



REPUBLIC OF KENYA



KENYA LAW
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**Kore v Wuantai & 4 others (Environment and Land Case Civil Suit
400 of 2017) [2023] KEELC 16885 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 400 OF 2017**

MN GICHERU, J

APRIL 17, 2023

BETWEEN

PARMUAT OLOISHORUA KORE PLAINTIFF

AND

PHILIP SANTAMO WUANTAI 1ST RESPONDENT

WUANTAI OLE SAIRE 2ND RESPONDENT

NISA OLE WUANTAI 3RD RESPONDENT

KAJIADO RESIDENT MAGISTRATE 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This Ruling is on the Notice of Motion dated March 25, 2022. The Motion which is brought under Order 22 Rule 29 of the *Civil Procedure Rules* and the *Contempt of Court Act* seeks two prayers;
 - i. An order to the OCS Kiserian Police Station to provide Security to Front Bench Auctioneers and the District Surveyor while executing the warrants.
 - ii. That the Applicant, Parmuat Oloihorua Kore/Judgment debtor be ordered to pay the costs of the eviction exercise that may be incurred by the decree holder.
2. The Application is supported by three grounds and an affidavit by Isaac Onyango Aloo which has four annexures. The gist of the above material is as follows. The Applicant was requested to voluntarily comply with the court decree dated November 20, 2018, his application for stay of execution was dismissed on July 31, 2019. Nothing else remain other than to execute the decree yet the judgment debtor has threatened the auctioneer and the surveyor.



3. The Motion is opposed and Pithon Mwangi has sworn a Replying Affidavit dated July 30, 2022 in which he says that the judgment debtor passed away on July 12, 2022 as per the annexed certificate of death dated December 1, 2022. He adds that the deceased did not show any hostility to the Respondent and the warrants of attachment were not served upon the deceased. Other issues raised are that the judgement does not include the individual homesteads of the Respondent and his dependents and its execution would be *ultra vires*.

4. I have carefully considered the Application in its entirety including the Affidavits, the annexures and the issues raised in the entire Motion. I find that the Motion has merit for the following reasons.

Firstly, it is surprising for counsel to come on record after the death of the Applicant and say that the Applicant is deceased. The question that arises is, who instructed him? . The person who instructed him should have sought to be appointed as legal representative of the estate of the deceased under Order 24 of the *Civil Procedure Rules*.

Secondly, it is obvious that the decree holder is being resisted by the estate of the deceased otherwise they would not have opposed the Application.

Thirdly, Pithon Mwangi, counsel for the estate of the deceased is not the right person to swear the Replying Affidavit. He cannot give first hand evidence in these proceedings.

Fourthly and very surprisingly, it is incredible that at this late stage of execution, issues of homesteads and the distribution of the deceased's property are being raised in this court. This is a land Court. Its jurisdiction is limited to strictly environment and land matters. Distribution of the estate of the deceased is an issue to be dealt with by the High Court. What must happen is that the decree of this court will be executed. Whatever remains of the estate of the deceased will be distributed amongst his heirs. That cannot be a reason to stop the execution of this court's decree. The only way to stop such execution is by an order of this court or that of a higher court. No such order has been annexed to the Replying Affidavit.

Finally, the judgment herein is in rem and not in personam. This means that the cause of action survives the deceased and his heirs will have to make do with whatever is left of the deceased's estate after execution of the decree herein.

For the above stated reasons, I find merit in the motion dated March 25, 2022 and I allow it as drawn with costs to the Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF APRIL, 2023.

N. GICHERU

JUDGE

