



**Ambwere T.S & Associates Advocates v Karama & another (Environment and Land Miscellaneous Application E020 of 2023) [2023] KEELC 18985 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18985 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E020 OF 2023  
NA MATHEKA, J  
JULY 25, 2023**

**BETWEEN**

**AMBWERE T.S & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**ANISA SWALEH KARAMA ..... 1<sup>ST</sup> RESPONDENT**

**NADIA OMAR AWADH ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

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1 The Application is dated March 24, 2023 and is brought under section 1, 1A, 1B, 3, 3A and 63 (a) of the Civil Procedure Act section 91(6) of the Land Act No. 3 of 2012 seeking the following orders;

1. That, the instant application be certified urgent and service thereof be dispensed with in the first instance.
2. That, the court do make an order compelling the respondents to issue a consent for sale of  $\frac{1}{2}$  share in property known as MBS/Block XVII/ 1323 commonly owned by the respondents as administrator of Estate of Omar Awadh Karama and one Mohamed Swaleh Karama and or, the Deputy Registry sign the consent on behalf of the respondents.
3. That, in the alternative the respondents do pay the applicant the sum of Kshs. 1,230,000/- as part of purchase of  $\frac{1}{2}$  share of commonly held property with Mohamed Karama Hantoosh, in respect of Judgment in H.C Family Misc. App. No. E011 of 2022 at Mombasa and H.C Family Misc. App. No. 23 of 2021 at Mombasa, Ambwere T.S & Associates Advocates =vs= Mohamed Swaleh Karama respectively.
4. That, the cost of this Application be provided.



- 2 It is based on the grounds that the respondents commonly own a property in equal share ½ with one Mohamed Swaleh Karama, as administrators of the Estate of one Omar Awadh Karama. The respondents have declined to grant consent to the applicant against one Mohamed Swaleh Karama. The respondents have declined to grant the applicant consent to sale the ½ share commonly owned with respondents. The High Court Family Division had directed that they get the consent of the respondents to sale the ½ share. The applicant has written to the respondent's Advocate for the consent, but the same has been declined or neglected and or ignored. The refusal is unreasonable and without any basis, hence this application. The applicant fears that the property shall be fraudulently transferred and be out of the reach of the applicant. It is supported by the annexed affidavit of Shitakha Tom Ambwere.
- 3 This court has considered the application and the submissions therein. The applicant seeks for court orders for the applicants to sign a consent for transfer or in the alternative the respondents do pay the applicant the sum of Kshs. 1,230,000/- as part of purchase of ½ share of commonly held property with Mohamed Karama Hantoosh, in respect of Judgment in H.C Family Misc. App. No. E011 of 2022 at Mombasa and H.C Family Misc. App. No. 23 of 2021 at Mombasa, Ambwere T.S & Associates Advocates =vs= Mohamed Swaleh Karama respectively. These matters were in the High Court and this is the Environment and Land Court, a court of equal status. How would this court enforce an order or decree if any of a court of equal status? This court has no jurisdiction to make such orders. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1 where Justice Nyarangi of the Court of Appeal held as follows
- "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
- 4 Even if this court had jurisdiction, courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted in *Witmore Investment Limited v County Government of Kirinyaga & 3 others* (2016) eKLR wherein it was held;
- "So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law."
- 5 In the case of *Nairobi West Hospital Limited v Joseph Kariba & another* (2018) eKLR it was held that;
- .....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral sclerolosis and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out."
- 6 For these reasons I find this application is unmerited and an abuse of the court process. I consequently dismiss it with costs to the respondent.



7 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**N.A. MATHEKA**

**JUDGE**

