



**Waswa v Samoei & another (Environment & Land Case 158 of 2017)
[2022] KEELC 13451 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 158 OF 2017
FO NYAGAKA, J
OCTOBER 11, 2022**

BETWEEN

ROBERT JUMA WASWA PLAINTIFF

AND

KIMAIYO ARAP SAMOEI 1ST DEFENDANT

EMMANUEL SAMOEI KIPCHUMBA 2ND DEFENDANT

RULING

1. This is a Ruling on whether or not the warrant of arrest issued herein against the 2nd judgment-debtor should be lifted and the said judgment-debtor be relieved of the obligations arising from the Judgment of this Court in relation to transfer of the subject land parcel herein. In essence the 2nd judgment-debtor wishes the judgment herein to be executed severally, rather than jointly.
2. There is no dispute that the issue before me is a post-judgment one: it arises out of the process of execution of the judgment of this Court. Thus, it is appropriate to summarize the background of the issue, as follows. The Plaintiff who is now the decree holder sued the Defendants who are the judgment debtors for an order of specific performance requiring the delivery of vacant possession by the Defendants and the transfer of Plot No. Kitale Municipality Block 1/Lessos/1558 measuring approximately 50ft by 100ft. He made an alternative prayer for a refund of the purchase price at the current market rates and general damages for breach of contract, together with costs of the suit.
3. The suit proceeded to full trial and was determined on merits. In this Ruling, I will not repeat the evidence that was adduced herein on behalf of the parties but there are salient features that will not glossed over or kept away from reliance herein as it goes to show the chain of events or as Section 6 of the *Evidence Act* provides, they form part of the same transaction. PW1, the Plaintiff testified, and it was not denied, that he entered into a written transaction for the purchase of the subject parcel of land herein.



4. At the centre of the agreement of sale of the suit land was the 2nd Defendant who allegedly entered into it on behalf of the 1st Defendant. The 1st Defendant who was said to be his father was the registered owner of the subject parcel of land and gave the 2nd Defendant authority to sell it. It also was the evidence of the Plaintiff, and was supported by P. Exhibit 3 - a certificate of official search of the suit land - that on June 17, 2014 the property was registered in favour of the 1st Defendant and on September 11, 2014 a title deed was issued in his favour. Thereafter, on October 27, 2016 a caution was placed on the title in favour of three persons claiming to be beneficiaries of interest in the parcel. Judgment having been entered for the Plaintiff against the Defendants jointly as summarized in the next paragraph and there having been no appeal preferred against it, the issues are now settled.
5. By its Judgment, delivered on February 26, 2021, this Court ordered for delivery of vacant possession by the Defendants and subsequent transfer of Plot No. Kitale Municipality Block 1/Lessos/1558. Further the Defendants were required to pay the Plaintiff jointly a sum of Kshs. 40,000/= as general damages and the cautioners to remove the caution that had been placed on the parcel of land to facilitate the immediate transfer thereof to the Plaintiff. But in regard to costs of the suit, the Defendants were also required to jointly and severally bear them. Thus, as it plainly reads, apart from costs of the suit, the rest of the reliefs were to be satisfied jointly.
6. On March 18, 2021 the Judgment-debtor fixed the matter on May 4, 2021 for assessment of party and party costs. When the taxation came up before the Deputy Registrar on the material date, Ruling was reserved for May 25, 2021. On May 31, 2021 the decree-holder fixed the matter for June 8, 2021 for the hearing of a Notice to Show Cause why the judgment debtors should not be committed to civil jail. When the same came up on the material date it was extended to another date.
7. The record also bears that on 08/07/2021 the Judgment-Creditor filed an Application dated 07/07/2021 seeking a vesting order and to have the Deputy Registrar of this Court to execute on behalf of the 1st Defendant the transfer documents in relation to the subject parcel of land, in favour of the decree-holder. On July 27, 2021 when the case was mentioned before the Deputy Registrar for showing cause, the 2nd Judgment debtor was granted up to 10/8/2021 to pay Kshs 126,910/= plus Kshs 1,400/= by 10/08/2021. By the said date not all the sum was paid and the Court fixed the matter for September 7, 2021.
8. It appears that the decree-holder had concentrated on executing the decree against the 2nd Defendant and may have been satisfied with the progress of the payment of the decretal sums due that he made but not with the reluctance of the transfer of the subject parcel of land to him. Therefore, he fixed the Application dated July 7, 2021 for hearing on September 20, 2021. This Court would later be informed, on that date that the judgment-debtor had partially complied with the decree of the Court but the issue of handling over the title for transfer was still outstanding. It was on the said date that learned counsel for the judgment-debtors informed the Court that the issue of settlement of the matter would require more time as it involved contacting a financial institution.
9. Following this revelation, learned counsel called upon the Court to summon the branch manager of the financial institution, namely, Kenya Commercial Bank, Kitale, to explain why it should not release the title for execution of the decree of the Court. The bank manager sent an officer under him, by name, Paul Bii, the Credit Manager - who testified on oath that the title was charged to the bank but the loan debtor had defaulted and the loan stood at Kshs. 50,000,000/=. He explained that that was the reason why the bank could not comply with the orders of the Court to release the title. Upon that revelation, the Court required the personal attendance of the judgment-debtors to explain the unfolding events.



10. Learned counsel for the judgment-debtors attended Court on a date soon after and pleaded with the Court not to issue warrants of arrest against his clients but instead to give him time to ensure he availed them. What transpired thereafter was a bit baffling. One, learned counsel availed only the 2nd Judgment debtor.
11. Interestingly, on February 8, 2022 learned counsel held brief for the one who appeared for the judgment-debtors all along. He did not give reason for the absence of counsel who was duly instructed in the matter. However, he informed the Court that the 1st judgment debtor was 98 years old and could not attend Court without facilitation hence “there was need for facilitation for him to attend court.” He explained that the 2nd judgment-debtor was in Nairobi and could not attend at short notice. The Court was not satisfied with the reasons given for non-attendance and issued warrants of arrest against both judgment debtors. The warrants were to be effected by the Officer Commanding Station, Kitale Police Station.
12. On June 8, 2022 learned counsel for the decree-holder informed the Court that the 1st judgment-debtor had since passed away. At the same time, the 2nd judgment-debtor, against whom also a warrant of arrest had been issued in the course of the proceedings pleaded with the Court to discharge and free him of any further obligation as the title in issue was not registered in his name and it was not him who charged it to the bank. He stated, through counsel, that he had control of neither the bank nor the 1st judgment debtor who had since died. He moved the Court to issue an order for him to be set free and that the decree-holder be compelled to take a citation against the estate of the deceased judgment-debtor.
13. Learned counsel for the decree-holder submitted that it was mischievous on the part of the judgment debtors to knowingly charge the property on August 21, 2021, well after judgment. He submitted that the judgment was joint and several against both Defendants hence both should be held responsible to the full execution of the decree. His view was that the 2nd Defendant cannot be exonerated and he should be held in contempt of Court and be committed to civil jail for six months.

Issue, Analysis and Determination

14. I have considered the issue before me and the submissions by both counsel. I have also considered the law applicable. I am of the view that the following are the issues for determination:
 - a. Whether the 2nd Judgment Debtor can be exonerated from the obligations of the judgment herein.
 - b. What the decree-holder should do in light of a charge being placed on the subject land.
 - c. Who to bear the costs of the Application?
15. I will begin with the analysis of the first issue. The first issue is whether the 2nd Judgment-debtor should be exonerated from further performance of the decree of this Court. The basis for that said argument is that the 2nd Defendant, being faced with the execution of the decree herein, satisfied the monetary requirements thereof. He contended that it was impossible for him to perform the other limb of the judgment since, first, he was not the registered owner of the parcel of land in question, second, he could not compel the other judgment debtor to perform an obligation not directly under his control, third, the parcel of land was already given as collateral and charged with the bank to wit Kenya Commercial Bank, Kitale Branch, and fourth, the 1st judgment-debtor was now deceased and before the satisfaction of the loan he guaranteed.
16. As noted above, the oral application was opposed strongly. It was argued against the 2nd judgment-debtor’s proposition that the judgment herein was jointly and severally against the Defendants. It



therefore goes that the obligations of the two defendants cannot be severed and the 2nd Defendant has as much obligation to satisfy the decree as the 1st Defendant, now deceased.

17. To determine the issue, it should be borne in mind that the judgment herein was neither appealed from nor reviewed. Thus, as it stands, it is neither overturned nor varied. The reliefs that the Court granted for the Plaintiff/Decree-holder were clear and have been summarized at paragraph 5 of this Ruling and they call not for reiteration at this point. It is not in dispute that part thereof, being the monetary aspects have been satisfied.
18. It appears that it is imperative to distil the meaning of the terms “jointly” and “severally”. From the plain reading of the words, the grammatical meaning of the term joint means that there is more than one party and they, whether two or several up to infinity have the equal and unsevered obligation to meet. One of them may bear the entire obligation on behalf of all others or each of them may do so. In such circumstances, it is immaterial as to whom of the parties liable the decree-holder elects to execute the decree against, as long as it is satisfied, and only to the extent that is due to him/her and not more. It is not upon the judgment-debtor to determine against whom between or among them the decree has to be executed.
19. Where in the course of executing against one or all of the judgment-debtors he recovers more than is decreed, which will be illegal, it is obligatory on him/her to reimburse the additional sum. And it goes without saying that the reimbursement should be made to the judgment-debtors jointly as the decree was joint. In support of this view, I am persuaded by my brother Odunga J., as he then was, in *Republic vs PS in Charge of Internal Security Ex parte Joshua Paul* [2013] eKLR. It was held inter alia: -

“After considering past decisions on the issue I Stated: Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”
20. I am also encouraged to hold the same view by the holding of Ringera J. in *Kenya Airways Limited - vs- Mwangi Gichohi* which my brother Odunga cited with approval. He stated as follows:

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”
21. It is therefore not difficult to decipher the meaning of the term “severally” when used in a Judgment or Order of the Court. It means that where there are more than one party who is liable in such a finding, each of them is liable to the extent they are found to be, and no more. So much so that where execution is levied against one of them to the extent he/she is liable and it does not satisfy the decree, the decree-holder cannot execute against that judgment debtor more than as he was liable. If he does so, it would be illegal. Any excess benefit acquired from the process of execution against such a party shall and has



to be reimbursed to him and the judgment-debtor shall be at liberty to seek appropriate remedy against the decree holder for illegal execution.

22. In the current case, this Court shall use easiest of the tools of constitutional interpretation, that is to say, textualism, to find out the nature of the unexecuted part of the decree herein. Textualism relies on the plain meaning of a legal document to arrive at the interpretation thereof. One of the great legal scholars of the United States of America who finally rose to serve as a Justice in the Supreme Court of the USA, in his work, Hon. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 23-38 (Amy Gutmann ed., 1997), rendered the meaning of textualism as to mean that lays emphasis on how the terms in a Constitution would be understood by the people at the time they ratified the document, and also as analyzed in the context in which they appear.
23. I will now look at the yet to be settled relief. In the judgment delivered on February 28, 2022, this Court gave the first relief as follows, “The Defendants herein shall give immediate vacant possession and subsequently transfer within reasonable period...the plot measuring 50 x 100 feet from Plot No. Kitale Municipality Block 1/Lessos/1558...” In my understanding, the learned Judge analyzed all the evidence before him and was satisfied and clear that both the vacant possession and transfer of the 50 ft x 100 ft plot was to be transferred to the Decree holder by both defendants. That was to be a joint exercise irrespective of whom the title was registered in. In any event, it was the 2nd judgment holder who entered into the agreement of sale for and on behalf of the 1st judgment debtor with his full authority and the same was duly ratified by him. The 2nd judgment debtor cannot run away from the judgment. He is under as much obligation as the now deceased judgment-debtor to ensure that the Plot is transferred to the decree-holder.

(b) – What the decree-holder should do in light of a charge being placed on the subject land

24. Having determined that the two judgment-debtors were jointly liable to satisfy the unexecuted part of the decree, the next question for me to determine is, what the decree-holder should do in light of the obtaining circumstances that the title was given as security for the a loan secured by, as it appears from the document supplied to Court by learned counsel for the 2nd judgment-debtor. In my view, learned counsel for or the decree-holder ought to move the Court formally on whether or not the charge placed on the subject parcel of land in this matter, while there was a valid judgment to the effect that it be transferred to the decree-holder, is or is not valid. Having filed the formal application, the decree-holder will serve the parties herein and the bank that is alleged to have charged the property so that all the parties to be affected by any orders this Court may issue will have an opportunity to be heard.

(c) What orders to issue and who to bear the costs of the Application?

25. The upshot of the application that was before me is that it is lost. The warrants issued against the 2nd judgment debtor shall remain in force. In the interest of justice, and in order to secure his release in case he is arrested, pending the filing of the formal application as directed by this Court above, the said judgment-debtor shall be required to deposit security in Court, equivalent to the sum being the consideration of the agreement that he duly signed regarding the sale of the subject suit land, and thereafter bind himself to be attending Court in person as and when required to.
26. On the issue of costs, it is clear that the prayers by the 2nd judgment-debtor herein have not been granted. The application by the said party is for dismissal and is hereby so dismissed. Since costs follow the event, the 2nd judgment-debtor shall bear the costs of the application.
27. This matter shall be mentioned on 24/11/2022 to confirm compliance. The judgment-debtor to also attend Court then.



DATED, SIGNED AND DELIVERED AT KITALE THIS 11TH DAY OF OCTOBER, 2022.

HON. DR. IUR NYAGAKA,

JUDGE, ELC, KITALE

