



**Ambwere T. S. & Associates Advocates v Karama (Miscellaneous Application
23 of 2021) [2023] KEHC 20992 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 23 OF 2021**

**G MUTAI, J
JULY 31, 2023**

BETWEEN

AMBWERE T. S. & ASSOCIATES ADVOCATES APPLICANT

AND

MOHAMED SWALEH KARAMA RESPONDENT

RULING

1. There is a judgment of this Court dated 30th September 2022. Vide the said judgment the Court found for the Applicant in the sum of Kes.685,927.00. A decree for the said amount was subsequently issued on 18th October 2022. The said amount attracts interest at Court rates from 17th February 2022 until payment in full is made.
2. The Applicant was unable to procure willful payment of the outstanding amount. The said firm was thus forced to execute against the Respondent. Consequently, Mugema Auctioneers were instructed. The said auctioneers obtained warrants of attachment and sale of Title No. Mombasa/Block XVII/1323.
3. On 16th December 2022 the instant Notice of Motion was filed by the Respondent/Applicant. The orders sought are the following: -
 1. Spent
 2. Spent
 3. Spent
 4. That this honourable Court be pleased to order that the sale of the Respondent's Title Number Mombasa/Block/1323 be set aside pending hearing and determination of a cases involving the attachment property; and



5. That costs of this application be provided.
4. The application is premises on 4 grounds which I summarize as follows, that there are 2 cases (including this one) before the Family Court), 1 case before the Kadhi Court and 1 case before the Environment and Land Court. That the High Court in Mombasa in High Court Misc Application No. E011 of 2020 and the Environment and Land Court in Civil Suit No 1885 of 2022 have separately given orders stopping sale of Title No. Mombasa/Block/1323 citing various grounds. That the Applicant had proceeded to issue warrants of attachment and sale of the said property on 3rd November 2022 in clear disregard of the preservatory orders issued herein. Lastly the Applicant avers that the property was owned by 2 parties. One of the parties has a succession cause which was due for hearing on 19th January 2023.
5. The application was supported by the affidavit of the Respondent. He annexed a copy of the Title (Title No. Mombasa/Block/XVII/1323), the ruling of the Deputy Registrar delivered on 10th November 2022 vide which the said judicial officer declined to allow the sale of Title No. Mombasa/Block XVII/1323. In her ruling she said “I am unable to grant the order considering the parcel of land is not owned solely by the judgment debtor and any order to sell the land would be prejudicial to the other party”. Also attached were warrants of attachment of movable property, Notice to Redeem property issued to the Respondent in respect of Title Number Mombasa/Block XVII/1323, order issued by the Mombasa Chief Magistrate Court in respect of the ELC Cause No. 185 of 2022 on 9th December 2022. The Respondent/Applicant further attached an application before the Kadhi Court and a copy of the judgment vide which the said Court found that Anisa Swaleh Karama be registered as a Co- owner of Title Number Mombasa/Block XVII/1323 (in place of her deceased husband Omar Awadh Karama) together with Mohamed Swaleh Karama.
6. Upon being served the Applicant/Respondent filed a Notice of Preliminary Objection. The said Preliminary Objection impugned the jurisdiction of the Deputy Registrar to hear and determine the application, the fact that the application was to be heard during the Court’s vacation without requisite leave and the nature of the stay sought which in the view of the Applicant/Respondent was indeterminate. The advocate for the Respondent filed a Replying Affidavit on 17th January 2023.
7. On the 24th January 2023 the Applicant filed a Notice of Motion application dated the same day vide which he sought to have the orders issued by the Learned Deputy Registrar set aside or be vacated. This latter application was opposed by the Respondent vide the Replying Affidavit sworn on 9th February 2023.
8. After hearing the parties I dismissed the application dated 24th January 2023 vide my ruling dated 28th April 2023. In paragraph 18 of my said ruling I stated as follows: -

“for the foregoing reasons I dismiss the Notice Motion application dated 24th January, 2023.

The same has no merit. It is grounded on misapprehension or non-apprehension of the provisions of order 48 Rule 7 of the Civil Procedure Rules, 2010. It has no legs to stand on and must be mercifully put to sleep.”

9. I then went on to say that: -

“having dismissed this application I must then decide the fate of the application dated 16th December 2022. Although it would have been preferable to have the same heard by the Registrar I find it prudent to hear the application myself. I therefore order that the said application be listed for hearing before me on 16th May 2023.



10. There are only 2 prayers in respect of the Notice of Motion dated 10th December 2022. They are
 1. Whether sale of Title No. Mombasa/Block XVII/1323 may be stayed pending hearing and determination of all cases involving the said property; and
 2. Costs

Submissions of the parties

Submissions of the Respondent/Applicant

11. The Respondent/Applicant's counsel submitted that Title Number Mombasa/Block XVII/1323 is owned by 2 individuals. I was referred to my decision in Mombasa High Court Misc. Cause No E011 of 2022; *Ambwere T. S. & Associates Advocates versus Mohamed Swaleh Karama* wherein in paragraphs 15 I found as follows:-

“I have considered the ruling the Deputy Registrar on its merits. I find no fault with it. My opinion is that it is not possible to execute (against) the Respondent's portion of land without failing foul of section 91(6) of the *Land Registration Act*, Act No 3 of 2012 that provides as follows:-

“No tenant in common shall deal with that undivided share in favour of any person other than the tenant in common, except with the consent in writing of the remaining tenants, but such consent shall not be unreasonably withheld.”
12. In paragraph 10 I went on to say that:-

“As earlier shown the Respondent is an owner in common with a Mr. Omar Awadh Karama. I haven't seen evidence of consent by Mr. Omar Awadh Karama to the proposed transaction.”
13. Counsel for the Respondent referred to the several cases which are currently outstanding. The Respondent identified 2 issues to wit; whether a tenant in common can dispose of his share without the consent of the other party, whether execution can be done where a Court has made a contrary decision which has not been appealed against and also whether a Court becomes functus officio the moment it delivers judgment.
14. The Respondent/Applicant referred the Court to the case of *Diana Muchiri versus Lydia Wariara Njenga & Another* [2022]eKLR on the distinction between joint tenancy and tenancy In common. It was urged that it is necessary to obtain the consent of the tenant in common and that asking for such consent isn't unreasonable. The Respondent/Applicant submitted that the Deputy Registrar made a decision regarding execution against the property which wasn't appealed against. The said decision was eventually upheld by this Court.
15. Mr. Mangaro learned counsel for the Respondent/Applicant submitted that after the Court made its finding on whether execution could be levied against Title Number Mombasa/Block XVII/1323 it became functus officio. In support of the said contention I was referred to the decision of Nzioka J in Misc. Criminal Appeal No E043 of 2021 *Jane Nandaye Manyunge versus Republic*. The Court was thus asked to allow the application for the reasons given.



Submissions of the Applicant/Respondent

16. Mr. Ambwere submitted that the ELC case was before the Chief Magistrate's Court. The said Court is subordinate to the High Court. He argued that the application before Court is an abuse of the process. He stated that the share of the property belonging to the Respondent/Applicant was not in dispute.
17. It was submitted that stay was being sought for an indeterminate period and in respect of matters which are not before this Court. The Court was informed that the Applicant/Respondent has a judgment in its favour and should be allowed to enjoy the fruits of the said judgment without let or hindrance.
18. The Applicant/Respondent prayed that in the event I grant stay the stay should be conditional on the Respondent/Applicant paying Kes.1,000,000.00 into the Court. He submitted that a successful litigation shouldn't be denied fruits of a judgment in his favour. It was urged that litigation must come to an end.

Directions on the Ruling

19. After hearing the parties, I set down the matter for ruling on 30th June, 2023. This was not to be, for on 25th May 2023 an application was filed by J. A. Kahindi & Co. Advocates for an Interested Party/Applicant, one Sofia Awadh Salim. The said application sought the certification of the application as urgent, leave for J. A. Kahindi & Co. Advocates to come on record for the Intended Interested Party, arrest of the ruling slated for 30th June, 2023, joinder of Sofia Awadh Salim as an Interested Party, order that the legal fees payable to the Applicant/Respondent be borne by estate of Omar Awadh Karama and not the Respondent and costs of the application.

Proceedings in respect of the applications date 25th May 2023**

20. The latter application was argued before me on 16th June 2023. The effect of the said hearing is that the ruling slated for 30th June 2023 was arrested. The parties made oral submissions which I shall summarize below.
21. Mr. Kahindi for the Interested Party/Applicant stated that his client had been adversely mentioned. She therefore desired to be enjoined so that she could defend herself. It was submitted that the Respondent filed the Petition on behalf of the estate and not for himself. Costs payable to the advocate should therefore be paid by the estate and not the Respondent. He therefore prayed that I allow the application.
22. Mr. Ambwere for the Applicant/Respondent opposed the application. He stated that Title No. Mombasa/Block XVII/1323 is owned jointly by Omar Awadh Karama and the Respondent in equal shares. His intention is to execute against the latter's ½ share. He raised 3 questions to wit:-
 1. Can a Court reopen a judgment it previously delivered?
 2. Can a party who is not an a legal representative of an estate, administer an estate of a deceased person?
 3. Can a third party make an application to reopen a matter?

Mr. Ambwere submitted that the Intended Interested Party cannot represent the estate as she does not have a grant of representation. He urged that what was being sought was the transfer of liability to an intended Interested Party. He asked the Court to dismiss the said application.



23. Mr. Mangaro, on his part supported the application. He urged that the Court wasn't functus officio. The court, he submitted, has power under section 99 of the *Civil Procedure Act* to correct errors apparent on the face of the record. It was submitted that joinder can be done at any time even after entry of judgment.
24. In Reply Mr. Kahindi reiterated that his client had been adversely mentioned. He denied that he was seeking to transfer liability. He submitted that his client was a necessary party in this matter. It was thus urged that I allow the application and award the applicants costs.

Determination

25. I will determine the application filed on 25th May 2023 first. thereafter I will render my ruling in regard to the application dated 16th December 2023.
26. It is a common ground that the Intended Interested party/Applicant Sofia Awadh Salim does not have letters of administration in respect of estate of Omar Awadh Karama (deceased). In those circumstances can she purport to represent his estate? The Court of Appeal in the case of *Trouistik Union International & Ingrid Ursula Heinz versus Jane Mbeyu and Alice Mbeyu* [1997] eKLR determined authoritatively that in respect of an Intestate estate the person entitled to agitate a suit on behalf of the deceased is the personal representative. In his case Sofia Awadh Salim is not the personal representative of the estate of Omar Awadh Karama. She cannot therefore at law purport to represent the said estate. The application is therefore bereft of merit and must fail.
27. Even if she had letters of administration this Court has already entered judgment against the Respondent. He never appealed against the same. The said judgment binds him.
28. It would appear to this Court that the application dated 26th May 2023 was filed so as to obfuscate and confuse matters.
29. Regarding the application dated 16th December, 2023 this Court has previously determined that Title No. Mombasa/Block XVII/1323 is jointly owned by the estate Omar Awadh Karama and Mohamed Swaleh Karama with each having ½ share and may not be sold without the consent of the other co-owner. I haven't seen a legal justification for departing from my previous decision. Since the Applicant/Respondent can't sell Title No. Mombasa/Block XVII/1323 without the consent of the estate of Omar Awadh Karama it is not necessary for me to make a determination in respect of prayer No. 4 of the said application. The upshot of the foregoing is that the application dated 16th December 2022 is dismissed with no orders as to costs.
30. The Applicant/Respondent is at liberty to execute for his decretal sum but may not sell Title No. Mombasa/Block XVII/1323 without the consent of the co-owner.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS AT MOMBASA THIS 31ST DAY OF JULY 2023 VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Ambwere for the Applicant/Respondent;



No appearances for the Respondent/Applicant and the Interested Party/Applicant; and
Mr. Arthur Ranyundo – Court Assistant.

