0.135 hectares which is equivalent to 3 plots of 50 × 100 feet each and the Appellant/ Respondent ought to have recovered an amount of Kshs. 2,100,000 i.e. Kshs. 700,000 × 3, had he sold the land at the reserve price ordered by the court. The Appellant/Respondent short-changed himself and therefore the Respondent/Applicant is not liable or responsible for the same.
18. That being, the case, the same would have not fully satisfied the decretal amount of Kshs. 2,743,896 as there would have been a pending amount of Kshs. 643,896/-. In my considered view, that is the only amount that the Respondent/Applicant herein owes the Appellant/Respondent. The same deducted from Kshs. 1,200,000/- leaves Kshs. 556,104/- which in my considered view should be refunded to the Respondent/Applicant.
19. From the foregoing analysis, the Respondent/Applicant's application partially succeeds in these terms:
- i. That the sum of Kshs 556,104/- be released to the Applicant upon the lapse of 30 days from the date of delivery of this ruling.
 - ii. That each party bear its own costs.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 20TH DAY OF DECEMBER, 2023.

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C KARIUKI

JUDGE

