



**Ingotse v Inagai (Environment & Land Case 2 of 2014)
[2023] KEELC 16605 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 2 OF 2014
BN OLAO, J
MARCH 28, 2023**

BETWEEN

JACKTON ALIERO INGOTSE PLAINTIFF

AND

JOHN EBU INAGAI DEFENDANT

RULING

1. The dispute between Jacton Aliero Ingotse (the plaintiff) and John Ebu Inagai (the defendant) involved the ownership of the land parcel No North Teso/Kamuriai/456 (the suit land).
2. It was the plaintiff's case that he had purchased the suit land from the defendant's father on June 2, 1977 and took possession of it after the defendant's father had relocated elsewhere. However, following the death of the defendant's father, the defendant fraudulently registered the suit land in his (defendant's) name. The plaintiff therefore sought the revocation of the title in the names of the defendant.
3. The defendant filed a defence denying the plaintiff's averments adding that in fact the claim was statute barred.
4. The dispute was heard by Omollo J who delivered a judgment on January 27, 2022 and issued the following disposal orders:
 1. "That the defendant is holding land title No N. Teso/Kamuriai/456 in trust for the Plaintiff."
 2. "Each party to meet their respective costs of the suit."

The record shows that the defendant was aggrieved by that judgment and lodged a notice of appeal at this court's registry on February 9, 2022. Meanwhile, the plaintiff extracted a decree on February 13, 2022.



5. The plaintiff has now approached this court vide his Notice of Motion dated October 28, 2022, filed on October 31, 2022 and premised upon the provisions of section 3A of the Civil Procedure Act. He seeks the following orders:

1. That this honourable court do order the defendant/judgment debtor to sign transfer by trustee forms, application for Land Board Consent Forms for land parcel No North Teso/Kamuriai/456 and all other necessary forms in favour of the Plaintiff/Decree holder to give effect to the judgement of this Court delivered on January 27, 2022.
2. That in default, this honourable court do authorise the Deputy Registrar and/or Executive Officer of the court to sign the transfer by trustee forms, application for Land Consent forms for land parcel No North Teso/Kamuriai/456 and all other necessary forms to give effect to the judgment delivered on January 27, 2022.
3. That the costs of this application be provided for.

The application is predicated on the grounds set out therein and is supported by the applicant's affidavit of even date.

6. The gravamen of the application is that following this Court's judgment delivered on January 27, 2022, the plaintiff's counsel extracted a decree and also wrote to the defendant's counsel forwarding for execution Form R.L 52 being the transfer by trustee form along with an application for Land Control Board Consent. However, the defendant has refused to execute the said documents which is only calculated to defeat this court's judgment and render it of no effect.

7. The following documents are annexed to the application:

1. Decree dated February 13, 2022.
2. Letter by plaintiff's counsel dated October 13, 2022 and addressed to the defendant's counsel forwarding Form LR 52 and application for Land Board Consent for execution by the defendant.

8. The application is opposed and the defendant filed a replying affidavit dated February 3, 2022 in which he has deposed, inter alia, that in the judgment delivered on January 27, 2022 this court granted an order which was never pleaded in the plaint. that the defendant, aggrieved by that judgment, has filed at the Court of Appeal in Kisumu Civil Appeal No 74 of 2022. That the said judgment is arguable with high chances of success and it should be heard and determined first on its merit before the execution of this judgment. That if the said judgment is executed, it will pre-empt the pending appeal and in an event, there shall be no prejudice caused if this matter is held in abeyance. Further, that this application lacks merit as it is not supported by any law.

9. Annexed to the replying affidavit are the following documents:

1. Plaint in this case.
2. Memorandum of Appeal in Court of Appeal C.A. Civil Appeal No 74 of 2022.

The applicant filed a supplementary affidavit dated January 9, 2023 stating that an appeal does not serve to stay any execution. Further that the respondent has not obtained orders of stay of execution nor served him with any record of appeal. Further, that to stay these proceedings will be a violation of the plaintiff's right to access justice.



10. The application has been canvassed by way of written submissions. These have been filed both by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the defendant and by Mr Otieno instructed by the firm of S.B. Otieno & Company Advocates for the plaintiff.
11. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
12. The contents of the judgment delivered herein on January 27, 2022 and the subsequent decree are not really in dispute. And although not raised in the defendant's supporting affidavit, his counsel suggests in his submissions that if this court were to grant the prayer sought by the plaintiff, then the Deputy Registrar will be acting without jurisdiction. This is how counsel has submitted at page 1:

“The Deputy Registrar lacks jurisdiction to grant the substantive and additional orders which are intended to modify the judgment further when the said judgment has already been appealed against. The court granted an order which was never pleaded by the plaintiff and the said orders should be limited to the declaration on the court's orders to modify the declaratory order which has never been pleaded in the plaint. Granting such modified and substantive orders will amount to calling on the Deputy Registrar to review the judgment in favour of the plaintiff by granting substantive orders which were never pleaded for in the plaint or included in the judgment. Such orders in the application are substantive and they exceed the powers of the Deputy Registrar who will be sitting on appeal in regard to the court's inconclusive judgment.” Emphasis mine.

While those submissions may sound attractive, they are certainly not factual. That is because, should this court allow the plaintiff's application, any disposal orders flowing therefrom will not have been issued by the Deputy Registrar. Rather, they will have been issued by this court. Therefore, the allegation that the orders sought are beyond the Deputy Registrar's jurisdiction or that they will amount to the Deputy Registrar sitting on appeal or reviewing this court's judgment are unfounded. When a Deputy Registrar executes the orders of the superior court, he does not exercise any original jurisdiction. Therefore, the issue of the Deputy Registrar exceeding his jurisdiction does not arise unless of course he acts beyond the confines of what the court has directed him to do.

13. The defendant has deposed in paragraph 5 of his replying affidavit that he has filed an appeal at the Court of Appeal which has high chances of success and should be heard first and determined by its merits. It is not in doubt that the defendant has already filed a Notice of appeal and indeed Civil Appeal No 74 of 2022 at the Court of Appeal in Kisumu. However, and as the Plaintiff has deposed in paragraph 3 of his supplementary affidavit, the filing of an appeal in itself does not serve to stay the execution of a judgment. Indeed Order 42 Rule 6(1) of the *Civil Procedure Rules* which is the applicable provision in this Court, (not Rule 5(2) of the *Court of Appeal Rules* as cited by the plaintiff), makes it clear that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but ...”

It is common ground that there is no application before me for stay of execution of the judgment delivered on January 27, 2022. Therefore, there can be no basis upon which this court should stay the execution of that judgment to await the hearing and determination of the appeal. The law cited above makes it clear that the filing of an appeal is not by itself a sufficient ground to stop the execution of any judgment.



14. Having said so, it is correct to observe that in the judgment delivered on January 27, 2022, Omollo J did not order that the suit land be transferred to the Plaintiff. All that the judge found, as I have already stated above, was that the defendant is holding the title to the suit land in trust for the plaintiff. She also ordered that each party meets their own costs. This court is not sitting on appeal over that judgment. Among the grounds raised in paragraph 7 of the Memorandum of Appeal is that:

7. “The learned Judge erred in law and fact when she immensely sought to assist the respondent’s side by introducing the new concept of constructive trust which had never been pleaded or sufficiently introduced to the appellant to avail him the chance to amend his defence appropriately and bring the evidence to discount such constructive or implied trust as was lately introduced through the contested judgment.”

As to whether or not the Judge erred in law and in fact in arriving at the decision which she did is an issue to be determined by the appellate court when the appeal is eventually heard and determined. It is not an issue before this court.

15. However, the plaintiff has a judgment in his favour whose execution has not been stayed. He is entitled to enjoy the fruits of that judgment even as the defendant pursues his appeal. In my view, even though Omollo J did not specifically make any order that the defendant transfers the suit land to the plaintiff, a wholesome interpretation of that judgment can only mean that the judge found in favour of the plaintiff in relation to the ownership of the suit land. I say so because, the thrust of the plaintiff’s claim was that he had purchased the suit land from the defendant’s late father and taken possession of it after obtaining the necessary consent of the Land Control Board. However, the defendant fraudulently registered the suit land in his name following the death of his father. He therefore sought the cancellation of the defendant’s title to the suit land.

16. The defendant’s case was that infact he obtained the title to the suit land following succession proceedings and that in any event, no consent of the Land Control Board was obtained by the plaintiff.

17. The Judge did not find that fraud had been proved but proceeded to find in favour of the plaintiff on the basis of a constructive trust citing the case of *Willy Kitilit -v- Michael Kibet* 2018 eKLR. That means the Judge was satisfied that the defendant was holding the title to the suit land only as a trustee. The term trustee is defined in *Black’s Law Dictionary* 10th Edition as:

“Someone who stands in a fiduciary or confidential relation to another; especially one who, having legal title to property holds it in trust for the benefits of another and owes a fiduciary duty to that beneficiary.”

A constructive trustee, which is what Omollo J actually relied on in the judgment, is defined in the same dictionary as follows:

“One whom the law makes liable to hold property for the use or benefit of another, usu. on account of his or her own wrongful conduct; one who benefits from a breach of a trust to a great enough degree to become liable as a trustee.”

I have gone at great length to describe my understanding of the judgment by Omollo J because it is important for purposes of the orders which I will shortly be making in respect to the application before me. This is especially so in view of the defendant’s submissions that the orders sought will amount to a review of the judgment herein. The truth, however, is that having found that the defendant is only a trustee, he cannot continue holding the title to the suit land indefinitely especially in a case such as this where the plaintiff is a purchaser. The plaintiff is entitled to have the title to the suit land transferred



into his name otherwise the judgment which he obtained will remain hollow, of no effect and incapable of execution. The effect of the judgment is that the ownership of the suit land has now been acquired by the plaintiff. That can therefore only be actualized if the orders sought are granted.

18. Ultimately therefore and having considered the Notice of Motion dated October 28, 2022, I allow it in the following terms:
1. The defendant shall within 30 days of this ruling executive all the relevant documents to facilitate the transfer of the land parcel No North Teso/Kamuriai/456 to the plaintiff in order to give effect to the judgment delivered on January 27, 2022.
 2. In default of (1) above, the Deputy Registrar shall execute all such documents on behalf of the Defendant.
 3. No orders as to costs.

BOAZ N. OLAO

JUDGE

28TH MARCH 2023

Ruling dated, signed and delivered at BUSIA ELC on this 28th day of March 2023 by way of electronic mail as was advised to the parties.

BOAZ N. OLAO

JUDGE

28TH MARCH 2023

