



**Wagechi & another (Suing on their own behalf and as administrators of the Estate of Eunice Wanguthi Ndung'u) v Mungai (Civil Appeal E017 of 2023) [2024] KEHC 6520 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6520 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E017 OF 2023  
GL NZIOKA, J  
JUNE 4, 2024**

**BETWEEN**

**ELIZABETH WAGECHI ..... 1<sup>ST</sup> APPELLANT**

**MARY WANJA MURITHI ..... 2<sup>ND</sup> APPELLANT**

**SUING ON THEIR OWN BEHALF AND AS ADMINISTRATORS OF THE  
ESTATE OF EUNICE WANGUTHI NDUNG'U**

**AND**

**SAMUEL KIRAGU MUNGAI ..... RESPONDENT**

*(Being an appeal against the decision of Hon. Y. M. Barasa (SRM)  
delivered on 23rd February, 2023 in CMCC No. 690 of 2019)*

**JUDGMENT**

1. By a memorandum of appeal dated 17<sup>th</sup> March 2023 the appellants are appealing against the decisions of the trial court rendered vide CMCC No. 690 of 2019 on 23<sup>rd</sup> February, 2023.
2. The appeal is based on the following grounds:
  - a. That the learned magistrate erred in law and in fact by failing to appreciate that the judgment from the court is what forms the decree and hence any amount that has been paid in settling the judgment cannot be captured in the decree.
  - b. That the learned magistrate erred in law and in fact by introducing contents to a decree that are unknown in law
  - c. That the learned magistrate erred in law and in fact by directing that a fresh decree be drawn yet there was an existing one which was yet to be set aside.



- d. That the learned magistrate erred in law and in fact in disregarding the fact that the parties had incurred expenses during execution in making a determination that each party bears its own costs of the execution.
3. As a result, the appellants are seeking for the following orders:
  - a. The appeal be allowed.
  - b. This court proceeds to find that the execution was proper and that the respondent be held liable for the expenses incurred in the execution.
  - c. The appellants be granted costs of the appeal.
4. The background facts are that, the appellants filed a notice of application dated 27<sup>th</sup> January 2023, seeking for the following orders:
  - a. That this Honourable court be pleased to certify this application as urgent, service of the same be dispensed with and heard ex-parte in the first instance.
  - b. That this Honourable court be pleased to order stay of any pending, ongoing or further execution of the decree given on 24<sup>th</sup> October, 2022 or generally in Naivasha CMCC 690 of 2019.
  - c. That pending the hearing and determination of this application this Honourable court be pleased to order the immediate release of motor vehicle registration KCQ 321L to the defendant/applicant in the exact state that it was taken on 16<sup>th</sup> January 2023.
  - d. That this Honourable court be pleased to recall and cancel, set aside and/or revoke the decree given on 24<sup>th</sup> October, 2022 and/or generally in Naivasha CMCC 690 of 2019.
  - e. That this Honourable court be pleased to recall and cancel, set aside and/or revoke the proclamation of attachment, warrant of attachment of movable property, and warrant of sale property obtained by Direct “O” Auctioneers on 13<sup>th</sup> December 2022 and/or generally in Naivasha CMCC 690 of 2019.
  - f. That this Honourable court be pleased to order that any fees and/or charges claimed by Direct “O” Auctioneers in Naivasha CMCC 690 of 2019 be entirely borne by the respondent’s advocate without any reference to the applicant.
  - g. That this Honourable court be pleased to admonish the plaintiff’s advocate (Ms Wangamboko) for her unprofessional and discourteous conduct not worthy of an officer of the court and/or refer her to the Advocates Disciplinary Tribunal for the unprofessional and discourteous conduct in this matter.
  - h. That the costs of this application be granted to the applicant.
5. The application was based on the grounds on the face of it and an affidavit sworn by Joseph Karanja Legal officer of CIC Insurance Company Limited. He deposed that judgment was delivered in the suit in the trial court on 18<sup>th</sup> August 2022 in the sum of Kshs 1, 861, 486.



6. That on 5<sup>th</sup> September, 2022 the decretal sum was adjusted to Kshs 1, 816, 390 and 45 day of execution granted with effect from 18<sup>th</sup> August 2022. On 4<sup>th</sup> October, 2022 the respondent was paid a sum of Kshs 1, 968, 931 made of Kshs 1, 861, 486 plus Kshs 152,445 as costs.
7. That the respondent acknowledged receipt of the sum paid vide a letter dated 1<sup>st</sup> December, 2022. That the sum paid left a balance of Kshs 15, 000 due to lack of payment voucher
8. On 24<sup>th</sup> October, 2022 the respondent extracted a decree without serving a draft therefore to the appellants and proceeded thereafter to instruct an Auctioneer who issue a proclamation and notification of sale over unpaid sum of Kshs 112, 314.
9. The appellants argue that the decree extracted had an error in that, it did not reflect the sum already paid. That by a letter dated 22<sup>nd</sup> August 2022, the appellants sought for correction of the error but that was not done. The appellants are disputing the amount claimed as interest on the decretal sum. Hence the application in issue.
10. However, the respondent opposed the application vide the replying affidavit of respondent dated 15<sup>th</sup> February, 2023. He joined issues with the appellants on the matter in the trial court, the delivery of judgement therein, decretal sum awarded and adjusted.
11. That there was a dispute over a sum of Kshs 20, 000, payable to Patrick Juma Yuka, the process server and his advocate provided the payment voucher in support of the payment. That by a letter dated 19<sup>th</sup> August, 2022, the respondent's advocate notified the appellants' advocate that she was going to extract a decree.
12. That on the 1<sup>st</sup> December, 2022, his advocate demanded for the payment of Kshs 108, 974 and enclosed in that letter the decree. That his advocate was not obliged to give notice before the decree was drawn. That the warrants are clear on the amount claimed and does not reflect amount already paid. Further the appellants were served with proclamation and they declined to sign.
13. That the appellants' counsel called for clarification of the amount claimed after the attachment. Further from 25<sup>th</sup> October 2022 to 26<sup>th</sup> January 2023, the appellants did not take any action to forestall the execution. The respondent deposed that the appellants' advocate was served with the proclamation.
14. Upon hearing the parties', the learned trial Magistrate ordered as follows: -
  - a. Any further execution be stayed
  - b. Fresh decree be drawn by the plaintiff counsel and approved by the counsel for the defence. The amount already paid be indicated
  - c. Bill of costs to be assessed by the court
  - d. Motor vehicle registration No. KCQ 321L be released forthwith to the defendant
  - e. Each party to meet its own costs for the execution and for this application.
15. It is against these orders that the appeal arises. In considering the appeal, I note 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.



16. 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.”

17. The appeal herein was canvassed through filing of submissions. The appellants vide submissions dated 21<sup>st</sup> August, 2023 argued that the trial Magistrate erred by directing that a new decree to include the amount already paid be prepared by the plaintiff’s counsel and approved by the defendant’s counsel.
18. That, the judgment of the court forms the decree. The appellants cited Order 21 Rule 7 and argued that it is explicit on the contents of a decree and does not provide for an item known as “already settled amount”.
19. Further, it is irregular to have a fresh decree drawn while the existing one has not been set aside as there is no indication as to what happens to previous decree dated 23<sup>rd</sup> May, 2023 included at page 88 of the Record of Appeal.
20. That it was not in dispute that the respondent had not paid the full decretal sum but had left out the balance of costs incurred in serving summons. That, the argument by the respondent that interest in the decree should have been calculated on the Kshs. 20,000 lacks legal backing as interest on a decretal amount accrues until payment in full.
21. The appellants submitted that execution was proper as the respondent had not paid the balance of the decretal amount and therefore it was wrong for the trial court to direct the appellants to pay costs of execution.
22. Further, the argument that the respondent was not served with a draft decree prior to execution did not hold water as the appellants served the respondent’s advocate with the letter contemplated under with Order 21 Rule 9A of the Civil Procedure Rules requiring a party claiming costs at a Magistrate court to file a written request, statement of costs and supporting documents with the court and serve it on the other party.
23. Furthermore, the fact that the appellants did not forward a draft decree prior to execution cannot lead to setting aside of the decree as the respondent did not demonstrate that the decree failed to conform to the judgment. The appellants relied on the case of; Civil Case No. 70 of 2014 Eco Bank Limited vs Elsek & Elsek (Kenya) Ltd where the court stated that the failure to forward the draft decree cannot lead to setting aside of the execution unless it is shown the decree does not conform to the judgment.
24. The appellants argued that having forwarded the decree to the respondent and its advocate, and having received a response it was within the law and therefore the respondent should have been directed to pay the costs incurred during execution.
25. However, the respondent in submissions dated; 1<sup>st</sup> November, 2023 argued that the respondent paid Kshs. 1,968,931 on 4<sup>th</sup> October, 2023 during the stay period directed by the court, leaving an amount of



- Kshs. 15,000 that was contested. However, instead of clarifying the contentious amount, the appellants proceeded and extracted a decree issued on 24<sup>th</sup> October, 2023, being after the appellants had received substantial payment.
26. That the decree did not indicate the amount already paid resulting in undeserved amounts as interest and further court fees. He quoted the case of; Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited & another (Garnishee) [2021] eKLR where the court held that the respondent having failed to reckon a payment made by the claimant in the process of extracting the decree, the decree as extracted had errors that required to be addressed before execution. The court proceeded to cancel the decree and directed the parties to extract a fresh decree.
  27. The respondent argued that the appellant charged an interest of Kshs 27,869 on the judgment despite the fact that full judgment had been paid during the stay of execution period and therefore should not have started accruing. He cited the case of; Manase Onyimbi vs Director Kenya Medical Research Institute (KEMRI) [2021] eKLR where the court stated that, the balance of the principal amount that was outstanding was the one that would continue to attract interest.
  28. Further, the court fees of Kshs. 60,005 was unnecessary as the appellants' advocate failed to engage the respondent's advocate on the contested amount of Kshs. 15,000. Furthermore, the court fees were excessive based on a genuine assumption by the executive officer that there was no settlement of the judgment award.
  29. That, the appellants had duty to inform the court of the outstanding amounts which they failed and would have prevented the exaggerated fees and interest. He relied on the case of; Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited & another (Garnishee) (supra) where the court explained the reason for parties drafting the decree is that they may have information the registrar may not be privy to that ought to assist in drafting the decree.
  30. The respondent contended that the decision by the appellants' advocate to unilaterally extract the decree without the appellants knowledge or participation was actuated by malice and vindictive agenda against the respondent's advocate, a fact that the trial Magistrate acknowledged noting that the issue could have been resolved by the advocates engaging in good faith.
  31. Finally, the respondent submitted that had the appellants' advocate served the decree pursuant to; Order 21 Rule 8(5) of the Civil Procedure Rules the issue would have been resolved. The case of; Timwood Products Limited vs Karachiwalla (Nairobi) Limited [2017] eKLR was cited where the court stated that provisions of Order 21 Rule 8 of the Civil Procedure Rules oblige the plaintiff/decree holder to prepare draft decreed sent it to the defendant/judgment debtor's advocate for approval absence of which the decree thereof if irregular.
  32. I have considered the above submissions and find that the issue to resolve is whether the decree extracted was procedurally done. In that regard the provisions of; 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.

33. 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.

34. 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”.

35. 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”



36. 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”.

37. To revert back to this matter, the respondent did not prepare and/or forward draft decree to the appellants. The parties had a dispute as to the amount owing as evidenced by correspondence between them and therefore there was need to draft a decree for concurrence and/or for consideration by the court.

38. 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.

39. In that respect had the respondent complied with the rules, the application in the trial court would not have arisen. It was therefore not in vain when the applicant filed the application seeking for stay execution.

40. However, on the other part, the appellants had been given 45 days that had lapsed and without extension or full payment made. He who goes to equity must have clean hands.

41. As such both parties were to blame. I believe as stated by the learned trial Magistrate this is a matter that should have been resolved amicably.

42. In the given circumstances I find that, the trial court was well guided and proper in staying execution and ordering for release of the attached motor vehicle and each party bear its costs.

43. The decree issued was issued after substantial payments and without knowledge of the appellants and therefore there is no error in the order of the court for fresh decree and taxation of costs if in dispute.

44. I find no merit in the appeal herein. However, since to date the total amount is not settled to bring this matter to an end I order as follows:

- a. Auctioneers fees be borne by both parties in the ratio of 50:50%
- b. The dispute process server fees be reduced from Kshs 20, 00 to Kshs 10,000 and be supported by a payment voucher
- c. Interest on principal sum is payable from 18<sup>th</sup> August 2022 to 4<sup>th</sup> October, 2022.

45. No order is made to any party as to costs in this appeal. Each party to bear its own costs.

46. 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:



Ms. Amboko for the appellant

Mr. Mabeya for the respondent

Ms. Ogutu: Court assistant

