



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. 6 OF 2019**

**ALFRED MUYEYELI**

**LABAN ASIAOKE.....APPELLANTS**

**VERSUS**

**JAMIN ONYIRI**

**TIMOTHY K. ONYARI.....RESPONDENTS**

**JUDGEMENT**

The appellants herein being dissatisfied with the judgment and decree of the learned Hon. S.O. Ongeri appealed to this honorable court on 20<sup>th</sup> day of March, 2019. The appellants appeal against the entire ruling above mentioned on the following grounds inter alia, namely:-

1. The learned judge erred in law in finding that the notice of motion dated 26<sup>th</sup> July, 2018 amounted to a notice to show cause pursuant to order 22 rule 18.
2. The learned judge erred in fact in making a finding that the respondents could proceed with execution.
3. The learned judge misdirected himself and failed to appreciate the import and legal effect of the law of succession in regards to gifts passed by the deceased during their life time.
4. The learned judge, in all circumstances of the matter, failed to do justice as regards to the Notice of Motion that was before him and accordingly erred in law by making the orders that he did.
5. In view of the circumstances set out herein above, the learned judge erred in delivering a ruling without putting into consideration the proper provisions of the law.

The appellants ask the court for orders that:-

1. The appeal be allowed as prayed by the appellant's and a declaration be made to the extent that the respondents should put in proper court pleadings.
2. The costs of the appeal be granted to the appellant against the respondent.

The appellants submitted that the application for execution is different from a notice to show cause therefore the application dated 26<sup>th</sup> July 2018 cannot suffice as a notice to show cause under order 22 rule

18(1) of the Civil Procedure Rules.

The respondents oppose the appeal and pray that the appeal be dismissed. They submit that indeed the application sought to extend time to execute the decree of the trial magistrate and thus was one of notice to show cause why execution should not be carried out. They submit that the appellants were given a chance to appeal which they did, but however failed to pursue the appeal. It was upon the dismissal of the said appeal (High Court Civil Appeal No. 9 of 2000) that the respondents sought to harvest the fruits of the judgment and upon extension of time the trial magistrate allowed the respondents to execute and thus a notice to show cause as to why execution should not take place was allowed as was attached to the said Notice of Motion dated 23<sup>rd</sup> July, 2018. They submit that the same was rightfully granted to the extent of the land that was in the name of the appellants, that is, LR/South Maragoli/Buyonga/1465. The same was rightful as the appellants are the owners of the said land which the respondents occupy as was vividly submitted in the respondent's submissions to the trial court on 11<sup>th</sup> February, 2019.

This court has considered the application and the submissions therein. Order 22 Rule 18 (1) of the Civil Procedure Rules provides that;

*“(1) Where an application for execution is made-*

- a) More than one year after the date of the decree;*
- b) Against the legal representative of a party to the decree; or*
- c) For attachment of salary or allowance of any person under Rule 43,*

*The Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.*

*Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the Judgment-debtor, if upon a previous application for execution against the same person in Court has ordered execution to issue against him.”*

The court in *Grand Creek LLC & Another vs. Nathan Chesangmoson* (2015) eKLR held that -

*“In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.”*

In the instant case the judgment of the court is over one year old. Judgement in this case was entered in the year 2000 and the notice of motion was dated 26<sup>th</sup> July 2018. **Order 22 rule 18 of Civil Procedure Rules** requires a decree holder, before taking out execution proceedings to take out a Notice to show cause why execution should not issue. This was evidently not done. In the case of *Roslyn Development Limited vs Bidco Oil Refineries Limited* (2014) eKLR the court held that;

*“The decree the subject of this application was drawn on the 11<sup>th</sup> of November 2011 as per the warrants of attachment. The warrants of attachment and sale were issued on the 3<sup>rd</sup> July 2013. This a period over a year from the date the decree was issued, the decree-holder should have moved under order 22 rule 18 (1) (a) and caused the court to issue a notice to show cause against the judgment debtor/ applicant. Having not complied with the said provision, then it is only in order that the warrants of attachment and sale be cancelled. Any goods that could have been attached shall be released to the defendants unconditionally. The Respondent has a right to*

*execute but only after it has complied with the relevant provisions of the law as provided in the Civil Procedure Rules. The order granted is that the warrants of attachment and sale be delivered to the Registrar for cancellation. Cost shall be in the cause.”*

In yet another case of *Ngure Kairu v Amin Abdulkadir Mohamed & another* (2015) eKLR the court held that;

*“On the first issue, I am satisfied that under Order 22 Rule 18 of the Civil Procedure Rules, where an application for execution is made more than one year after the date of the decree, the court executing the decree is required to issue a Notice to the person against whom execution is applied requiring him to show cause why the decree should not be executed against him. There is no evidence that the Plaintiff herein was ever issued with such a Notice. On this ground alone the Plaintiff’s application appears to have a sound grip.”*

*The Appellants deserved a Notice to Show Cause being served on them to explain why they have not complied with the decree. It cannot be prudent for the decree to be executed without following due process as provided in the execution rules and procedure as provided under **Order 22** of the **Civil Procedure Rules**. I find that the appeal is merited and the same is allowed with costs to the appellants.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28<sup>TH</sup> SEPTEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**