



**Muchiri & another v Maina & another (Environment and Land Appeal  
24 of 2019) [2022] KEELC 3057 (KLR) (23 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3057 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL 24 OF 2019**

**JM MUTUNGI, J**

**MAY 23, 2022**

**BETWEEN**

**GEORGE KINYANJUI MUCHIRI ..... 1<sup>ST</sup> APPELLANT**

**JULIUS KIBE MUCHIRI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GLADYS AGNES NJERI MAINA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MUCHIRI GACHUHI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This appeal is against the Ruling delivered by Hon K Bidali Chief Magistrate on 18<sup>th</sup> September 2019 in Naivasha CMC ELC No.397 of 2018. The ruling arose from the 1<sup>st</sup> Respondent's (plaintiff in the lower court) application dated 2<sup>nd</sup> November 2018. The Respondent having obtained a decree in his favour had vide the Notice of Motion by way of execution sought to have land parcel number LOC.16/Gatura/456 registered in favour of John Muchiri Gachuhi the 2<sup>nd</sup> Respondent (defendant in the lower court) attached and sold by public auction to recover the decretal sum of Kshs2,285,682.00 as at the time of the application.
2. The 1<sup>st</sup> Respondent's notice of motion expressed to be brought under Order 22 Rule 6 and 48 of the [Civil Procedure Rules](#), sections 1A,1B and 3 of the [Civil Procedure Act](#) prayed for the following orders.
  1. That an order of prohibition be and is hereby issued prohibiting/restraining any registration, transfer, charge or any further dealings on land parcel number LOC.16/Gatura456 by sale, gift or otherwise until the further orders of this court.
  2. That land parcel number LOC.16/Gatura/456 be advertised and sold by public auction to recover the total outstanding decretal sum of



Kshs2,285,682.00 as at 5<sup>th</sup> October 2018 together with further accrued interest until payment in full.

3. That the defendant/judgment debtor be ordered to grant free and unlimited access to the subject property for the purpose of inspection and valuation.
  4. That costs of valuation, auctioneer's fees and any other related expenses be paid from the proceeds of the sale herein.
  5. That costs of this application be provided for.
3. The appellants were by consent following their application dated 9<sup>th</sup> July 2018 joined as interested parties in the lower court suit on 14<sup>th</sup> November 2018. The appellants (interested parties) filed a replying affidavit in opposition to the 1<sup>st</sup> respondent's application in the lower court for execution of the decree by way of attachment and sale of land parcel LOC.16/Gatura/456 claiming they had interest in the said property and that they had lodged a caution against the title to safeguard their said interest. The 2<sup>nd</sup> respondent (defendant) against whom the application dated 2<sup>nd</sup> November 2018 was made did not file any response to the application, and/or participate in the proceedings. The appellants/interested parties were his sons and their claim essentially was through the 2<sup>nd</sup> respondent as their father.
4. The learned trial magistrate upon hearing the application rendered the impugned ruling holding that the objection by the appellants (interested parties) to the 1<sup>st</sup> respondent's application lacked merit. The learned trial magistrate held that the interested parties had not showed that the defendant held the land the subject of execution in trust for them. Besides the trial magistrate found that there was no proper objection to execution before him and accordingly allowed the 1<sup>st</sup> Respondent's (plaintiff) application dated 2<sup>nd</sup> November 2018 and condemned the interested parties to pay the costs of the application.
5. This ruling by the learned trial magistrate provoked the present appeal and the appellants by their memorandum of appeal dated set out 12 grounds of appeal which I reproduce hereunder: -
1. The learned magistrate misdirected himself in allowing the notice of motion dated 2<sup>nd</sup> November 2018 when the same was based on misrepresentation of facts.
  2. The learned magistrate misdirect himself in law and fact in failing to address the issue of forgery that was raised by the appellant.
  3. That learned magistrate misdirected himself in law and fact in failing to interrogate the existence of two searches that were at variance.
  4. The learned magistrate misdirected himself in law and fact when he failed to appreciate the existence of an earlier suit in Thika ELC 78 of 2014 where the subject matter is the same.
  5. The learned magistrate misdirected himself in law and fact when addressed himself on facts that were not contained in the Notice of Motion.
  6. The learned magistrate misdirected himself in law and fact by entertaining facts that were not contained in the Notice of Motion but in the plaintiff's submission thus denying the appellant an opportunity of addressing them by way of an affidavit.



7. The learned magistrate erred in law and fact by allowing the Notice of Motion while the whole was made without making the fullest possible disclosures of all material fact relevant.
  8. The learned magistrate erred in law and fact by failing to appreciate that the respondent did not produce evidence of service of the decree to the defendant has required in law
  9. The learned magistrate erred in law and fact in failing to fully appreciate that the appellant would suffer prejudice by the ruling in the other mentioned cases.
  10. The learned magistrate erred in law and fact in failing to balance the competing rights between the appellants and the respondents.
  11. The learned magistrate misinterpreted the law on the subject matter.
6. The appeal was canvassed by the parties by way of written submissions. Mr Kabaka advocate appearing on behalf of the appellants requested and was allowed by the court to orally highlight the submissions filed on behalf of the appellants. Mr. Wainaina advocate appearing for the 1<sup>st</sup> respondent opted to entirely rely on the submissions filed on behalf of the 1<sup>st</sup> respondent and did not do any oral highlighting of the same.
7. The grounds of appeal as laid by the appellants broadly fault the learned trial magistrate’s evaluation, analysis and findings of fact and the application and interpretation of the law. Consequently, it is not practical to isolate and consider the grounds of appeal separately and distinctly, I will therefore in the determination of the appeal consider the grounds collectively having regard to the facts that had been placed before the learned trial magistrate and the applicable law in the circumstances.
8. This court in the case of *Christopher Ngeno -vs- Eunice Langat* (2021) eKLR guided by the principle established in the court of Appeal case of *Selle -vs- Associated Motor Boat Company Ltd* (1968) EA 123 respecting the role of an appellate court while considering an appeal as in the instant matter held thus: -
- “ this court being the first appellate court is under a duty and indeed is obligated to re-evaluate the evidence adduced before the trial court in order to determine whether the determination made by the trial court as justified. The court is not bound by the finding of fact and law reached by the trial court and is at liberty to make its own findings and/or reach different conclusion upon evaluation and reconsideration of the evidence”
9. In this appeal the following facts are undisputed: -
- i. That the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent had on 18<sup>th</sup> September 2014 entered into a written sale agreement where the 1<sup>st</sup> Respondent was to purchase a portion of one acre out of land parcel No.LOC.16/Gatura/456 registered in the 2<sup>nd</sup> Respondent’s name for the consideration of Kshs.1,300,000/=.
  - ii. That the agreement was not completed and the 1<sup>st</sup> respondent instituted a suit against the 2<sup>nd</sup> respondent for recovery of the purchase amount paid and damages for breach of contract and the 1<sup>st</sup> respondent obtained a default judgment against the 2<sup>nd</sup> respondent in the sum of Kshs1,425.000/= plus interest and costs.
  - iii. That following entry of judgment the appellants who are the sons of the 2<sup>nd</sup> respondent applied to be joined as interested parties in the suit and were joined by consent on 14<sup>th</sup> November 2018.



- iv. The 1<sup>st</sup> Respondent as decree holder filed an application in the lower court dated 2<sup>nd</sup> November 2018 seeking to attach the 2<sup>nd</sup> Respondent's land parcel No. LOC16/Gatura/456.
  - v. The 2<sup>nd</sup> respondent did not oppose the application but the appellants who had been joined as interested parties filed a replying affidavit in opposition to the application for execution by the 1<sup>st</sup> respondent.
10. The thrust of the appellants submissions as highlighted by counsel was that the learned trial magistrate failed to consider that the 1<sup>st</sup> respondent in applying for execution had not disclosed that the parcel of land subject of execution had a caution lodged against the title by the appellants claiming licensee interest. The appellants contended the certificate of official search annexed by the respondent in support of the application for execution could not have been genuine since it never showed there was a caution registered against the title while it was evident that the caution placed by the appellants against the title on 25<sup>th</sup> July 2014 was still subsisting and had not been lifted. The appellants further submitted that the 2<sup>nd</sup> respondent had filed a suit at Thika court being CMC ELC No.78 of 2014 where he sought the lifting of the caution and that the suit was still pending determination. The appellants thus submitted the learned trial magistrate allowed the 1<sup>st</sup> respondent's application dated 2<sup>nd</sup> November 2018 without appreciating there was still a caution registered against the 2<sup>nd</sup> respondent's land title and relied on the search furnished by the 1<sup>st</sup> respondent which indicated the property was unencumbered which was not the case.
  11. The appellants submitted that the learned trial magistrate ought in view of the pending case, Thika CMC ELC 78 of 2014 that related to the subject land, and the inconsistent copies of search exhibited, not to have granted the orders of execution sought in the 2<sup>nd</sup> respondent's application as it was clear the subject land had an encumbrance that needed to be sorted out to enable execution to proceed. The appellants argued that the learned trial magistrate erred in not finding the present suit was by virtue of the suit pending before the Thika CM's court involving the same subject matter subjudice and therefore offended Section 6 of the *Civil Procedure Act*. In support of the submission that the suit was subjudice the appellants placed reliance on the case of *Barclays Bank of Kenya Ltd -vs- Elizabeth Agidza & 2 others* (2012) eKLR.
  12. The 1<sup>st</sup> respondent opposed the appeal broadly on three points. Firstly, that the application dated 2<sup>nd</sup> November 2018 was not opposed by the 2<sup>nd</sup> respondent (defendant in the lower court) who had been duly served. Secondly, the 1<sup>st</sup> respondent contended there was no valid objection to the execution process by the appellants before the lower court. And, thirdly, there was no demonstration and/or evidence that a trust existed in favour of the appellants over land parcel LOC.16/Gatura/456.
  13. It is not disputed that the 2<sup>nd</sup> respondent was served with the application dated 2<sup>nd</sup> November 2018 and never opposed the same. The decree was against the 2<sup>nd</sup> Respondent and the property LOC.16/Gatura/456 against which execution proceedings was initiated registered in the 2<sup>nd</sup> respondent's name.
  14. The appellants were joined as interested parties to the suit after judgment had been entered against the 2<sup>nd</sup> respondent and in favour of the 1<sup>st</sup> respondent. The appellants upon being joined as interested parties, and after the 1<sup>st</sup> respondent applied for attachment of land parcel LOC.16/Gatura/456 and for sale of the same by auction to recover the decretal sum, did not file any formal objection proceedings to attachment as provided under Order 22 Rule 51 of the Civil Procedure Rules but rather filed a replying affidavit to oppose the 1<sup>st</sup> Respondent's application. The 1<sup>st</sup> Respondent's application was grounded under Order 22 Rules 6 and 48 of the Civil Procedure Rules and without doubt related to execution of a decree by way of attachment of immovable property (see Rule 48(1)). Once an application for execution has been initiated any person with an objection to the execution by way of attachment of



the identified property, is required under Rule 51 of Order 22 to give notice of objection and to file an application to establish the interest he/she has in the property. Order 22 Rule 51 provides: -

51.

Objection to attachment [Order 22, rule 51.]

- (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.
  - (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
  - (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.
15. The appellants it is evident, did not comply with these clear provisions of the law and there was therefore no valid objection to the attachment of the subject property before the lower court and the learned trial magistrate properly held there was no valid objection before the court. The 1<sup>st</sup> respondent in urging the court to dismiss the appeal on this ground placed reliance on the court of Appeal case of *Stanley Ng'ethe Kinyanjui -vs- Tony Ketter & 5 others* (2015) eKLR where the court reiterated the need for parties to follow and adhere to rules of procedure. In the case the court stated: -
- “While fully cognizant of the court’s primary duty to do justice untrammelled by procedural technicalities, we are also aware that litigation is a game with clear rules of engagement. It is not open to parties to pursue and for courts to follow, a path of circumventing the rules that are imposed to aid in the attainment of justice. The (oxygen principle) cannot save applications that are incompetent.”
16. Having regard to the replying affidavit filed by the appellants in opposition to the 1<sup>st</sup> respondents application for attachment of the 2<sup>nd</sup> respondent’s immovable property, I readily agree with the learned trial magistrate that it did not constitute a valid objection to the attachment as provided in the law.
17. The appellants submitted at some considerable length respecting the suit pending in Thika ELC 78 of 2014 arguing that the same was the earlier suit and was on the same subject matter. I have perused the copy of the plaint filed before the Thika court and noted that though the suit related to land parcel LOC16/Gatura/456, the plaintiff (the 2<sup>nd</sup> respondent herein) was seeking to have the caution registered against the title by the appellants, who were the defendants in the Thika suit, lifted. In the suit before the Naivasha court, the 1<sup>st</sup> respondent who was the plaintiff, claimed from the 2<sup>nd</sup> respondent, the defendant in the suit the sum of Kshs.1,425,000/= together with interest and costs. In the two suits before the lower courts, it is my view the issues were not similar and/or the subject the same. The doctrine of subjudice as provided under section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya in my view would have no application.
18. Although I have held there was no valid objection to attachment before the learned trial magistrate and that should have been sufficient to dispose of the appeal, I nonetheless deem it necessary to consider what in actual sense was the foundation of the appellants presumed objection to the attachment. The appellants admittedly are the sons of the 2<sup>nd</sup> respondent and they claim entitlement to land parcel



LOC.16/GATURA/456 as licensees and on that account had placed a caution against the title on 25<sup>th</sup> July 2014 claiming “licensee interest”.

19. In the Black’s Law Dictionary, 10<sup>th</sup> Edition “Licensee” is defined thus:-

“someone who has permission to enter or use another’s premises but only for one’s own purposes and not for the occupier’s benefit”

20. The fulcrum of the appellants objection before the lower court and indeed in the present appeal is that they had an interest in the parcel of land attached by the 1<sup>st</sup> respondent in execution of the decree and that they had registered a caution over the land to safeguard their said interest which the learned trial magistrate ignored and thereby reached an erroneous decision. The appellants have argued that the trial magistrate failed to appreciate that there were two copies of searches from the lands office presented before the court that were in conflict. The search presented by the 1<sup>st</sup> respondent showed there was no caution while the one presented by the appellants showed the caution registered in 2014 was still in force. The learned trial magistrate indeed in his ruling noted the search certificates were conflicting but nonetheless held that the appellants had not validly objected to the attachment of the suit land and besides they had not demonstrated the 2<sup>nd</sup> respondent held the parcel of land in trust for them to invite protection under the law. The learned trial magistrate cited sections 25 and 28 of the Land Registration Act, 2012 and the cases of Karanja Kimani -vs- Isaac Mwangi Kimani (2018) eKLR and Salesio M’Gitonga -vs- M’Ithara & 3 others (2015) eKLR and held that the appellants had failed to prove that the 2<sup>nd</sup> respondent held the subject land in trust for them.

21. The 1<sup>st</sup> respondent in her submission supported the learned trial magistrate’s holding relating to whether or not the 2<sup>nd</sup> respondent held the subject land in trust for the appellants. The 1<sup>st</sup> respondent in support of her submissions relied on the cases of Edward Kipkosgei & Another -vs- Charles K Kosgei & Another (2014) eKLR; Silvia Wanjiku Kiman & Another -vs- Kimani Muiruri Machugu & 2 others (2020) eKLR; and Jemutai Tanui -vs- Juliana Jeptep Keny & 5 others (2013) eKLR where the courts had held that the rights of a registered proprietor are not affected by the fact that a proprietor has children as there is no legal provision that parents hold land in a general trust for their children. Where trust is alleged, the same must be proved through evidence.

22. In the instant appeal the appellants are staking claim to land parcel LOC16/Gatura/456 which they claim their father had inherited from their grandfather and therefore held the land in trust for his immediate family. In the caution the appellants lodged against the title they claim “licensee interest”. As per the definition of Licensee it denotes one who has the permission of the legal owner to enter and/or occupy premises. The grantor of a license can revoke and/or terminate the same and such license would terminate if the grantor of the license ceases to be the legal owner of the premises. A licensee cannot therefore confer on a grantee a higher interest than a right to enter and/or occupy during the lifespan of the license. If it is revoked, terminated and/or the grantor relinquishes the right of ownership of the premises, the licensee cease to have any further interest in the subject premises. The process of execution can properly divest a grantor of a license title to a property the subject of a license and in such event the license is extinguished.

23. The rights and interest conferred to a proprietor of land by registration under sections 24, 25 and 26 of the Land Registration Act, 2012 are absolute and indefeasible and would only be subject to the overriding interests set out under section 28 of the Land Registration Act, 2012. The appellants in the present matter were claiming a trust over the subject property and in my understanding that was merely because they were sons of the 2<sup>nd</sup> respondent and would have been entitled as beneficiaries to a share of the land through inheritance. As Munyao, J stated in the cases of Edward Kipsogei (supra) and



Jemutai Tanui (supra) children have no automatic trust in land registered in the name of their parents. Such parents hold such land absolutely and can deal with the same in the manner provided in the law subject only to any overriding interests under section 28 of the Land Registration Act, 2012.

24. In my view any interest the appellants may have had in the subject property could only have accrued after the death of their father and not before. The court of Appeal in the case of Muriuki Marigi - vs- Richard Marigi Muriuki & 2 others (1997) eKLR affirmed that children's rights over their father's estate could only accrue after the death of their father. In the case the court stated:-

“It is, however, noteworthy that the Law of Succession Act, (Cap 160 Laws of Kenya) does recognize the rights of wives and children over their husband's or father's estate as the case may be, those rights accrue after death otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise----- the appellant as the registered owner of the suit property is still alive. His property is not yet available for subdivision and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will”.

25. The appellants in placing the caution against the title of their father's land were perhaps seeking to prevent him from dealing with the property which he had apparently done as he had sold the parcel to several persons including the 1<sup>st</sup> respondent. The placing of the caution may perhaps have been ill advised and I doubt it was sustainable as licensee interest ought not to be a registrable interest. The trust claim by the appellants was clearly not established and the trial magistrate was entitled to reject the same.

26. Having carefully considered the appeal and having evaluated the evidence and material before the learned trial magistrate I find no merit in the appeal. I dismiss the same with costs to the 1<sup>st</sup> respondent.

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23<sup>RD</sup> DAY OF MAY 2022.**

**J M MUTUNGI**

**JUDGE**

