



REPUBLIC OF KENYA



**Gateri & another v Gathura & another (Civil Appeal E741 of 2021)  
[2024] KEHC 2120 (KLR) (Civ) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2120 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E741 OF 2021**

**AN ONGERI, J**

**MARCH 1, 2024**

**BETWEEN**

**PETER MUKIRI GATERI ..... 1<sup>ST</sup> APPELLANT**

**PEMUGA AUTO SPARES LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WINFRED W. GATHURA ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN NGINJIRI TAITI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. Kagoni E. M (PM)  
in Milimani CMCC No. 3377 of 2018 delivered on 5/11/2021)*

**JUDGMENT**

1. The trial court delivered a ruling on 5/11/2021 in which the court stated that where a court grants the main relief and an alternative relief, a litigant has election on which prayer to enforce.
2. The court was interpreting a ruling delivered on 28/09/2020 as follows;

“That judgment on admission be and is hereby entered in favour of the plaintiffs against the 2<sup>nd</sup> defendant.

An order be and is hereby directed to the 2<sup>nd</sup> defendant herein to cause to the transfer to the 2<sup>nd</sup> plaintiff a portion of land measuring half an acre from all that parcel of land known as Thika Municipality Block 13/701.



In the alternative, to prayer 1 above, judgment on admission be and is hereby entered against the 2<sup>nd</sup> defendant in favour of the 1<sup>st</sup> plaintiff in the sum of ksh.4,800,000 together with interest at court rates from 11<sup>th</sup> September 2013.

In the exercise of my discretion under Section 27 of the Civil Procedure Act, the plaintiff shall have the costs of the suit and the application to be borne by the 2<sup>nd</sup> defendant”.

3. The appellant is aggrieved with the said interpretation and has filed an appeal on the following grounds;
  - i. The learned magistrate exceeded his jurisdiction by entering an application dated 19<sup>th</sup> March, 2021 which appellants never filed in that court.
  - ii. The learned magistrate erred in not following the doctrine of precedent as formulated by the Court of Appeal in *Dobia v. National & Grindlays Bank* (1970) EA 175, requiring subordinate courts to follow decisions of the higher courts;
  - iii. The learned magistrate ignored the decision of the Court of Appeal in *Independent Electoral And Boundaries Commission & Another – v – Stephen Mutinda Mule & 3 others* (2014) eKLR, binding on him, which holds that the pleadings bind not only the parties to a suit, but also the court itself.
  - iv. The learned magistrate erred in basing his decision on an application which he himself chose in contravention of the rule in *Provincial Insurance Company of East Africa v Nandwa* (1995-1998) 2 EACA 288 which bars a court from deciding on issues other than those placed before it by the parties.
  - v. If, which is denied, the application dated 19<sup>th</sup> March, 2021 exist in fact, and, is identical to the appellant’s application dated 12<sup>th</sup> August, 2020 the learned magistrate wholly misunderstood it.
  - vi. The ruling delivered on 5.11.2021 and the proceedings giving rise to it are a nullity because of the rule in *Ole Nganai v Arap Boo* (1983) KLR 233 which declares that the effect of an order which is nebulous, indefinite and uncertain is to render it impossible for a sensible order to be drawn up and consequently the subsequent order and proceedings are a nullity.
  - vii. If, which is denied, the application dated 19<sup>th</sup> March, 2021 exist in fact, and, is identical to the appellant’s application dated 12<sup>th</sup> August, 2020, the learned magistrate ignored the fact that it raised the following issues for determination:
    - a. What are the respective rights of the parties under the decree which was issued on 25<sup>th</sup> September, 2020?
    - b. Does this honourable court have jurisdiction to enforce the alternative order whilst the defendant(appellants) are still complying with the order for the transfer of half an acre to the plaintiffs?
    - c. Did the plaintiffs(respondents)obtain warrants of attachment through deception of this honourable court?
    - d. Are the execution proceedings taking the form of attachment of the 2<sup>nd</sup> defendant’s (appellant’s) stock in trade in respect of the decree of the court?
    - e. Is the purported enforcement of the alternative order payer available to the plaintiffs(respondents) without an application to court for the transfer?



- f. Did the court determine in the decree issued on 25<sup>th</sup> September, 2020 the value of half an acre from all that parcel of land known as LR No. Thika Municipality/Block 13/701?
  - g. Did the plaintiffs (respondents) deceive the court when they applied for execution of the alternative order.
  - h. Are the defendants (appellants) entitled to liquidate the costs by installments?
  - i. If the answer to (e) is in the affirmative, what are the consequences?
  - j. Are the defendants (appellants) entitled to the orders which they have sought?
- viii. The learned magistrate wholly overlooked the appellants' submissions dated 4<sup>th</sup> September 2021.
  - ix. The learned magistrate in his ruling, manifested bias against the appellant and favoured the respondents.
  - x. The learned magistrate erred in basing his decision on only one of the grounds on which the appellants relied in the application dated 12<sup>th</sup> August, 2021.
  - xi. The learned magistrate ignored the persuasive decision of the High Court of Tanzania in *Attilio v Mbowe* in which the Chief Justice Georges held, following the practice in England, that the court supervises the enforcement of the order for specific performance and further that the court must grant leave to execute the alternative remedy.
  - xii. The learned magistrate ignored the fact that the order for the transfer of half an acre to the plaintiffs was in the nature of an order for specific performance of a contract.
  - xiii. The learned magistrate ignored the fact that the court supervises the transfer of a property to a party where an order for transfer/specific performance has been made and that leave for execution of an alternative remedy must be sought from the court, and the respondents had not sought such leave.
  - xiv. The learned magistrate erred in not holding that the warrants of attachment issued on the application of the respondents were so issued after they deceived the court.
  - xv. The learned magistrate erred in not holding that he lacked jurisdiction to enforce an illegal warrant.
  - xvi. The learned magistrate erred in ignoring that it was the respondents who requested for the transfer of half an acre of LR no. Thika Municipality/Block 13/701.
  - xvii. The learned magistrate misapprehended the nature of the law in jurisprudence.
  - xviii. The learned magistrate misunderstood the nature of a decree.
  - xix. The learned magistrate erred in making a contract for the parties.
  - xx. The learned magistrate erred in not holding that the respondents were not honest in applying for execution of the alternative remedy.
4. The parties filed written submissions as follows; the appellant submitted that the learned magistrate having allowed the main relief had no mandate to award the alternative reliefs and therefore the ruling of the court on 5/11/2021 allowing execution of the alternative relief was a nullity.



5. In support the appellant cited the court of appeal in *Olive Mwibaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR where the learned Judges of the Court of Appeal, Mwilu J. Mohammed & Otieno-Odek JJ.A., while faced with the same situation held at paragraph 68 that:

“The next issue for our determination is whether the trial court erred in granting both the main and alternative reliefs sought in the Notice of Motion dated 7th December 2015. It is not in dispute that the trial court granted the main and alternative prayers in the Motion. The decision of this Court in *Alex Wainaina t/a John Commercial Agencies -v- Manson Mwangi Wanjibin* (2015) eKLR, is good law. This Court held there that “where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both cannot be granted in blanket form.” The 1st respondent has not demonstrated to our satisfaction or at all that the principle in *Alex Wainaina* (supra) is bad law. We are inclined to follow the same and we hereby make a finding that in the Ruling delivered on 18th December 2015. the trial court erred in granting both the main and alternative prayers in the Motion.”

6. The appellant submitted that they were in the process of complying with the main relief granted by the court and it cannot therefore be that the respondents wielded the powers to elect which of the orders of the court to comply with as this would be of great prejudice to the appellant who was keen on specifically performing the verbal agreement that they had with the respondents.
7. The appellant argued that the learned magistrate having allowed the main relief had no mandate to award the alternative reliefs and therefore the ruling of the court was a nullity. The execution of the warrants was premised on a nullity and cannot therefore stand.
8. The respondent alternatively submitted that following the admission of the appellants, the respondents filed an application dated 31/1/2020 seeking for judgement on admission. The import then is that the respondent’s reliefs that were prayed for in the plaint were allowed. There was no prayer the transfer of the property by the respondent and therefore the same was not a prayer that the respondent could enforce.
9. The respondent submitted that the appellant filed an application dated 12/8/2021 seeking to set aside warrants of attachment which they claimed were erroneous since they were couched in terms of prayer No. 3 which was an alternative prayer. It was the respondents agreed with the sentiments of the lower court that warrants of attachment cannot be illegal simply because a party elected the part of the ruling which favors it.
10. The issues for determination in this appeal are as follows;
- i. Whether the trial court exceeded its mandate in hearing the application dated 19/3/2021.
  - ii. Whether the respondent ought to have enforced the main relief.
11. On the issue as to whether the trial court exceeded its mandate, I find that there was an application seeking setting aside of the warrants of attachment. The trial court was properly seized of the matter.
12. On the issue as to whether the respondent ought to have enforced the main relief, I find that the trial court erred in granting both the main and alternative prayers in the Motion.
13. I find that the Trial court having granted the main prayer, it did not have the option of granting the alternative prayer.



14. In the case of *Alex Wainaina t/a John Commercial Agencies -v- Janson Mwangi Wanjibin* (2015) eKLR, the Court held as follows;

“Where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so”.

15. In the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, the Court of Appeal said as follows;

“It is our finding that the trial court having allowed the main relief which we have already affirmed above had no mandate to award the alternative reliefs. These were therefore granted in error, therefore stand vitiated and are accordingly set aside”.

16. I allow the appeal and set aside the order granting the alternative prayer since the main prayer was granted.

17. Each party to bear its own costs of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH, 2024.**

**A. N. ONGERI**

**JUDGE**

