



**Gicheru v Ngure & another (Environment and Land Appeal
E048 of 2023) [2024] KEELC 767 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E048 OF 2023
EK WABWOTO, J
FEBRUARY 15, 2024**

BETWEEN

HARRISON BISMARCK NDORIA GICHERU APPELLANT

AND

FRANCIS GITAU NGURE 1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT

*(Being an Appeal from the Ruling and Order of the Milimani
Chief Magistrate's Court at Nairobi (Honourable L. Njora –SPM)
made on 8th March, 2023, in Milimani CMLC No. 10639 of 2018)*

JUDGMENT

1. This appeal is against the Ruling and Order of the Milimani Chief Magistrates Court at Nairobi (Honourable L. Njora) made on 8th M
2. March 2021 in Milimani (CMC ELC No. 19639 of 2018 (Formerly HCCC No. 97(of 2000). In her ruling the learned trial Magistrate dismissed with costs the appellants' application dated 26th April, 2022. The Appellant had sought the following Orders in his application dated 26th April, 2022: -
 1. Spent.
 2. That an Order do forthwith issue compelling the 1st Defendant to deposit in court for safe custody, the original title for Land LR No. Limuru/Rironi/57.
 3. That an Order do issue compelling the 1st Defendant (now 1st Respondent) to sign and provide all the necessary documents and the transfer to effect the transfer of the land L.R No. Limuru/Rironi/57 to the Plaintiff.
 4. Costs be provided for.



3. The Appellant being aggrieved by the aforementioned decision filed this Appeal vide a Memorandum of Appeal dated 17th May, 2023. The following grounds were set at in the Memorandum of Appeal: -
1. The learned Magistrate erred in dismissing the application dated 26th April, 2022, when she overlooked the fact that she exercised a coordinate jurisdiction to that of the Magistrate who delivered the Judgement in this suit in favour of the Plaintiff and therefore lacked jurisdiction to serve as an appellate court against that judgement.
 2. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she held that the judgement and decree of this court is incapable of being executed/unenforceable in view of the post judgement allegations by the 1st Defendant that he had cleared the mortgage arrears and obtained the title for the property.
 3. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to appreciate the fact that the Plaintiff had paid the entire purchase price for the suit land could therefore, not be required to continue paying the mortgage instalments that arose from the 1st Defendant's failure to remit the purchase price towards mortgage repayments.
 4. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to appreciate that issue of mortgage in the decree vis a vis full payments of purchase price as required in the decree as alleged by the 1st defendant and the Plaintiff respectively are issues that the court would have dealt with under Order 22 rule 28(5) of the Civil Procedure Rules in order to give effect to the Judgement.
 5. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to deal with and make a determination on issue of mortgage repayments in the decree vis a vis full payment of purchase price as required in the decree as alleged by the 1st defendant and the Plaintiff respectively under Order 22 rule 28(5) of the Civil Procedure Rules in order to give effect to the Judgement.
 6. The Learned Magistrate erred in dismissing the application dated 26th April, 2022, when she failed to appreciate that the 1st defendant had a chance to raise the issue of having paid the mortgage before the judgement of court was made on 3rd December, 2020 but he did not; he was therefore, estopped from raising it at the execution stage.
 7. The learned magistrate erred in dismissing the application dated 26th April 2022 when she failed to appreciate that the 1st defendant had raised the very issue of having paid the mortgage arrears in support of his earlier application for review of judgement dated 30th July, 2021 which application had been dismissed on 4th March, 2022; the 1st defendant was therefore, estopped by the doctrine of res judicata from raising it in resisting the application for execution of the judgement/decree.
 8. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she held that the Judgement of this court dated 3rd December, 2020 and as reviewed on 23rd July, 2021 is unenforceable when the same has not been challenged by way of appeal and a challenge by way of review by the 1st Defendant had been dismissed.
 9. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to appreciate that the plaintiff was entitled to specific performance of the contract of sale of suit land in view of the court express finding in the judgement that the Plaintiff had in fact



paid the entire purchase price and indeed overpaid and hence the proviso to the decree that the Plaintiff continue paying the mortgage was unnecessary and superfluous.

10. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to find and appreciate that she was barred by the Doctrine of *functus officio* and or *Res Judicata* from revisiting or reviewing the decree which the 1st Defendant did not appeal against according to the rule in *Raila Odinga versus IEBC*, Supreme Court Petition No. 5 of 2013.
 11. The Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to appreciate that she had no jurisdiction to grant to the 1st Defendant a relief which he had not sought; which is what she essentially did, contrary to the rule in *Nandwa versus Provincial Insurance Company of East Africa (1995-1998) EACA*, 288.
4. The Appellant sought for the following reliefs:-
- a. That this appeal be allowed.
 - b. That the ruling of the Milimani Chief Magistrate Court delivered on 8th March, 2023 be set aside and be substituted with a ruling allowing with costs, the Plaintiffs application dated 26th April, 2022.
 - c. That this court be pleased to make any other or further orders as it shall deem fit to make within its powers.
 - d. That the costs of appeal be awarded to the appellant.
5. Parties took directions to have appeal canvassed by way of written submissions. The Appellant filed written submissions dated 10th November, 2023 and the 1st Respondent filed written submissions dated 27th November, 2023.
6. The Appellant submitted on the following issues:-
- i. Whether the Magistrate had powers and jurisdiction to deal with the issues raised in the application.
 - ii. Whether the application had merits.
 - iii. Whether the magistrate had power and jurisdiction to declare the judgement of the court as enforceable.
 - iv. Whether the appellant is entitled to the reliefs sought.
7. The Appellant contended that the trial court had jurisdiction to hear the application. Reliance was placed to Section 34 of the *Civil Procedure Act* and Order 22 Rule 28(5) of the Civil Procedure Rules and also the case of *John Mwangi Ndegwa versus Kanyi Gichuhi [2019]eKLR*.
8. It was argued that the learned Magistrate erred in dismissing the application when she failed to appreciate that issue of mortgage repayments in the decrees vis a vis full payment of purchase price as required in the decree as alleged by the 1st Defendant and the Plaintiff respectively are issues that the court would have dealt with under Section 34 of the *Civil Procedure Act*, Order 22 Rule 28 (5) of the Civil Procedure Rules in order to give effect to the judgement.
9. It was also submitted that the amended decree was a decree for specific performance of the contract of sale of land between the appellant and 1st respondent. It was argued that by the first order, the first defendant was compelled by way of specific performance to remit Kshs. 416,000/- being monies



received from the Plaintiff with interest to the bank account held by himself with the secured defendant in respect to the mortgage over the land parcel No. Limuru/Rironi/57. The appellant argued that this specific amount of Kshs. 416,000/- is the among the monies sent to the 1st Defendant by the Plaintiff to pay to the AFC Loan so that the title can be eventually be discharged/released and title discharged for purposes of transfer to the Plaintiff.

The 1st Defendant did not remit this amount and he had to be compelled to pay this amount.

10. It was also submitted that in the second order, the Plaintiff was to continue with the payments until the mortgage is redeemed whereby discharge of a charge is issued and the original title released to the Plaintiff. The Appellant also submitted that two events occurred that affected the enforcement of the 1st and 2nd Orders thus necessitating the filing of his application. Firstly, the 1st Defendant allegedly paid the loan and had the property discharged and the original title issued to him. Secondly, the Plaintiff realised that he had overpaid the loan and hence no need for further repayment. The Appellant urged this court to grant the orders sought in his application.
11. Relying on the case of John Gilbert Ouma versus Kenya Ferry Services Limited [2021]eKLR, it was argued that, the court erred in dismissing the application for the reasons that it was functus and further that it exercised a coordinate jurisdiction to that of the Magistrate who delivered the judgement and therefore, lacked jurisdiction to serve as an appellant court against that judgement.
12. It was further argued that, in its judgement of 3rd December, 2020, the court determined the issues of ownership, rights of parties to the suit property and what the appellant was merely doing was to give effect to that judgement. The appellant thus prayed for the appeal to be allowed.
13. The 1st Respondent filed written submissions dated 27th November, 2023. It was submitted that the Appellant had not brought before this court any proof to show that the Magistrate had indeed served as an appellate court and just was just a mere allegation.
14. The 1st Respondent also submitted that he had cleared the mortgage arrears and obtained the title to the suit property but he only did that to prevent the property from being auctioned as it had already been advertised for sale in the Newspapers.
15. It was contended that it was not true that the appellant had paid the entire purchase price as only Kshs. 136,500/- had been paid by the appellant and Kshs. 550,000/- to the 2nd Respondent and a balance of Kshs. 482,377.20 remained. The 1st Respondent argued that the appellant was in breach of the agreement as he was to clear the loan that the 1st Respondent had with the 2nd Respondent which as at 31st August, 1994 stood at Kshs. 1,032,377.20. The evidence adduced before the Magistrate court showed that the appellant did not pay any money since at the time of filing the suit the property could have been sold a long time ago had the Respondent not paid the loan. It was contended that by the conduct of the appellant being in breach of the contract, the 1st defendant took it upon himself to clear the balance to save the suit property which was in his name from being auctioned.
16. On whether the Learned Magistrate erred in dismissing the application dated 26th April, 2022 when she failed to appreciate that the issue of mortgage repayments in the decree vis a vis full payment of purchase price as required in the decree as alleged by the 1st Respondent and the Appellant respectively are issues that the court would have dealt with under Order 22 Rule 28 (5) of the Civil Procedure Rules in order to give effect to the Judgement, it was submitted that the learned Magistrate did indeed consider what was ruled by both Magistrates could not be practically done by the decree holder as it was already done by the Judgement debtor and therefore, the learned Magistrate had the inherent jurisdiction which enabled her to exercise control over process by relegating its proceedings by presenting the abuse of the process.



17. The 1st Respondent submitted that the Appellant is not entitled to the orders of specific performance because he was in breach of the agreement. He never paid the balance of the agreed purchase price.
18. It was also argued that the court cannot recognize a wrong and refuse to right the same if it is so obvious so as to fulfil itself properly and effectively as a court of law. The 1st Respondent urged this court to dismiss the appeal with costs.
19. The Court has considered the grounds of the appeal and the written submissions filed by the parties together with the cited cases. The issues which arise for determination are as follows:-
 - i. Whether the Learned Magistrate had jurisdiction to deal with the issues raised in the application.
 - ii. Whether the application was merited.
 - iii. What are the appropriate reliefs to grant herein.
20. Before this court addressing itself as to whether the learned Magistrate had jurisdiction to hear the application dated 26th April, 2022, it is important to have sight to the Orders that were earlier issued that subsequently necessitated the filling of that application. On 3rd December, 2020, the Learned Magistrate G. Mmasi- SPM entered Judgement in favour of the appellant as follows:-
 1. That the 1st Defendant be compelled by way of specific performance to remit Kshs. 416,000 being monies received from the Plaintiff with interest to the loan account held by himself with the second defendant in respect of mortgage over the land parcel L.R. No. Limuru/Rironi/57.
 2. That the Plaintiff continues with repayment until the mortgage is redeemed whereupon a discharge of charge will be issued to the Plaintiff.
 3. That the Defendant are permanently restrained by themselves or through their agents from in any way selling, disposing of, or auctioning land parcel L.R. No. Limuru/Rironi/57.
 4. In the Alternative, the 1st defendant be compelled to refund to the Plaintiff Kshs. 1,298,622.80 with interest herein at commercial rates from March 1997.
 5. Costs of the suit.
21. Upon delivery of that judgement the appellant then moved the court vide an application dated 11th February, 2021 and amended on 10th March 2021 seeking review of the Order made in the judgement, On 23rd July, 2021 Learned Magistrate Hon. Mburu-SPM upon considering the application granted the following orders:-
 - i. The first defendant is herewith compelled by way of specific performance to remit Kshs. 416,000.00 being monies received from Plaintiff with interest therein to the loan account held by himself with the second defendant in respect to the mortgage over the land parcel No. Limuru/Rironi/57.
 - ii. The Plaintiff to continue with the payments until the mortgage is redeemed whereupon discharge of charge will be issued to the Plaintiff.
 - iii. The defendants are permanently by themselves or their agents restrained from in any way selling, disposing and/or auctioning land parcel No. Limuru/Rironi/57.
 - iv. Cost of this suit and interest at court rate.



22. The amended decree was issued on 22nd April 2022. The 1st Respondent then applied to review the said ruling of 23rd July, 2021 vide his application dated 30th July, 2021 so that the orders of specific performance may be removed. The said application was dismissed with costs on 4th March, 2022. From the record, the amended decree of 23rd July 2021 and issued on 22nd April, 2022 remains and is still in force.
23. The Appellants application before the Lower Court was brought under Sections 1A, 1B, 3A and 34 of the *Civil Procedure Act* and Order 22 Rule 28 (5) and Order 51 Rule 6 of the Civil Procedure Rules.
24. Section 34 of the *Civil Procedure Act* stipulates as follows:-
 1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 2. The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this Section as a suit, or a suit as a proceeding and may, if necessary order payment of any additional civil fees.
25. From the aforementioned provision it is evident that the application was properly before the said court, however, the salient issue was whether or not the prayers sought could be granted as prayed.
26. It was contended by the 1st Respondent that the Orders issued on 23rd July, 2021 by Hon. D.W. Mburu-SPM could not be implemented as the 1st Respondent had been serving the mortgage as the trial continued to avoid losing the suit property and being freed to Credit Reference Bureau.
27. The Appellant sought orders seeking to compel the 1st Respondent to inter alia sign and provide all the necessary documents and the transfer to effect the transfer of the land L.R. No. Limuru/Rironi/57. The 1st Respondent on the other hand contended that the said orders could not have been granted on the reason that Appellant had failed to pay a balance of Kshs. 550,000/- and the he intervened and redeemed the loan for which he got a discharge in order to save the property before judgement could be delivered.
28. It also emerged that the orders sought could not be granted since the 1st Respondent had cleared the loan arrears and discharge of charge issued to him by the 2nd Respondent which enabled him to acquire the title to the suit property.
29. A perusal of the ruling delivered by the learned trial magistrate also clearly shows that the learned trial Magistrate arrived at the same decision when she held that the court orders and amended decree issued were unenforceable as at 3rd December, 2020 and remain unenforceable to date.
30. Section 2 of the *Civil Procedure Act* defines a decree as a formal expression of an adjudication which is so far as regard the court expressing it, conclusively determines the rights with regard to all or any of the matters in contrary in the suit and may be either preliminary or fixed. It is the decree as a legal instruct which is executable and not the judgment by itself. It is the view of the court that in a suit what is executable is the decree.
31. In the instant case, it was clear that the orders sought could not be granted in view of the developments between the 1st and 2nd Respondents. Court Orders cannot be issued in vain. It cannot be disputed that an order of the court has to be respected by the parties but at the same time it must be remembered that the court does not and ought not to be seen to make orders in vain. Otherwise the court would be exposed to ridicule.



32. Having considered the record of appeal, this court finds that the trial magistrate can't be faulted for her decision in dismissing the appellate application dated 26th April, 2022. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I find no fault with the decision of the trial court. Consequently, the appeal fails and the same is hereby dismissed.
33. On the issue of costs, costs are in the discretion of the court and in any event awarded to a party who is successful. However, having considered the circumstances of this case, this court directs each party to bear own cost of the appeal.

Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024

E.K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Gacheru for Appellant.

Ms. Waweru for 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant: Caroline Nafuna.

