



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Waigwa v Mwangi (Environment and Land Appeal 18 of 2020)
[2023] KEELC 15998 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 18 OF 2020**

BM EBOSO, J

FEBRUARY 15, 2023

BETWEEN

SAMUEL MURIGI WAIGWA APPELLANT

AND

FRANCIS BABU MWANGI RESPONDENT

*(Being an Appeal from the Judgment of the Senior Principal Magistrate
Court at Ruiru, delivered by Honourable C K Kisiangani, Senior Resident
Magistrate, on 29/4/2020 in Ruiru MCL & E Case No 41 of 2019)*

RULING

1. This court rendered a judgment in this appeal on 1/12/2021 in the following terms:
 - a. The disposal orders made by the trial court in the Judgment rendered in Ruiru MCL & E Case No 41 of 2019 are hereby set aside and are hereby substituted with the following award in favour of the plaintiff in the said suit, Francis Babu Mwangi:
 - i. An award of Kshs 1,800,000 being the balance of the purchase price relating to Ruiru/ Kiu Block 2 (Githunguri) 14214.
 - ii. Interest on the above sum at court rate from the date of filing suit till payment in full.
 - iii. Costs of the suit.
 - b. Parties shall bear their respective costs of this appeal.
2. On 1/12/2021, the Deputy Registrar of this court issued a formal decree in terms of the above disposal orders. Subsequently, the respondent presented Form Civil 5D, applying for warrants of execution relating to the decree of this court. On 4/3/2022, the Deputy Registrar of this court issued warrants



- of execution to M/s Icon Auctioneers, authorizing them to realize the sum of Kshs 2,380,500 from the appellant.
3. It does emerge from the record that the respondent, through Ms Icon Auctioneers, purported to sale the suit property, land parcel number Ruiru/Kiu Block 2 (Githunguri) 14214, in execution of the decree. It has also emerged from the evidence on record in this appeal that on December 23, 2020, the respondent caused the registration of the appellant as proprietor of the suit property to be cancelled. This was in execution of the preceding Judgment of the Ruiru Senior Principal Magistrate Court in Ruiru SPMC Environment and Land Case No 41 of 2019. The said Judgment of the lower court was the subject of this appeal and was set aside as outlined above. There is no evidence that the respondent caused the appellant's registration to be restored before purporting to execute the decree against the suit property. In essence, he executed the decree against himself because the suit property was still registered in his name.
 4. The above execution triggered a notice of motion dated 31/5/2022 by the appellant. The notice of motion was amended on 12/7/2022. Through the application, the respondent in this appeal seeks, among other reliefs: (i) orders setting aside the execution; and (ii) an order reinstating him as proprietor of the suit property.
 5. The amended notice of motion was supported by the applicant's affidavit sworn on 12/7/2022. It was canvassed through written submissions dated November 16, 2022, filed by M/s Milimo Muthomi & Co Advocates. Through the affidavits and the written submissions, The applicant contends that the respondent secretly caused his registration as proprietor of the suit property to be cancelled and withheld that information from this court. Further, the applicant faults the execution on the grounds that: (i) the notification of sale was issued in this file instead of the lower court file; (ii) the notification of sale was issued before the decree in this appeal was issued; (iii) the sale is purported to have taken place on 8/6/2022 instead of 6/6/2022 which is the date that was indicated in the notification; (iv) the purported sale of 8/6/2022 was done without a fresh notification and without a variation notice in terms of the requirements of the [Civil Procedure Rules](#).
 6. It is the case of the applicant that the interested party cannot be said to be an innocent purchaser because he had the opportunity to interrogate and must have interrogated the relevant files prior to getting involved in the transaction. The applicant urges this court to grant the orders sought.
 7. The respondent filed grounds of opposition dated 4/7/2022; replying affidavit dated 4/7/2022; supplementary affidavit dated 20/7/2022; and written submissions dated 5/12/2022 through M/s Kimandu & Ndegwa Company Advocates. The case of the respondent is that the cancellation of the applicant as proprietor of the suit property was properly effected in execution of the decree of the lower court because the appellant /applicant failed to pay security of costs in the sum of Kshs 500,000 within 60 days as ordered by this court.
 8. On the applicant's plea for an order setting aside the execution, the respondent contends that the sale can only be set aside on the basis of material irregularity or fraud in publishing or conducting the sale and upon the court being satisfied that the applicant has "sustained substantial injury". On the auction process, the respondent argues that the applicant has not demonstrated breach of any law by the respondent or the auctioneer. The respondent contends that the applicant was, all along, aware of the intended sale by public auction and had the opportunity to redeem the property. It is the case of the respondent that should this court be convinced that there "was irregularities in the sale" of the suit property, then it should find that the irregularities were minor and would not justify the setting aside of the sale.



9. On the question as to whether this appeal file was the appropriate file for execution of the relevant decree, the respondent contends that the warrant of sale were issued by this court and it behoved the applicant to take appropriate action “ that he deemed fit”. He adds that sale of the suit property on 8/6/2022 instead of 6/6/2022 cannot be a basis for setting aside the sale because the applicant did nothing to redeem the suit property. On the applicant’s contention that he withheld material information from this court, the respondent contends that his duty before this court was to file submissions in opposition to the appeal. He adds that he made full disclosure to this court in the opening paragraph of his written submissions. He urges the court to dismiss the application.

Interested Party’s Case

10. The interested party’s case is that he is an innocent purchaser for value whose title should be protected. He contends that he purchased the suit property in a public auction on 8/7/2022 and he was issued with a certificate of sale.
11. I have considered the application, the responses to the application, and the parties’ respective submissions on the application. The two key issues to be determined in the application are: (i) Whether there were material irregularities in the impugned execution to warrant the setting aside of the execution; and (ii) Whether the applicant has satisfied the criteria of substantial injury to warrant the setting aside of the impugned sale. I will dispose the two issues sequentially in the above order.
12. Was there any material irregularity in the impugned execution, to warrant the setting aside of the execution? First, this court exercised appellate jurisdiction. It did not exercise its original jurisdiction. Second, in its disposal orders, this court made variations to the decree of the lower court. Those variations were specified in the disposal orders of this court. Thirdly, this court did not make any award relating to costs of this appeal. Given the above circumstances, it is clear that the only decree capable of execution is the decree of the lower court, as varied by the Judgment and decree of this court. In the absence of an award of costs, there was nothing to attract warrants of execution in this appeal. The disposal order of this court has been reproduced in the opening paragraph of this ruling, for avoidance of doubt.
13. Indeed, the framers of the *Civil Procedure Rules* were clear on how the appellate judgments that vary decrees of trial courts are to be executed. The *Civil Procedure Rules* make it a mandatory requirement that upon finalization of an appeal by this court, certified copies of the judgment and the decree of this court be sent to the lower court. Order 42 rule 34 of the *Civil Procedure Rules* provides thus:
- “ A copy of the judgment and of the decree, certified by the High Court, or such officer as it appoints in this behalf, shall be sent to the court which passed the decree appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the court to which the appeal is preferred shall be made in the register of civil suits.”
14. The object of the above provision is to facilitate orderly execution of decrees by the trial courts upon disposal of appeals by the third tier superior courts. It was therefore materially wrong, and indeed illegal, for the respondent in this appeal to initiate an execution process on the platform of this appeal. The execution process was irredeemably irregular. The respondent argues that he was blameless in this illegal exercise. I do not think so. Whereas it is true that the court registry contributed to the perpetuation of this illegality, there is no doubt that the respondent was the initiator and driver of the irregular exercise. He is the one who applied for execution on the wrong platform.



15. That was not the only irregularity. The respondent knew that he had already executed the decree of the lower court by effecting the registration of the suit property into his name. For the suit property to be the subject of execution for recovery of the sum of Kshs 1,800,000 awarded to him in this appeal, in terms of the execution process contemplated under order 22 of the *Civil Procedure Rules*, the respondent ought to have first extracted the decree of the lower court as varied by the judgment of this court. The second thing he was required to do was to register the new decree against the parcel register and cause the registration of the suit property to revert to the appellant. It is only after the registration of the suit property is restored into the name of the appellant that he would be in a position to execute against the title through the process of sale of the suit property in execution of the decree. As things stood, the respondent held the title to the suit property in his name and proceeded to execute against that very title for recovery of the Kshs 1,800,000 which he had been awarded in lieu of the title. I have no doubt in my mind that this was irregular.
16. On the question of substantial injury, the applicant is a successful appellant. He purchased the suit property in 2018. He paid a substantial portion of the purchase price. This court found that the respondent was only entitled to recovery of the balance of the purchase price. If the illegal execution is left to stand, the applicant will lose both the land and the purchase price that he paid to the respondent. In my view, this would be substantial injury.
17. The interested party contended that he was a *bonafide* purchaser for value who should be protected. I do not think so. The interested party purported to purchase the suit property in a purported process of execution of a decree of this court. He had the opportunity and the duty to peruse the relevant court files. If he did that, he must have noticed that the execution which was being staged on the platform of this appeal file was illegal. Secondly, he must have known that no legitimate execution could be mounted by the respondent against a title that was at the time of execution still registered in the respondent's name. For those reasons, I reject the interested party's contention that he is an innocent purchaser for value.
18. Besides the plea for an order setting aside the execution, the appellant urged this court to issue orders cancelling the registration of the respondent as proprietor of the suit property. I will not exercise that jurisdiction. This court exercised appellate jurisdiction in this appeal. The proper court to issue the above facilitative order is the court executing the final decree. That court is the trial court.
19. For the above reasons, the appellant's notice of motion dated 31/5/2022 and amended on 12/7/2022 succeeds in terms of prayers 3 and 4. Given that the court registry was partially responsible for the illegal execution, parties will bear their respective costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Muthomi for the Appellant

Ms Ochieng for the Interested Party

Court Assistant: Hinga

