



Ayiego v Erima; Mukweyi (Interested Party) (Environment and Land Appeal E048 of 2022) [2024] KEELC 7045 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E048 OF 2022
DO OHUNGO, J
OCTOBER 24, 2024**

BETWEEN

EZEKIEL MARLEY AYIEGO APPELLANT

AND

BETTY NANJEKHO ERIMA RESPONDENT

AND

ESTERY AMUNGA MUKWEYI INTERESTED PARTY

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kakamega (Hon. H Wandere, Senior Principal Magistrate) delivered on 28th September 2022 in Kakamega MCCC No. 258 of 2015)

JUDGMENT

1. Litigation leading to this appeal was commenced in the Subordinate Court by the Respondent through Plaintiff dated 25th June 2015 wherein she averred that she had entered into a sale agreement with the Interested Party on 28th March 2013, pursuant to which she purchased a portion of the parcel of land known as Butsotso/Indangalasia/849 at a consideration of KShs 350,000. That although she paid to the Interested Party KShs 230,000 towards the said purchase price, the Interested Party reneged on the agreement. She therefore sought judgment against the Interested Party for the sum of KShs 230,000 together with interest thereon at 18% until payment in full.
2. Judgment in default of appearance and defence was entered against the Interested Party after which a formal proof hearing was held. Subsequently, judgment was delivered on 26th January 2016, in favour of the Respondent, for the sum of KShs 230,000 plus KShs 113,850 being interest. The Respondent was also awarded costs and further interest. Costs were later assessed at KShs 72,499.



3. A decree and certificate of costs were duly issued on 31st May 2016, after which execution commenced. Among other attempts, on 20th March 2017 the Respondent filed Notice of Motion dated 13th March 2017, through which she sought to have the parcel of land known as Butsotso/Indangalasia/6312 (the suit property), whose registered proprietor was then the Interested Party, sold by auction to recover the decretal sum. The Subordinate Court allowed the application, through a ruling delivered on 28th August 2018. From the copy of the register in respect of the parcel and certificate of official search as of 9th March 2017, the Interested Party was the registered proprietor from 19th September 2014 until 29th May 2017 when the Appellant became the registered proprietor.
 4. The Respondent's attempt to sell the suit property by public auction encountered a hurdle, for she soon realised that the Interested Party ceased being the registered proprietor on 29th May 2017. Consequently, the Respondent filed Notice of Motion dated 29th September 2020, through which she sought orders that an inhibition be registered against the suit property, that the transfer of the suit property to the Appellant be nullified and that an order for the sale of the suit property by public auction be reissued. Among the reasons advanced in support of the application was that the transfer to the Appellant was made in bad faith with a view to ensuring that the decree was not settled. The application was allowed as prayed on 17th November 2020. Effectively, the Appellant's title to the suit property was nullified. It is noteworthy that the Appellant was not a party to the suit as at the time judgment and decree were issued.
 5. Upon learning that auctioneers were preparing to sell the suit property, the Appellant reacted by filing Notice of Motion dated 23rd December 2021, seeking stay of execution, setting aside of the judgment and joinder to the suit as defendant. Notice of Motion dated 23rd December 2021 was later replaced with Amended Notice of Motion amended on 6th January 2022.
 6. The following prayers were sought in Amended Notice of Motion amended on 6th January 2022:
 1. The application be certified urgent and be heard on priority basis.
 2. For purposes of the interim relief sought in paragraph 3 of the prayers in this application, the requirement for service be temporarily waived as the hearing proceeds Ex Parte.
 3. Pending inter parties hearing, execution of the judgment of this court in this matter, the decree arising there from, the attachment of LP. Butsotso/Indangalasia/6312 by Jakacha Auctioneers and the notification of sale dated 6th December 2021 of the said parcel by the same auctioneers or thereabouts and all order subsequent thereto be stayed.
 4. Upon the application being heard inter parties, the interim orders granted in prayer 3 be extended and or remain in force until the final determination of this application.
 5. The proceedings and orders of the Honorable Court giving rise to the decree being executed be reviewed and recalled and vacated or set aside.
 6. The execution of the decree against the Applicant be wholly lifted, and his name and his land parcel known as Butsotso/Indangalasia/6312 be expunged from the proceedings.
 7. [Deleted]
 8. Costs of this application be recovered from the Respondent.
7. Upon considering the Amended Notice of Motion, the Subordinate Court (Hon. H Wandere, Senior Principal Magistrate) delivered the ruling thereon on 28th September 2022. The application was dismissed with costs.



8. Aggrieved by the outcome, the Appellant filed this appeal on 28th October 2022, through Memorandum of Appeal dated 27th October 2022. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. The Learned Magistrate erred in law in delivering a ruling in a matter of which, as on the date of the ruling, she did not have the requisite jurisdiction.
 2. The Learned magistrate grossly erred in law by delivering a ruling on a non-existent application.
 3. The Learned Magistrate did not understand or misapprehended the application before her as a result of which she delivered a ruling citing an application which was never before her nor in the file.
 4. *The Constitution* and the law was grossly violated in the conduct of the trial and delivery of the ruling by the Learned Magistrate.
 5. The ruling and or orders of the Learned Magistrate violates the principal of natural justice, fair administrative action and the overriding objective.
9. Based on those grounds, the Appellant prayed that the appeal be allowed, the ruling be set aside and that the Amended Notice of Motion be allowed. He further prayed for costs of this appeal and of the proceedings before the Subordinate Court.
10. The appeal was canvassed through written submissions. The Appellant argued that the Subordinate Court lacked jurisdiction to order execution of the decree against him since he was not a party to the suit, yet the decree was against the Interested Party. He further argued that although what was before the Subordinate Court for determination was Amended Notice of Motion amended on 6th January 2022, the leaned Magistrate stated in her final orders that “application dated 8th April 2019 is hereby dismissed with costs.” The further Appellant argued that the error in identifying the correct application rendered the ruling a nullity.
11. It was also contended by the Appellant that the orders to cancel his title and to sell the suit property went against the rules of natural justice since he was not a party to the suit and was not served with notice of the hearing. He therefore urged the court to allow the appeal.
12. The Respondent argued that Amended Notice of Motion amended on 6th January 2022 was misplaced since it sought setting aside of the decree, yet the decree was against the Interested Party and not the Appellant and that for the decree to be affected, the judgment would have to be set aside first. That the Subordinate Court correctly presumed that the transfer to the Appellant was aimed at avoiding satisfaction of the decree and that the Appellant’s claim that he acquired the suit property through sale was not supported by evidence.
13. The Respondent went on to argue that since in the introductory part of its ruling the Subordinate Court made it clear that the ruling was in respect of Amended Notice of Motion amended on 6th January 2022, the reference to “application dated 8th April 2019” in the conclusion was an inadvertent error.
14. Referring to the cases of *Mawji v US International University & another* [1976] KLR 185 and *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, the Respondent argued that transfer in favour of the Appellant was of no effect in view of the doctrine of *lis pendens*.
15. This is a first appeal. Consequently, this court has an obligation to re-consider and re-evaluate the pleadings, and the material on record and to determine whether the conclusions reached by the Learned



Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.

16. I have considered the grounds of appeal, the pleadings, and the parties' submissions. The issue that arises for determination is whether the reliefs sought in Amended Notice of Motion amended on 6th January 2022 should have issued.
17. I have discussed above the history of the litigation leading to this appeal. The Appellant was not a party to the suit and was not a judgment debtor. The decree was a money decree against the Interested Party. The suit property was not the subject matter of litigation leading up to the judgment. It only got involved when the Respondent sought to attach and sell it in execution of the money decree.
18. Order 22 Rule 48 of the Civil Procedure Rules provides that where the property to be attached is immovable, the attachment shall be made by way of a prohibitory order or inhibition and that the attachment shall be complete and effective upon registration of the prohibitory order or inhibition against the title to the property. There is no suggestion that the transfer to the Appellant was effected in violation of a registered prohibitory order. On the contrary, it the Respondent has not shown that she obtained and registered any prohibitory order or inhibition against the suit property prior to its transfer to the Appellant. The horse had bolted out of the stable by the time the Respondent filed Notice of Motion dated 29th September 2020 through which she sought orders that an inhibition be registered against the suit property. The suit property no longer belonged to the judgment debtor and was therefore not liable to attachment and sale in execution of the decree.
19. There was simply no attachment of the suit property prior to its transfer to the Appellant. Instead, the Respondent the jumped the gun by filing Notice of Motion dated 13th March 2017 through which she sought to have the suit property sold by auction to recover the decretal sum prior to attachment.
20. The Appellant argued in this appeal that the Subordinate Court lacked jurisdiction to order execution of the decree against him since he was not a party to the suit and the decree was not against him. There is no dispute the Appellant became the registered proprietor on 29th May 2017, long before the Subordinate Court delivered the ruling of 28th August 2018, through which it allowed sale of the suit property by auction to recover the decretal sum. It is also not in dispute that the Appellant was not heard prior to the order allowing sale of the suit property. The right to a hearing is at the core of the judicial process. The Appellant, as registered proprietor, was entitled to a hearing and the Subordinate Court had no jurisdiction to proceed without according him a hearing.
21. A registered proprietor of land is entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of *the Constitution* to Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Nullification of title cannot validly be achieved through an application as was done in this case, and without hearing the registered proprietor.
22. I am alive to the Respondent's arguments as to applicability of the doctrine of *lis pendens*. With respect, the doctrine was not applicable to the situation at hand. The suit before the Subordinate Court was a liquidated claim and did not concern the suit property. Even at the execution stage where the suit property was brought in, there was no valid litigation concerning the suit property since the suit property was not attached.



23. In view of the foregoing discourse, I find that there was merit in Amended Notice of Motion amended on 6th January 2022 and that the learned Magistrate misdirected herself in dismissing it. For the avoidance of doubt, this court's findings do not affect the judgment and decree of the Subordinate Court. The findings only affect the purported execution against the Appellant and in respect of the suit property.
24. In the result, I make the following orders:
- a. The ruling and order of the Subordinate Court delivered on 28th September 2022 are set aside and replaced with an order dismissing Notice of Motion dated 13th March 2017 and Notice of Motion dated 29th September 2020.
 - b. The Appellant shall have costs of this appeal. The Respondent shall bear the costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF OCTOBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Malanda for the Appellant

Mr Mondia holding brief for Ms Ikhumba for the Respondent

No appearance for the Interested Party

Court Assistant: M Nguyayi

