NO.84

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 44 OF 2010

MORAA MASARE……..……1ST APPELLANT

JEMIMAH MASARE……..……2ND APPELLANT

BWARI MASARE……...……3RD APPELLANT

EVANS SAMWEL MOCHACHE MASARE……..…….4TH APPELLANT

PETER MOKEBO MIENCHA…….……5TH APPELLANT

VERSUS

GEOFFREY MATOKE…..…… RESPONDENT

JUDGMENT

(Appeal from original ruling in Chief Magistrate Court at Kisii in

Civil Case No.19 of 1989 by M.N.Gicheru, CM-Kisii dated 4th March, 2010)

1. This appeal a rises from the ruling and order of the Chief Magistrate's Court presided over **M.N. Gicheru CM** made on 4th March, 2010 in Kisii, CMCC No. 19 of 1989 (hereinafter referred to only as "**the lower court"**), in which the 1st, 2nd and 3rd appellants herein were defendants, the 4th and 5th appellants,interested parties and the respondent, the plaintiff. In the lower court, the respondent had sought a declaration that the 1st, 2nd and 3rd appellants (herein after referred to only as "**the appellants**") held a portion measuring 35 acres of the parcel of land known as Plot No. 38 in trust for him, an order that the appellants do deliver to him vacant possession of the said 35 acres and in default, the court do execute all documents necessary to effect the transfer of the said portion of Plot No. 38 to him. The respondent also sought mesne profits, damages, costs and interest. The respondent's case in the lower court was heard by N.Owino, SRM who dismissed the same with costs on 4th March, 1999. The respondent was aggrieved with the said decision of N.Owino, SRM and appealed against the same to the High Court in **Kisii HCCA No. 33 of 1999, Geoffrey Matoke-vs-Kwamboka Masare & 3 others**. The respondent's appeal was heard by Justice Kaburu Bauni who in a judgment delivered on 26th July, 2005 allowed the said appeal with costs to the respondent. In the said judgment, the judge set aside N.Owino, SRM's judgment and in place thereof entered judgment for the respondent by declaring that the appellants hold a portion measuring 25 acres of Plot No. 38 in trust for the respondent and should transfer the same to the

respondent. A decree was duly extracted from the said judgment and issued by the High Court on 23rd January, 2005(6)(sic). This time round, the appellants who were not satisfied with the decision of Justice Kaburu Bauni. They filed a notice of appeal and obtained a stay of execution of Justice Kaburu Bauni's decree pending the hearing and determination of their appeal to the court of appeal. The appellants' appeal to the court of appeal was struck out on 1st December, 2006 thereby paving the way for the execution of the judgment passed by Justice Kaburu Bauni in favour of the respondent in the appeal aforesaid. Armed with the decree from the said judgment, the respondent moved the lower court on 20th January, 2009 by way of chamber summons application dated 16th January, 2009 brought under sections 3A and 38 of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order XXI rule 86 of the Civil Procedure Rules seeking two prayers namely, an order that, the 2nd appellant do deliver to the respondent a portion measuring 25 acres of land formerly known as Plot No. 38 Kineni Ranch that was now registered in the names of the 2nd appellant as land parcel No. Isoge/Kineni/Block I/49 and that, the executive officer of the court do execute all necessary documents to facilitate the transfer of the said portion of land parcel No. Isoge/Kineni/Block I/ 49 (hereinafter referred to only as "**Plot No. 49**") to the respondent. The respondent's application dated 16th January, 2009 was heard by G.H.Oduor, SRM exparte on 30th January, 2009 and allowed as prayed on the same date. The appellants were aggrieved with the decision of G.H.Oduor, SRM aforesaid and instead of applying to set it aside under the then Order L rule 17 of the Civil Procedure rules, decided to seek a review of the same under the then Order XLIV of the Civil Procedure Rules. In their application for review dated 23rd April, 2009, the respondents' sought the following principal orders;

i. **the review, variation and/or setting aside of the order made by G.H.Oduor, SRM. on 30th January, 2009 as concerns the sub-division and delivery of a portion of Plot No.49 measuring 25 acres to the respondent;**
ii. **the dismissal of the respondent's application dated 16th January, 2009;**
iii. **the nullification and/or rescission of the sub-division of Plot No. 49 that had been effected pursuant to the said orders of 30th January, 2009 and the resultant mutation;**
iv. **the nullification and/ or cancellation of any title a rising from the sub-division of Plot No. 49 and the restoration of the register of the said parcel of land.**

2. The appellants' application for review was heard by G.H.Oduor, SRM on 25th June, 2009. In a reserved ruling that was delivered on 6th August, 2009, G.H.Oduor, SRM allowed all the principal prayers that were sought by the appellants in their application for review the particulars of which I have set out herein above.

3. In the ruling, the learned senior resident magistrate identified four (4) issues for determination which he set out as follows;

i. **whether execution of a judgment of the High Court in its appellant jurisdiction could be carried out by the lower court whose decree was appealed;**
ii. **Whether Plot No. 49 and Plot No.38 were one and the same parcel of land;**
iii. **What was the effect of the failure on the part of the respondent to take out a notice to show cause before executing the decree made by the High Court which execution was being carried out after a lapse of more than one (1) year from the date it was issued; and**
iv. **whether the appellants had satisfied the conditions for review.**

On the 1st issue, the learned senior resident magistrate held that the High Court decree in its appellate jurisdiction could be executed by the lower court whose decree was appealed to that court. The learned senior resident magistrate found that the lower court was properly seized of the jurisdiction to execute the decree that was issued by the High Court in favour of the respondent. On the 2nd issue, the learned senior resident magistrate held that the proceedings in the lower court and the High Court concerned Plot No. 38 and as such in his order made on 30th January, 2009 that was under review, he should have referred to Plot No. 38 and not Plot No. 49. According to the learned

senior resident magistrate, this was an error apparent on the face of record of his order made on 30th January, 20009. The learned senior resident magistrate did not however determine the issue as to whether Plot No. 38 and Plot No. 49 was one and the same plot which is the issue that he had framed for determination. On the 3rd issue, the learned senior resident magistrate found that since the decree that was being executed was more than one year old, the respondent should have served a notice to show cause upon the appellants before applying for execution of the said decree. It is on the basis of the foregoing findings that the learned senior resident allowed the appellants' application for review.

4. What followed the review of the earlier decision by G.H.Oduor SRM by the same court was another application by the respondent brought by way of chamber summons dated 18th August, 2009 this time, under sections 1A, 3A, 34 63 (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order XXXIX rules 1 and 2 of the Civil Procedure Rules. In this application the respondent sought the following orders;

> **"an injunction restraining the appellants from dealing with Plot No. 49 pending the hearing and determination of the application, a declaration that Plot No. 49 in the name of the 3rd appellant arose from Plot No. 38 against which the decree issued by the High Court was to be executed, an order that the 3rd appellant do deliver to the respondent 25 acres of Plot No. 49 in execution of the decree that had been issued in favour of the respondent and an order that in the event that the 3rd respondent declines to execute the documents necessary for transferring the said portion of Plot No. 49 to the respondent, the executive officer of the court do execute the same**".

The respondent's application dated 18th August, 2009 came up for hearing *exparte* before Kimutai K.T. SRM on 20th August,2009 who granted prayer No. 2 thereof that sought injunction, pending the hearing of the application *inter partes* on 3rd September, 2009. On 3rd September, 2009, the matter was listed before G.H.Oduor SRM. At the request of the parties, the file was transferred to V.W.Wandera SPM for hearing. V.W.Wandera SPM extended the interim orders and fixed the matter for hearing on 24th September, 2009 before M.N.Gicheru,CM. On 24th September, 2009, M.N.Gicheru CM gave directions that the application would be treated as a suit and that parties were at liberty to give viva voce evidence. The matter was adjourned to 2nd November, 2009 for hearing. On 2nd November, 2009, the matter was adjourned once again by M.N.Gicheru CM to 23rd November, 2009. On 23rd November, 2009, the respondent filed yet another chamber summons application dated 20th November, 2009 brought under Order 1 rule 10 and Order XXXIX rules 1 and 2 of the Civil Procedure Rules and sections 1A, 1B, 3A, 51, and 63 (c) and (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya and section 143 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). The application sought the following reliefs;

> "**a temporary injunction to restrain one, Samwel Mochache Masare and Peter Mokebo Miencha from dealing with, disposing of or alienating land parcel Nos. Isoge/Kineni Block I/260,261,296 and 297 pending the hearing of the application, an order joining the said Samwel Mochache Masare and Peter Mokebo Miencha in the application as interested parties, an order consolidating the application with the earlier application dated 18th August, 2009, an order cancelling the registration of titles to land parcel Nos. Isoge/Kineni/Block I/260,261,296 and 297 that arose from land parcel No. Isoge/Kineni/Block I/49 and the registration of 25 acres thereof in the names of the respondent, the committal of the 3rd appellant to prison for a period of one month for obstructing and/or resisting execution of the decree of the court and that the court do give any other necessary directions and/or orders that the court may deem fit in the interest of justice".**

The respondent's advocate argued the application dated 20th November, 2009 *exparte* before M.N.Gacheru CM on 23rd November, 2009 and sought an interim injunction against Samwel Mochache Masare and Peter Mokebo Miencha, the 4th and 5th appellants pending the hearing of the application *inter partes*. In a ruling delivered on 24th November, 2009, M.N.Gacheru CM allowed the application in terms of prayers 1, 2, 3 and 4 thereof and fixed the application for hearing *inter partes* on 10th December, 2009. The respondent was ordered to serve the application upon Samwel Mochache Masare and Peter Mokebo Miencha, the 4th and 5th appellants who had been joined in the suit as interested parties (the 4th and 5th appellants are hereinafter referred to only as "**interested parties**"). The order made by M.N.Gicheru CM on 24th November, 2009 in addition to issuing interim injunction against the interested parties, added the said interested parties as parties to the suit and consolidated the application dated 20th November, 2009 with the application dated 18th September, 2009 that was filed earlier.

5. The respondent's application dated 18th August, 2009 was brought on the grounds that, the court had jurisdiction to determine all questions that may arise during the execution of a decree and that the 3rd appellant was ill bent on delaying and/or frustrating the execution of the decree herein and had refused and/or neglected to transfer to the respondent a portion of land measuring 25 acres as decreed by the court. The respondent contended that Plot No. 38 Kineni Ranch that was the subject of this suit had been registered in the name of the 2nd appellant as Plot No. 49 and as such it was necessary for the court to declare that the 2nd appellant holds 25 acres of the said Plot No. 49 in trust for the respondent. The respondent contended further that the 2nd appellant had threatened to dispose of Plot No.49 to third parties to the exclusion of the respondent a move that would subject the respondent to irreparable harm. In his affidavit sworn on 18th August, 2009 in support of the application, the respondent annexed a copy of an extract of the register for Plot No. 49 which confirmed that the property had been registered in the name of the 2nd appellant on 30th November, 2001 and that the 2nd appellant was issued with a title deed for the property on 29th January, 2002. The said extract of the register was issued by the district land registrar Nyamira, on 7th August, 2007 and it reflected the entries in the said register for Plot No. 49 as at that date. The respondent had also annexed to the said affidavit, survey computation list, proposed amendment map and registry index map for Nyansiongo/Isoge Keneni/ Block 1. The said proposed amendment map and registry index map are omitted from the record of appeal but I managed to trace them in the original application in the lower court file. The respondent also annexed a copy of a letter dated 1st May, 2009 from the chairman of Kineni Farmers' Co-operative Society which confirmed that Plot No. 49 was originally known as Plot No. 38 and was in the name of Simon Masare according to Keneni Farmers' co-operative society register. The said survey computation list, proposed amendment map, registry index map and the letter aforesaid from Keneni Farmers' co-operative society were produced by the respondent to prove that Plot No. 38 and Plot No. 49 were one and the same Plot with the former being the parcel number before registration and the later after registration under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). To this application, the appellants filed statements of grounds of opposition dated 21st August, 2009. No affidavit was filed by the appellants to controvert the factual averments in the respondent's affidavit in support of the application. I will revert to these grounds of opposition later in this judgment.

6. The respondent's application dated 20th November, 2009 that was consolidated with the application dated 18th September, 2009 that I have analyzed herein above was brought on the grounds that; the 2nd appellant had subdivided Plot No. 49 and purported to transfer the sub-divided portions to the interested parties with the intent of obstructing and/or denying the respondent the fruits of the judgment that had been entered in his favour, that the 2nd appellant had in defiance of the decree from the court purported to sell to the 2nd interested party the portion of Plot No. 49 that was in occupation of the respondent and which the respondent had occupied since the year 1989 and that the 2nd interested party had now threatened the respondent with eviction

from the said portion of Plot No. 49. The respondent contended that the said sub-division of Plot No. 49 was carried out while there was an injunction in force barring the 2nd appellant from dealing with Plot No. 49. The respondent contended further that the presence of the interested parties in the suit was in the circumstances necessary so that the court could fully and finally determine all issues in controversy between the parties. The respondent annexed to his affidavit sworn on 20th November, 2009 in support of this application, copies of; two (2) extracts of the register for Plot No. 49, a copy of a prohibitory order dated 24th September, 2009 that was presented for registration against the title of Plot No. 49 on 29th September, 2009, a copy of a letter dated 1st November, 2009 from the advocates for the 2nd interested party addressed to among others, the respondent demanding that he vacates land parcel No. Isoge Settlement/Block I/ 261 which is one of the sub-divisions of Plot No. 49 that had been transferred to the 2nd interested party by the 3rd appellant, certificates of official search for land parcel Nos. Kineni/Block I/260, 261, 296, 297, 298, 299, 300 and 301(hereinafter referred to only as "**Plot Nos. 260, 261, 296, 297, 298, 299, 300 and 301**") and a copy of the Mutation Form dated 22nd March, 2006 but which was received for registration on 1st October, 2009. The 2nd extract of the register for Plot No. 49 shows that the title was closed on 1st October, 2009 when the said parcel of land was sub-divided into Plot Nos. 260, 261, 296-301. The certificates of official search aforesaid show that Plot Nos. 261, 296, 298, 299, 300 and 301 are registered in the names of the 2nd appellant, while Plot No. 296 and Plot No. 297 are registered in the names of the 2nd and 1st interested parties respectively. The said parcels of land were registered in the names of the 2nd appellant and the 1st and 2nd interested parties on 1st October, 2009. As I had mentioned herein above, when the application dated 18th September, 2009 came up for hearing before Kimutai K.T SRM on 20th August, 2009 under certificate of urgency, the learned senior resident magistrate granted an order on the same day restraining the 2nd appellant from having any dealing with Plot No. 49 pending the hearing and determination of the said application *inter partes* on 3rd September, 2009. On 3rd September, 2009, the said order was extended to 24th November, 2009 on which day the orders were extended again by M.N.Gicheru CM to 2nd November, 2009. It is clear from the record that when the order of injunction was issued on 20th August, 2009 restraining the 2nd appellant from having any dealing with Plot No. 49 the appellants' advocate who is now also acting for the interested parties was present in court. The same applies to the subsequent extensions of the said order. The 2nd appellant was therefore aware as at 1st October, 2009 when she purported to sub-divide Plot No. 49 and to transfer portions thereof to herself and to the interested parties that there was a court order in force against that course of action. The respondent's application dated 20th November, 2009 was therefore brought to deal with the situation that arose when the 2nd appellant in defiance of the said order of injunction proceeded to sub-divide Plot No. 49 and to transfer portions thereof to the interested parties while the respondent's application dated 18th September, 2009 was pending hearing and determination. In response to the respondent's application dated 20th November, 2009, the appellants and the interested parties who were represented by the same advocate filed grounds of opposition dated 27th November, 2009. No affidavit was filed to controvert the averments of facts that were set out in the affidavit of the respondent in support of the said application. The foregoing is a summary of events leading to the hearing of the respondent's applications dated 18th September, 2009 and 20th November, 2009 by M.N.Gicheru CM and her ruling of 4th March, 2010 which is the subject of this appeal.

7. When the respondent's applications aforesaid came up for hearing before M.N.Gicheru CM on 10th December, 2009, Mr. Bosire appeared for the respondent while Mr. Oguttu Mboya appeared for the appellants and the interested parties. Mr.Bosire relying on the affidavits of the respondent in support of the two applications retraced the history of the dispute between the respondent and the appellants prior to the filing of this suit in 1989, the dismissal of the suit, the appeal to the High Court, the overturning of the order dismissing the suit and entry of judgment in favour of the respondent by the High Court, the change in the parcel number of the land that was the subject of

the suit from Plot No. 38 to Plot No. 49 while the appeal to the High Court by the respondent was pending, the registration of Plot No.49 in the name of the 2nd appellant, the application dated 16th January, 2009 by the respondent to enforce the decree, the granting of the said application by G.H.Oduor SRM on 30th January, 2009, the review of G.H.Oduor's order of 30th January, 2009 by the same court and the dismissal of the respondents application for execution dated 16th January, 2009. The respondent's advocate submitted before the learned Chief Magistrate that the respondent's application dated 16th January, 2009 was dismissed by G.H.Oduor SRM because the respondent had failed to serve the appellants with a notice to show cause prior to making the application for execution and that the land in dispute was Plot No. 38 and not Plot No. 49. Counsel submitted that the respondent's application dated 16th January, 2009 was not heard on merit. Counsel submitted that since the court had found the execution process that the respondent had initiated to be irregular, the respondent was at liberty to initiate the process afresh as the decree of the court in favour of the respondent had remained unexecuted. Counsel submitted that after instituting the application dated 18th January, 2009 which was afresh application for execution of the decree issued in favour of the respondent, the 3rd appellant proceeded to sub-divide Plot No. 49 and to transfer two portions thereof to the interested parties while retaining the remaining portions in her name. This exercise according to counsel was carried out while there was an injunction order in force prohibiting such action. Counsel submitted that on the basis of the Court of Appeal decision in the case of **Njuguna-vs-Wanyoike (2004) eKLR** the court had the power to revoke the sub-division of Plot No. 49 that was carried out by the 2nd respondent in defiance of the court injunction and the transfers of the portions thereof that were made in favour of the 2nd appellant and the interested parties. Counsel submitted that it was only fair that the orders sought in the respondent's applications be allowed so that the respondent may enjoy the fruits of judgment that was made in his favour.

8. As I had mentioned earlier in this judgment, the appellants and the interested parties only filed grounds of opposition in response to the respondents' applications dated 18th August, 2009 and 20th November, 2009. In summary, the appellants and the interested parties opposed the respondent's two applications on the following main grounds, namely, that;

i. **the issue as to whether or not Plot No. 49 and Plot No. 38 were one and the same had been heard and determined by G.H.Oduor SRM in his ruling of 6th August, 2009 and as such the same was res judicata;**
ii. **the declarations sought by the respondent's in the applications could only be granted in a substantive suit and not otherwise;**
iii. **the injunction sought by the respondent was being sought in vacuum as no injunction was sought in the main suit and that there was no suit subsisting as concerns Plot No. 49 on the basis of which the injunction sought could issue;**
iv. **there was no judgment capable of being executed;**
v. **the court lacked jurisdiction to entertain the application;**
vi. **the applications were an attempt to review the judgment of the High Court made in Kisii HCCA No. 33 of 1999 through the back door;**
vii. **the applications raised substantive issues that had not been dealt with in this suit;**
viii. **the orders seeking the cancellation of the titles arising from the subdivision of Plot No. 49 would amount to rectification of the register and as such could not issue on an application.**

In his response to Mr. Bosire's submission, Mr.Mboya on behalf of the appellants and the interested parties relied on the said grounds of opposition. Mr.Mboya submitted that the learned Chief Magistrate had no jurisdiction to declare that Plot No. 49 and Plot No. 38 were one and the same as the High Court judgment that the respondent sought to execute related only to Plot No. 38 and to drag Plot No. 49 into it would amount to correcting a judgment of superior court. Counsel submittedm further that the only way the respondent could introduce Plot No. 49 into this suit was by way of amendment of pleadings and not otherwise. In support of this submission counsel relied

on the court of appeal case of, **Provincial Insurance Company of East Africa Ltd.-vs-Mordekai Mwanga Nandwa, Civil Appeal No.179 of 1995 (unreported)**. Counsel submitted that parties are bound by their pleadings. Counsel submitted further that the respondent was attempting to execute a decree which was more than one year old without serving the appellants with a notice to show cause contrary to the then Order XXI rule 18 (1) of the Civil Procedure Rules. Counsel submitted that to allow the execution to proceed without the issuance of such notice would be contrary to the finding of G.H.Oduor SRM in his ruling made on 6th August, 2009 and will amount to the court sitting on an appeal from a decision of a court of concurrent jurisdiction. Counsel submitted further that the issue of Plot No. 38 and Plot No.49 being one and the same was laid to rest by the ruling of G.H.Oduor SRM made on 6th August, 2009 and as such was resjudicata and could not be re-opened for determination. Counsel relied on the cases of, **Daniel Kirui & Another-vs-Monica W.Macharia, Court of Appeal Civil Appeal No. 261 of 2002 (unreported), Mburu Kinyua-vs-Gachini Tuti (1978) KLR 69 and Okello and Another-vs-Osonga (1988) KLR 198** to support his submission on this issue of res judicata. Counsel submitted that to allow the application by the respondent would be tantamount to setting aside the decision of G.H.Oduor SRM which is a decision of a court of concurrent jurisdiction. Mr.Mboya submitted further that the cancellation of titles to the parcels of land that resulted from the sub-division of Plot No. 49 could only be done under section 143 of the Registered Land Act, Cap.300, Laws of Kenya (now repealed) and only on a substantive suit and not on an application. The orders that were sought by the respondent for the cancellations of the said titles in the application were therefore misconceived. Counsel accused the respondent of bringing a plethora of applications with the aim of abusing the process of the court. On the allegation that the 2nd applicant was obstructing execution, counsel submitted that there was no evidence of such obstruction and that in any event execution had not even commenced and as such there was no process to obstruct. Counsel in conclusion submitted that the respondent's applications were for dismissal.

9. In a reserved ruling that was delivered on 4th March, 2010, the learned Chief Magistrate allowed the respondent's applications in part and ordered the appellants and the Land Registrar to put the respondent in possession of the 25 acres of land in accordance with the judgment of the High Court at the risk of being committed to prison for up to 30 days in default of compliance that would amount to resisting execution of a lawful court order. In the ruling, the learned chief magistrate analyzed the arguments that were put forward by the parties and held that nothing could stand on the way of execution of a High Court judgment save for an order of the Court of Appeal. The learned chief magistrate held that any order of a subordinate court or action of a government officer like the land registrar which purports to hinder or bar the execution of a High Court judgment is a nullity and is of no effect. The learned chief magistrate held further that a notice to show cause was not necessary before the execution of the decree herein due to the special circumstances of the respondent in relation to the suit property and also in view of the provisions of order XXI rule 18 (2) of the Civil Procedure Rules.

9. The appeal to this court:

The appellants and the interested parties were aggrieved by the said decision of the learned chief magistrate and have appealed to this court. The learned chief magistrate's decision has been challenged by the appellants and interested parties on the

following nine (9) grounds;

i. **that the learned chief magistrate had erred in entertaining the respondent's application while the issues raised therein were directly and substantially raised before G.H.Oduor SRM and were fully and finally determined ;**
ii. **that the learned chief magistrate erred in not holding that the respondent's applications were res-judicata,**
iii. **that the learned chief magistrate erred in holding that the respondent did not need to issue a notice to show cause before applying for execution;**
iv. **that the learned chief magistrate arrogated to himself the jurisdiction of the court of appeal**

by reviewing and/or amending the judgment of the High Court that made in Kisii HCCA No. 33 of 1999;

v. **that the learned chief magistrate sanctioned an illegal and irregular execution;**
vi. **the learned chief magistrate erred in disregarding and/or ignoring the evidence and submissions by the appellants without assigning any valid reason thereby occasioning a miscarriage of justice;**
vii. **the learned chief magistrate misapprehended and/or misconceived the issues that were before him for determination and thus arrived at an erroneous conclusion on the same;**
viii. **that the ruling and /or decision of the learned chief magistrate was contrary to law and the weight of the submissions on record;**

ix. **that the ruling of the learned chief magistrate was contrary to the provisions of Order XX rule 4 of the Civil Procedure Rules.**

10. On 13th December, 2012, the parties agreed to argue this appeal by way of written submissions. The appellants and the interested parties filed their written submissions on 20th February, 2013 while the respondent filed his submissions in reply on 13th March, 2013. The advocates for the parties highlighted the said submissions on 14th March, 2013. I have perused the pleadings that were filed in the lower court, the proceedings, the two applications that were argued before the learned chief magistrate, the grounds of opposition that were put forward by the appellants, the submissions that were made by the advocates for both parties and the ruling of the learned chief magistrate that is the subject of this appeal. I have also considered the submissions filed herein by the advocates for both parties and the authorities cited. Section 78 of the civil procedure act, cap. 21 Laws of Kenya and Order 42 rule 32 of the Civil Procedure Rules, 2010, gives this court the same powers as the trial court while considering an appeal from the lower court. This court has the power to re-examine the pleadings and evaluate the evidence and material that was produced in the lower court and to pass any decree or make any order which ought to have been made by the lower court or to make such other or further decree or order as the justice of the matter may require. I set out herein below my views on the various grounds of appeal raised by the appellants and the interested parties against the decision of the learned chief magistrate. I will deal with grounds of appeal serially but where convenient to do so, I will combine some grounds and deal with them together;

Consideration of the appellant's grounds of appeal:

11. The 1st, 2nd and 3rd grounds of appeal:

I am in agreement with the submission by the respondent's advocates that the respondent's application dated 16th January, 2009 that sought the execution of the judgment made in his favour by the High Court in Kisii HCCA No. 33 of 1999 was not heard on merit. As I have observed at the beginning of this judgment, the application came up for hearing before G.H.Oduor SRM for hearing *exparte* on 30th January, 2009 and the learned senior resident magistrate allowed the same not on merit but on account of the fact that it was unopposed. See page 37 of the record of appeal. It follows therefore that the respondent could not be precluded from bringing another application for execution. The application that was heard on merit was the appellants' application dated 23rd April, 2009 which sought a review of the said *exparte* order that had been given by G.H.Oduor on 30th January, 2009. I agree that the issues that were raised by the parties in the said application dated 23rd April, 2009 and which were determined by G.H.Oduor SRM would be res judicata if they were to be raised once again before the learned chief magistrate for determination. That is however different from arguing that the learned chief magistrate had no jurisdiction to entertain another application for execution by the respondent. G.H.Oduor SRM in his ruling made on 6th August, 2009 found the execution process that had been commenced by the respondent to be irregular. He dismissed the irregular application and made appropriate consequential orders to restore the parties to the status quo prior to the said application. I am in agreement with the submission by the respondent's advocates that so long as the decree made in favour of the respondent remained unexecuted, nothing could bar the respondent from making another application for execution

unless the said decree was set aside or varied. If the initial application for execution by the respondent was found to be irregular and set aside, that did not stop the respondent from making a regular application for execution. The doctrine of res judicata under section 7 of the civil procedure act Cap. 21 Laws of Kenya is predicated upon the similarity of the subject matter in issue in a suit and not the suit perse. The respondent's applications dated 18th August, 2009 and 20th November, 2009 were not therefore res judicata in themselves as no similar applications by the respondent had been heard and determined on merit. As stated above though, some of the issues raised in the said applications could be res judicata if they had been raised in the appellants' application for review dated 23rd April, 2009 and finally determined. While considering the appellants' application for review dated 23rd April, 2009, some of the issues that the learned senior resident magistrate G.H.Oduor framed for determination were; whether Plot No. 49 and Plot No. 38 were one and the same and the effect of the failure on the part of the respondent to serve the appellant's with a notice to show cause. On the first issue, the learned senior resident magistrate held that the proceedings in the lower court and the High Court concerned Plot No. 38 and not Plot No. 49 and as such he had made an error in allowing execution against Plot No. 49 as the evidence of Plot No. 38 having changed to Plot No. 49 was not well presented to court. This in my view means that G.H.Oduor SRM did not determine this issue with finality. G.H.Oduor SRM did not hold as submitted by the appellants' advocates that Plot No. 38 and Plot No. 49 were separate and distinct. His determination on this issue could not therefore bar the respondent from moving the court again with evidence showing that Plot No. 38 and Plot No.49 were one and the same. On the second issue, the learned senior resident magistrate held that failure to serve a notice to show cause against the appellants before commencing execution was in the circumstances contrary to order XXI rule 18 of the then Civil Procedure Rules. This issue was therefore determined conclusively and could not be re-opened for litigation again. Due to the forgoing, I am not in agreement with the submission by the appellants' advocates that the issue of whether Plot No. 38 and Plot No. 49 were one and the same had been conclusively determined before G.H.Oduor SRM and as such could not be re-litigated before the learned chief magistrate. On the other hand, I accept the appellant's submission that the issue as to whether or not the respondent should have served a notice to show cause against the appellants' before commencing execution was determined with finality by G.H.Oduor SRM and as such was res judicata. The learned chief magistrate therefore fell into error when he reversed G.H.Oduor SRM's decision on that issue and substituted it by his own decision that no such notice was necessary. The issue was res judicata and the learned chief magistrate was statutorily barred from determining the same. The learned chief magistrate could not also reverse the decision of G.H.Oduor SRM as he was neither sitting on appeal against G.H.Oduor's ruling nor did she have the jurisdiction to do so. The decision of the Court of Appeal in, **Okello & Another –vs-Osonga (1988) KLR 198,** cited by the appellant is clear on this point. Due to the foregoing, grounds 1, 2 and 3 of appeal are allowed in part.

12. The 4th ground of appeal:

I have not come across anywhere in the ruling of the learned chief magistrate in which he attempted and/or purported to review, rescind and/or amend the decision of the High Court in Kisii HCCA No. 33 of 1999. The High Court had entered judgment for the respondent by making a declaration that the appellants held 25 acres of land in trust for him and that the appellants should transfer the said 25 acres to the respondent. See the decree of the High Court at page 82 of the record of appeal. In his ruling, the learned chief magistrate simply ordered the appellants and the district land registrar to put the respondent in possession of the said 25 acres of land as had been ordered by the High Court. See

the order of the chief magistrate at page 3 of the record of appeal. The respondent's application dated 18th August, 2009 was brought under among others section 34 of the civil procedure act, Cap. 21, Laws of Kenya. That section gave the learned chief magistrate the power to determine all issues arising at the execution stage. One of the issues that presented itself for determination before the learned chief magistrate was whether the parcel number for the parcel of land that was in dispute between the respondent and the appellants in the lower court and the High Court had changed after the registration of the said plot into the name of the 2nd appellant from No. 38 to No. 49. If on the evidence presented before the learned chief magistrate he was satisfied that indeed that was the case that could not amount to amending the High Court judgment which in any event did not direct execution to be levied against

any particular parcel of land. I am not in agreement with the submission by the appellants' advocates that an issue such as a change in the parcel number of a property in dispute in a suit in the course of proceedings if discovered at the execution stage would call for the amendment of the primary pleadings. I am of the view that these are the issues which the court executing the decree should deal with under section 34 of the civil procedure act. The case of, **Provincial Insurance Company of East Africa Limited –vs- Mordekai Mwanga Nandwa Court of Appeal Civil Apeal No. 179 of 1995 (unreported)** cited by the appellants and the interested parties is clearly distinguishable from the facts herein. In the circumstances, I find no merit in this ground of appeal.

13. The 5th, 6th and 7th grounds of appeal:

The appellant abandoned the 5th ground of appeal. I will not therefore consider the same. On ground 6 of appeal, the learned chief magistrate has been accused of disregarding the evidence and submissions by the appellants and the interested parties without assigning any reason. I see no merit on this ground of appeal. As I had mentioned earlier in this judgment, the appellants did not file any replying affidavit in response to the respondent's two applications. The averments of facts that were contained in the respondent's affidavits in support of the applications were therefore not controverted. The appellants' did not therefore place any evidence before the chief magistrate by way of affidavit or otherwise which the learned chief magistrate can be said to have disregarded or ignored. On submissions, the record of the learned chief magistrate is clear that he considered the submissions of both parties before arriving at his decision and the fact that he ruled in favour of the respondent means that he did not agree with the appellants' and the interested parties' submission. He needed not to have stated so expressly. On ground 7 of appeal, I don't think that the learned chief magistrate misapprehended and/or misconceived the issues that were before him for determination. The learned chief magistrate considered the applications that were before him, the affidavits in support thereof, and the grounds of opposition filed in opposition thereto and the submissions of counsel. He then proceeded to frame the issues for determination which according to him were only two, namely, whether or not the judgment that was made in favour of the respondent should be executed and whether it was necessary to serve a notice to show cause before such execution was levied. The parties raised many issues but according to the learned chief magistrate all those issues could be summarized to only the two issues that I have mentioned. I am in agreement that the learned chief magistrate should have pronounced herself on the many issues that were raised before him. However, since the parties neither framed nor agreed on issues for determination the learned chief magistrate was at liberty to frame issues from the pleadings and submissions of the parties. This is how he came up with these two issues which according to him were what the applications were all about. I am not persuaded that by failing to rule on each and every issue raised before him the learned chief magistrate either occasioned a miscarriage of justice or arrived at an erroneous conclusion as submitted by the appellants. In my view the learned chief magistrate could only be faulted for failing to consider and to rule on all the prayers that were sought by the respondent in the two applications that were before him. This court will at the conclusion of this judgment consider whether there were some orders which the learned chief magistrate ought to have given to give effect to his decision and which he failed to give.

14. The **8th ground of appeal;**

From the comments that I have already made above on how the learned chief magistrate analyzed the applications that were before him and the response to it by the appellants and the interested parties, I am of the view that this ground of appeal has no basis. I am not persuaded by the appellants and the interested parties that the decision of the learned chief magistrate was against the weight of submissions that were made before him. In his ruling, the learned chief magistrate stated that he considered the applications, the affidavits in support together with the annextures, the grounds of opposition, the submissions of both counsels and the authorities cited carefully before he arrived at the decision that he arrived at. See page 64 of the record of appeal. I don't think that failure on the part of the learned chief magistrate to pronounce himself expressly on each submission made and authority cited can be interpreted to mean that he never properly analyzed the said submissions and authorities.

15. The 9th ground of appeal:

As I have already stated above, the learned chief magistrate did consider the applications that were before him, the grounds of opposition filed in response thereto and submissions made before framing the issues for determination and proceeding to rule on the same. In the circumstances, the ruling by the learned chief magistrate did not offend the provisions of order XX rule 4 of the old civil procedure rules as submitted by the appellant's advocates.

Conclusion:

12. From my consideration of the grounds of appeal put forward by the appellant, I have come to the conclusion that the appellant's appeal succeeds in part. The learned chief magistrate was correct in ordering the appellants and the district land registrar to put the respondent in possession of the 25 acres of land as decreed in favour of the respondent by the High Court and in default the party occasioning such default to be committed to prison for 30 days. My own assessment of the material that was placed before the learned chief magistrate leaves no doubt that Plot No. 38 and Plot No. 49 are one and the same plot. The appellants and the interested parties did not put any evidence before the learned chief magistrate to the contrary. The 2nd appellant also came out as a person who was prepared to use whatever means that was available to defeat the execution of the judgment that was issued herein in favour of the respondent and had no qualms at all defying a lawful order of the court that restrained her from dealing with Plot No. 49. As I had mentioned at the beginning of this judgment, the subdivision of Plot No. 49 and the transfer of portions thereof to the 2nd appellant and the interested parties was carried out in defiance of a court order restraining the 2nd appellant from having any dealing with the said parcel of land. On the authority of, **Njuguna-vs-Wanyoike & Another (2004) eKLR** that was cited by the respondent before the learned chief magistrate and before this court, the sub-division of Plot No. 49 and the transfer of portions thereof to the 2nd appellant and interested parties that were carried out in breach of an order of injunction issued by the lower court were liable to be set aside so that Plot No. 49 reverts to its original status. The learned chief magistrate should have proceeded to make these orders that were sought by the respondent so as facilitate the execution of the decree of the High Court. I am not in agreement with the submission by the appellants and the interested parties advocates that such orders could not be given by the learned chief magistrate because it would amount to rectification of the register which could only be done on a substantive suit. It is worth noting that the appellants themselves had in their application dated 23rd April, 2009 that was heard by G.H.Oduor SRM sought orders for the cancellation of the sub-division that the respondent had carried out on Plot No. 49 and the nullification and cancellation of the resultant titles and in fact G.H.Oduor SRM in his decision made on 6th August, 2009 granted the said prayers in favour of theappellants. I don't see therefore why the said orders would be available to the appellants on an application and not to the respondent.

13. On the other hand, the learned chief magistrate erred by ruling that the execution could proceed without the necessity of the respondent serving a notice to show cause upon the appellants. This was contrary to the decision made earlier by G.H.Oduor SRM that was a court of concurrent jurisdiction and whose decision, the learned chief magistrate had no jurisdiction to reverse. Due to the foregoing, I hereby set aside the ruling and decision of the learned chief magistrate dated 4th march, 2010 and in substitute therefor, I make the following orders;

I. **The respondent shall only proceed with the execution of the decree issued in his favour in Kisii HCCA No. 33 of 1999 after service upon the appellants of a notice to show cause under Order 22 rule 18 of the Civil Procedure Rules and the hearing and determination of the same in compliance with the earlier decision made on 6th August, 2009 by G.H.Oduor SRM which has not been varied or set aside by a court of competent jurisdiction;**

II. **It is upon failure by the appellants to show cause why the said decree should not be executed that the 2nd appellant will be obliged to transfer to the respondent 25 acres of the said parcel of land known as Isoge/Kineni/Block I/49 in satisfaction of the said decree;**

III. **I declare that land parcel No.Isoge/Kineni/Block I/49 that was registered in the name of the 2nd appellant arose from Plot No.38 Kineni Ranch against which the decree that was issued in Kisii HCCA No. 33 of 1999 was to be executed;**

IV. **I declare that sub-division of land parcel No. Isoge/Kineni/Block I/49 was carried out with the intention of obstructing and/or resisting the execution of a lawful court decree and in defiance of a lawful court order;**

V. **The registration of land title Nos. Isoge/Kineni/Block I/260, 261,296, 297,298,299,300 and 301 which came into existence after the said illegal sub-division of land parcel No. Isoge/Kineni/Block I/49 is hereby cancelled and the register of the said parcel of land Isoge/Kineni/Block I/49 restored to the state in which it was prior to the closure thereof on 1st October, 2009;**

VI. **Since none of the parties has totally won or lost in this appeal, each party shall bear its own costs.**

Dated, signed and delivered at KISII this 21st day of June, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Ochwangi for Appellants

Mr. Bosire for the Respondent

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

E&LCA.NO.44 OF 2010