



REPUBLIC OF KENYA



KENYA LAW
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**Franceskides v Opondo & 4 others (Civil Case 178 of 2012)
[2022] KEHC 15705 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 178 OF 2012
SM GITHINJI, J
NOVEMBER 29, 2022**

BETWEEN

REBECCA PETER FRANCESKIDES PLAINTIFF

AND

LUCAS OLOO OPONDO 1ST RESPONDENT

**JOSEPH MUISYO PRACTISING AS MUISYO & CO.ADVOCATES-
DECEASED 2ND RESPONDENT**

**JOHN KHAMINWA & ALBERT KHAMINWA PRACTISING AS KHAMINWA
& KHAMINWA ADVOCATES 3RD RESPONDENT**

MORRIS MTANDA 4TH RESPONDENT

STANDARD CHARTERED BANK LTD 5TH RESPONDENT

RULING

1. Before court for determination is the applicant's application dated May 18, 2022 brought under section 48, 1A, 1B and 3A of the [Civil Procedure Act](#) and order 22 rule 77(1), 79, 80 and 81 of the [Civil Procedure Rules](#). The applicant seeks the following orders: -
 1. That this Honourable Court do make a declaration that the sale by public auction with respect to property Land Reference Plot No 10719/421 Malindi together with the developments on it, which was conducted on April 22, 2022 is absolute.
 2. That this Honourable Court do issue a certificate confirming that the Applicant herein, Brian Osois the purchaser of the property Land Reference No 10719/421 Malindi together with the developments on it.



3. That this Honourable Court direct the Deputy Registrar to execute the transfer instrument on behalf of the registered owner, the Respondent herein.
 4. That the Respondent Lucas Oloo Opondo, do produce and hand over the original title documents to the Registrar of Lands within seven days of service of an order requiring him to do so.
 5. That in the alternative, should the Respondent fail, neglect or refuse to hand over the original title documents, the Registrar of Lands be directed to dispense with the requirement that the original document of title be made available before the property can be transferred.
 6. That upon the registration of the Transfer of title to the Applicant, the Registrar of Lands be directed to issue to the Applicant a provisional certificate of Title for Land Reference No 10719/421 Malindi.
 7. That a vesting order of a good and valid title do issue in favour of the applicant, upon completion of the process of the Transfer of the title.
 8. That the Respondent and/or its agents, anyone claiming through the Respondent and/or its tenants be ordered to forthwith hand over vacant possession of Land Reference No 10719/421 Malindi together with the developments on it to the Applicant or in default be evicted from the property.
 9. That the costs of this application be provided for.
2. The application is premised on grounds *inter alia* that the applicant lawfully purchased by way of public auction, the parcel of land known as Land Reference Plot No 10719/421 Malindi together with the developments on it {the property} at the purchase price of Kshs 6,400,500/- which he paid in full; That at the time the public auction was scheduled there were no orders of stay; that there are no orders setting aside the sale; and that completion of the sale has been thwarted by the 1st Respondent's unwillingness to hand over the title documents to the property.
 3. The Application is also based on the supporting affidavit sworn on May 18, 2022 by the Applicant wherein he largely reiterated the aforementioned grounds. The Applicant deposed that he bought the property pursuant to this court's decree in this suit and to a newspaper advertisement dated April 4, 2022. He annexed a certificate of sale by auctioneer, the newspaper advertisement, warrants of attachment and sale of the property, and the said decree.
 4. The application was unopposed. When the application came up for mention on September 22, 2022, Mr Shujaa counsel for the 1st Respondent informed the court that he had lost contact with his client.

Analysis and Determination

5. I have considered the notice of motion and find that the sole issue for determination is whether the application is merited.
6. It is not in doubt that a sale was conducted by public auction on April 22, 2022. The Applicant emerged the successful purchaser and paid a sum of Kshs 6,400,500/- which he paid in full. A certificate of sale is annexed to the affidavit and marked "BO-1".



7. Section 48 of the *Civil Procedure Act* provides that:-

“Where immovable property is sold in execution of a decree and the sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.”

Order 22 rule 77(1) of the *Civil Procedure Rules* provides that:

“Where no application is made under rule 74, rule 75 or rule 76, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgment debtor in the property sold is concerned.”

8. Bearing in mind the above provisions and the undisputed evidence herein, I find merit in the present application. I therefore issue the following orders: -

- a. That a declaration be and is hereby issued that the sale by public auction in respect of LR No 10719/421 Malindi, which was conducted on April 22, 2022 is absolute.
- b. That a certificate do hereby issue confirming the applicant herein, Brian Oseso as the purchaser of the property known as LR No 10719/421 Malindi.
- c. That the Deputy Registrar is hereby directed to execute the transfer instrument on behalf of the registered owner, the 1st respondent herein.
- d. That the 1st respondent herein Lucas Oloo Opondo, is hereby ordered to produce and hand over the original title documents to the Registrar of Lands within seven (7) days of service of an order requiring him to do so.
- e. That in the alternative, should the respondent fail, neglect or refuse to handover the original title documents, the Registrar of Land is hereby directed to dispense with the requirement that the original document of title be made available before the property can be transferred.
- f. That upon registration of the transfer of title to the Applicant the Registrar of Lands is directed to issue to the Applicant a provisional Certificate of Title for LR No 10719/421 Malindi.
- g. That a vesting order of a good and valid title do issue in favour of the applicant upon completing the process of the transfer of the title.
- h. That the respondent and/or his tenants be given 30 days notice in which to hand over vacant possession of LR No 10719/421 Malindi together with the developments on it to the Applicant and in default be evicted from the property.
- i. That costs of this application be borne by the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29TH DAY OF NOVEMBER, 2022.

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SM GITHINJI

JUDGE

In the Presence/Absence of; -



Miss Murimi holding brief for Mr Nyongesa for the interested party

Mr Shujaa is for the 1st Defendant /Respondent

