



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Kenya Commercial Bank Limited & 2 others; J. K. Kibui t/a Kahuthia
Kibui & Co., Valuers & another (Third party) (Civil Case 646 of 2008)
[2021] KEHC 302 (KLR) (Commercial and Tax) (26 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 646 OF 2008
DAS MAJANJA, J
NOVEMBER 26, 2021**

BETWEEN

PAULINE MUTAVE SAMSON KAMAU PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

JUSTUS MUSYOKI ISAIYAH 2ND DEFENDANT

MARY MURIUKI T/A VERA PROPERTIES 3RD DEFENDANT

AND

J. K. KIBUI T/A KAHUTHIA KIBUI & CO., VALUERS THIRD PARTY

VERA PROPERTIES LIMITED THIRD PARTY

RULING

1. In the Notice of Motion dated 12th January 2021, the 1st Defendant (“the Bank”) seeks an order that the court direct the Plaintiff to sign the Transfer and application to the Land Control Board Consent for the property; Mutonguni/Kauwi/2509 in favour of the Bank within 14 days or in default the Deputy Registrar be directed to sign the documents. The application is supported by the affidavit and further affidavit of the Bank’s advocate, Dr Benjamin Musau, sworn on 12th January 2021 and 12th November 2021. The application is opposed by the Plaintiff through the affidavit of her advocate on record, S. Owino, sworn on 23rd August 2021.
2. The facts upon which the application is grounded are common ground. By a judgment dated 26th July 2001, the court set aside the sale by public auction of LR No. Mutongoni/Kauwi/2509 (“suit



property”) and ordered the Bank to refund the Plaintiff Kes. 291,000 with interest thereon at 25% p.a from 5th February 1999 until payment in full. Subsequently the parties negotiated settlement and on 10th June 2019, the Bank forwarded Kes. 1,939,912.50 to the Plaintiff’s advocates. The Bill of Costs was also taxed at Kes. 348,428.00.

3. The Bank complains that despite the Plaintiff releasing the original title document for the suit property, the Plaintiff has refused to execute the Transfer and application for the Land Control Board Consent in favour of the Bank. The Bank through an email dated 18th May 2020 informed the Plaintiff’s advocate that it was willing to pay Kes. 160,378/- arising out of the taxation in exchange for the duly executed documents but instead of forwarding the documents, the Plaintiff instructed Nairobi Connection Services Auctioneers to proceed with execution for the sum of Kes. 2,138,756.00 despite settlement of the decretal sum. The Bank states that on 30th June 2020, it forwarded the cheque for Kes. 160,378.00 in full and final settlement of the decretal sum and costs on the Plaintiff’s professional undertaking to execute the transfer and application for Land Control Board Consent. The Bank argues that the Plaintiff is not entitled to proceed with execution and the execution is irregular and unlawful.
4. The Plaintiff opposes the application. She states that while she applied for execution on 26th February 2021, the amount of Kes. 2,138,756.08 reflected in the warrants of attachment was an error as the application for execution clearly showed that the amount to be executed for was Kes. 160,578.00. When the Plaintiff’s advocates realised the error, they informed the Deputy Registrar by the letter dated 26th June 2020 and it is on 30th June 2020 that the balance of the decretal sum was received. The Plaintiff reiterates that there was nothing irregular or unlawful as it was entitled to execute for the sum of Kes. 160,578.00 as such the Bank must pay Kes. 28,028.90 being the Auctioneer’s invoice before the Plaintiff can execute the Transfer or application for the Land Control Board Consent.
5. There is no dispute that this matter was settled and only Kes. 160,578.00 was outstanding. As I understand, the issue for resolution is whether the Plaintiff is entitled to demand the Auctioneer’s fee before executing the Transfer and application for Land Control Board Consent.
6. The Plaintiff made the application for execution on 26th February 2021 before the Bank made an offer to make payment on 18th May 2021. The Plaintiff issued the proclamation for Kes. 2,138,756.00 on 25th June 2020 after the Bank had made the offer to settle the matter. I hold that by this time, counsel for the Plaintiff already knew that the Bank was ready and willing to make payment hence there was not need to proceed with execution. I say so because the overriding objective anchored in section 1A and 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) requires that the court facilitate the just, expeditious, proportionate and affordable resolution on disputes and that each party to the proceedings including the Advocates on record must give effect to and participate in processes that the give effect to the overriding objective. In this respect there, counsel must be wary of increasing and or imposing unnecessary cost on parties when it is clear that such action as is here in was unnecessary.
7. In the circumstances and for the reasons I have stated, I direct as follows:
 - a. The Plaintiff shall unconditionally execute and thereafter forward to the 1st Defendant’s Advocates the Transfer and Land Control Board Consent application in favour of the 1st Defendant in respect of Mutonguni/Kauwi/2509 within 7 days from the date hereof and in default the Deputy Registrar of this court is directed to execute the said documents.
 - b. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER 2021.

D. S. MAJANJA



JUDGE

Court Assistant: Mr M. Onyango

Mr Owino instructed by S. Owino and Company Advocates for the Plaintiff.

Dr Musau instructed by B. M. Musau and Company Advocates for the 1st Defendant.

