



**Kenya Power & Lighting Co. Ltd v Gichure (Suing on His Own Capacity as the Administrator of the Estate of the Late Julius Gichure Wanjiru) (Civil Appeal E038 of 2023) [2024] KEHC 6609 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6609 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E038 OF 2023  
GL NZIOKA, J  
JUNE 4, 2024**

**BETWEEN**

**KENYA POWER & LIGHTING CO. LTD ..... APPELLANT**

**AND**

**SIMON KARUMI GICHURE (SUING ON HIS OWN CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JULIUS GICHURE WANJIRU) ..... RESPONDENT**

*(Being an appeal against the ruling of Hon. Eunice Kelly Principal Magistrate (PM) delivered on 29<sup>th</sup> September 2023 in Naivasha Chief Magistrate Civil Case No. 452 of 2015)*

**JUDGMENT**

1. By a memorandum of appeal dated 20<sup>th</sup> April 2023, the appellant is appealing against the decisions of the trial court rendered vide CMCC No. 452 of 2018 on 28<sup>th</sup> March 2023.
2. The appeal is based on the grounds:
  - a. That the learned Magistrate erred in law and in fact by finding the applicant's application dated 26<sup>th</sup> September, 2022 as unmerited and dismissing it with costs.
  - b. That the learned Magistrate erred in law and in fact by failing to find that the respondent ought to have drawn a decree from the judgment of the appellate court in Naivasha HCCA No. E005 of 2020: Kenya Power & Lighting Co. Ltd vs Simon Karumi Gichure (suing on his own behalf and as the administrator of the estate of the late Julius Gichure Wanjiru) and seek execution of the said decree from the Appellate Court.
  - c. That the learned Magistrate erred in law and in fact by failing to find that it was, unlawful, irregular and unprocedural for the Respondent to extract and execute a decree from the trial



court whereas the Appellate Court had set aside the trial court judgment and varied the awards previously issued.

- d. That the learned Magistrate erred in law and in fact by failing to find that the Respondent ought to have filed a bill of costs at the Appellate Court in Naivasha HCCA No. E005 of 2020: Kenya Power & Lighting Co. Ltd -vs- Simon Karumi Gichure (Suing on his own behalf and as the administrator of the estate of the late Julius Gichure Wanjiru) before claiming any costs after the Appellate Court's judgment.
  - e. That the learned Magistrate erred in law and in fact by failing to find that the Respondent ought to have drawn and served a draft decree for confirmation by the Appellant and/or the Appellant's advocates on record.
  - f. That the learned Magistrate erred in law and in fact by failing to find that the decree relied upon in the execution proceedings leading to proclamation of the Appellant's motor vehicles was erroneous and irregular.
  - g. That the learned Magistrate erred in law and in fact by failing to find that the execution proceedings based on an erroneous and irregular decree were null and void.
  - h. That the learned Magistrate erred in law and in fact by failing to find that execution by attachment and sale of the Appellant's 16 motor vehicles critical to the Appellant's operations as a public parastatal was unwarranted and a draconian step when a substantial deposit is held as security in a joint bank account operated by advocates for both parties.
  - i. That the learned Magistrate erred in law and in fact by failing to find that costs ordered by the Appellate Court was subject to 50% liability contribution determined by the Appellate Court.
  - j. That the learned magistrate erred in law and in fact by failing to find that no interest had been awarded by the Appellate Court after setting aside the trial court's judgment thus none should be claimed by the Respondent.
  - k. That the learned magistrate erred in law and in fact by failing to be guided by the statutory provisions relied upon in the application dated 26<sup>th</sup> eptember, 2022 and submitted on.
  - l. That the learned magistrate erred in law and in fact by failing to be guided by the doctrine of stare decisis.
  - m. That the learned magistrate erred in law and in fact by failing to consider and sufficiently appreciate the Appellant's written submissions filed on 18<sup>th</sup> November, 2022.
3. As a result the appellant is seeking for the following orders:
- a. That this appeal against the ruling and order of Honourable Eunice Kelly, Principal Magistrate delivered on 28<sup>th</sup> March, 2023 in Naivasha CMCC No. 452 of 2018 be allowed.
  - b. That the ruling and order of Honourable Eunice Kelly, Principal Magistrate delivered on 28<sup>th</sup> March, 2023 in Naivasha CMCC No. 452 of 2018 be set aside and the application dated 26<sup>th</sup> September, 2022 be allowed as prayed.
  - c. That the costs of this appeal be awarded to the Appellant.
4. The appeal was canvassed vide filing of submissions. On 1<sup>st</sup> December 2023, the appellant filed submission dated 12<sup>th</sup> October 2022 and while the respondent filed submission is dated 13<sup>th</sup> December 2023.



5. The appellant submitted that, the judgment delivered on 19<sup>th</sup> July, 2020 vide High Court Civil Appeal No. E005 of 2020, varied the trial court's judgment by apportioning liability at 50:50% and reducing total damages to Kshs. 1,266,625. That, in the circumstances the respondent was mandated to draw a draft decree from the appellate's court judgment.
6. Further, the respondent was mandated to serve the draft decree upon the appellant's advocate for approval, in accordance with Order 21 Rule 8(2) and (5) of the Civil Procedure Rules, 2010, but the respondent's advocate failed to do so.
7. The appellant relied on the case of; *Timwood Products Limited vs Karachiwalla (Nairobi) Limited* [2016] eKLR where the court stated that, Order 21 Rule 8 of the Civil Procedure Rules, 2010 oblige the plaintiff/decree holder in the lower court to prepare a draft decree, send it over to the defendant/judgment debtor's advocate for approval That, in absence of such an approval the decree is irregular.
8. Further, reliance was placed on the case of; *Edward Kamau & another vs Hannah Mukui Gichuki & another* [2015] eKLR where the court stated that, decrees and orders of the lower court must be prepared in compliance with Order 21 Rule 8 of the Civil Procedure Rules. That where applicants are not given an opportunity to approve the decree, and there is no evidence that the trial Magistrate approved the decree at the time of her decision, the decree is irregular.
9. That the respondent did not serve the appellant's Advocate with a breakdown of tabulated costs together with supporting documents for approval in accordance with the mandatory provisions of Order 21 Rule 9A and 9B of the Civil Procedure Rules.
10. The appellant argued that, the warrants of attachment and sale did not conform to the appellate court's judgment apportioning liability at 50:50%, therefore the costs of the suit should be subjected to 50% liability contribution. That Order 21 Rule 9D of the Civil Procedure Rules, 2010 mandates the court to be guided by the Advocates Remuneration Order in awarding costs.
11. The appellant cited Schedule 7A note 3 of the Advocates Remuneration (Amendment) Order 2014 that states:

“Where success in a suit is divided, the scale may be distributed having regard to partial success on either side.”
12. The appellant argued that, taking into account that the damages awarded by the appellate court are Kshs. 1,266,625, the party to party costs under the Advocates Remuneration Order would be Kshs. 120,000 and when subjected to 50% contribution the respondent will be entitled to Kshs. 60,000. Therefore, in the circumstances, the costs in the warrant are excessive, unjustified and unproved.
13. Further, the appellant court did not make any orders on interest and therefore the respondent's claim for Kshs. 527,124 indicated in the warrants is actuated by unjust enrichment and malice towards the appellant.
14. That, the warrants of attachment and sale issued by Direct “O” Auctioneers and intended execution process are irregular and illegal ab initio as the appellant was never served with the draft decree for confirmation.
15. Further, there is substantial security of Kshs. 3,287,036 deposited in a joint interest earning account of which the respondent's advocate is a co-signatory and therefore the intended execution by way of selling the appellant's i6 motor vehicles is draconian. That, the respondent had the option of making a formal application to the court for the release of a portion of the security equivalent to the judgment



- award under Order 23 Rule 2 of the Civil Procedure Rules which provides for attachment of bank deposits.
16. Lastly, the warrant of attachment and sale was based on a decree of the trial court dated 20th June, 2019, which decree is unknown to the appellant and is irregular having been issued before the trial court's judgment delivered on 17<sup>th</sup> November, 2020.
  17. However, the respondent submitted that the court lacked jurisdiction to consider the appeal as the appellant failed to seek leave at the lower court before filing the appeal. That there is no automatic right of appeal for order made under Order 22 Rule 7, 8 and 9D, Order 22 Rule 17 and Order 51 Rule 1.
  18. The respondent cited Order 21 Rule 8 (2) and (5) that provides for the drafting of a decree by a party and submitting it for approval by the other party, and argued that the use of the word "may" meant that it was not mandatory for the appellant to be served with the decree.
  19. Further, prior to execution, the respondent's advocate served the appellant with a letter tabulating her costs.
  20. That despite the security being deposited in a joint interest earning account, no money had been released to him after the lapse of the 45-day period of stay of execution. That, it would have been prudent for the appellant's advocate to release the undisputed amount but they failed to necessitating execution.
  21. The respondent argued that in the circumstance, the decision of the trial Magistrate was proper and asked the court to dismiss the appeal with costs and direct the appellant to pay the auctioneer's charges.
  22. At the conclusion of the arguments by the respective parties and in considering the appeal, I recognize that the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
  23. The Court of Appeal thus observed: -

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."
  24. In that regard, I have considered the impugned ruling by the learned trial Magistrate Hon. E. Kelly (PM) and the submissions by the parties in the trial court and I note the trial court clearly and correctly stated that it could not interpret the orders of the appellate court due to want of jurisdiction.



25. The learned trial Magistrate thus stated as follows: -
- “I have taken the liberty to go through the decision of the lower court and the High Court on record and narrowed the issues for determination in this application as interpretation and application of the learned Judge’s order in the appeal filed in this matter”
26. The learned trial Magistrate went on to state as follows after quoting the final orders of the appellate court: -
- “In the latter part of the aforesaid statement again, as to whether the said full costs of the trial court should be interpreted to mean subject 50:50 apportionment or not, is a matter not within this court’s jurisdiction.”
27. The court went further to state: -
- “Parties are at liberty to move the competent court in the issue of interpretation of the High court’s judgment after which the decree of the High court and the bill of costs be served upon the High Court’s judgment and decree”.
28. However, as much as the finding of the trial court was in order, I note that the prayers in the application before the trial court centred on the extraction and/or execution of the decree issued in the trial court.
29. The applicant was seeking that, the decree issued in the trial court and resultant proclamation, warrants of attachment and/or sale and auctioneer’s charges be recalled, cancelled, set aside and/or revoked, and the respondent’s lawyer be admonished and/or referred to the Advocates’ Disciplinary Tribunal for professional misconduct.
30. It suffices to note indeed the trial court went further and stated as follows: -
- “The decree and bill of costs, should in my considered view, hence reflect the judgment of the High Court with costs as granted by the lower court in the primary suit with interest from the date of judgment and order so. I find the latter to be just and fair and order as such”
31. With utmost respect, pursuant to the aforesaid, the trial court had pronounced itself on the matter by holding the view that the interest payable was from date of judgment in the lower court and costs as ordered by the appellate court and proceeded to order so.
32. In my considered opinion, trial court was called upon to address the specific prayers in the application as to whether; the decree that was being executed was contested or not and whether it had complied with the provision of the procedural law in relation its issuance and execution thereof.
33. I note from the subject ruling that the learned trial Magistrate dealt with the subject issues by stating as follows:
- “I agree with the respondent that the fact that, the applicant did not forward a draft decree cannot lead to setting aside the execution, relying on the case of; Eco Bank Ltd -vs Elsek (Kenya) Limited 2015 eKLR which was quoted in Florence Cherugut -vs Cheptum Murei Annah (2022) eKLR.”



34. However, it is noteworthy that, Order 21 Rule 8(2) and (5) of Civil Procedure Rules, 2010, lay down the procedure of execution of the decree. It states as follows: -

- “(1) A decree shall bear the date of the day on which the judgment was delivered.
- (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
- (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
- (4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
- (5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the sub-rules shall refer to magistrate.
- (6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in manner as a decree.
- (7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.

35. The afore provisions are plainly clear that the content of a decree is be based on consent of the parties or an order of the court. The rationale of requiring a draft decree be forwarded for approval is to confirm that it is drawn in the terms of the judgment and avoid unnecessary litigation as herein.

36. In that regard the court in the case of; *Ecobank Kenya Limited v Afrikon Limited* [2017] eKLR had this to say:

- “8. The rationale for above provisions cannot be difficult to surmise. A Decree is often at a tail-end of proceedings and would usually set out the rights and obligations of the parties that the Judgment would have declared or ordered. A Decree must accurately and faithfully reflect the Orders or Judgement of the Court”.

37. Similarly, in the case of *Florence Cherugut v Cheptum Murei Annah* [2022] eKLR the court stated as follows: -

- “The main idea behind the enactment was to on preparation of decrees and orders following that process was to avoid situations where parties extracted decrees that would be at variance with the final adjudication of the Court or so to say, that would suit their interests. It was not to act as a hurdle for the successful party to in a cause when realizing the fruits of his



judgment. Otherwise, if no execution could occur without the approval of the decree by the other party, mischievous ones would lie in wait for such step to be started and then erect a range of “bulwarks” of objections to delay the execution, after all they have all to lose if it came to pass”

38. The question is what is legal effect of failure to comply with the afore provisions. In my considered opinion it does not render execution process illegal or invalid. As well stated by the trial court, in the case of; *Eco Bank Ltd v Elsek (Kenya) Limited & 3 Others* [2015] eKLR the court thus stated:
- “The plaintiff, has not denied it did not forward the draft decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgment”.
39. To revert back to this matter, the respondent did not prepare and/or forward draft decree to the appellant. The trial court decision had been set aside by the appellate court. The parties had a dispute as to the amount payable as costs and interest and therefore there was need to draft a decree for concurrence and/or for consideration by the court.
40. The provisions of Order 21 Rule 8(4) provides that in event of disagreement on the terms of the draft decree, the issue be referred to the judge who he heard the case for settlement. Indeed, where the decree does not confirm to the terms of the judgment execution thereof will be set aside.
41. In that respect had the respondent complied with the rules, the application in the trial court would not have arisen. In fact, the issue of interpretation of the judgment of the appellate court on costs and interest would have been canvassed and resolved.
42. It was therefore not in vain when the appellant filed the application seeking for setting aside of the decree. It was also in submissions that the parties fixed the decretal sum in an interest earning account in joint names of the respective parties’ advocates.
43. The respondent interest was therefore secured. The funds were encumbered and the appellant could not deal with it in a manner inconsistent with the respondent’s rights. As such the respondent should have called in the security first instead of instructing the auctioneer to proclaim the appellant’s property.
44. On the other part, the appellant had been given 30 days stay of execution from 17<sup>th</sup> November, 2020, that had lapsed and did not secure extension or make payment of the undisputed decretal sum as per the judgment of the appellate court.
45. He who goes to equity must have clean hands. This matter has been in court for a long time and delay at the execution stage is caused by both parties. It needs to rest and in that regard I set aside the order of the trial court dismissing the application and substitute with the following orders:
- a. The undisputed decretal sum be paid forthwith within 7 days of the date of this order unless it has already been paid.
  - b. Execution against the appellant’s property be stayed to allow utilization of funds in the joint account.
  - c. The issue of interest and costs payable is settled in the decision rendered by this court in High Court Civil Appeal N0. E005 of 2020.



- d. For clarity the interest shall be calculated on the adjusted amount from 17<sup>th</sup> December, 2023, to date of payment.
  - e. Costs if in dispute be subjected to taxation.
  - f. The auctioneer's fees be borne by the parties in the ratio of 50-50% as both contributed to execution.
  - g. The further court fees was not contested as confirmed by the appellant's counsel.
46. If the respondent wants to execute for costs and interest a fresh decree should be drawn and processed procedurally.
47. Each party shall meet the costs of this appeal.
48. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 4<sup>TH</sup> DAY OF JUNE, 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Mabeya for the appellant

Ms. Amboko for the respondent

Ms. Ogutu: Court assistant

