



Odam (Suing as the Administrator of the Estate of Konel Adam Omollo - Deceased) & another v Odingo & 11 others (Environment and Land Case Civil Suit 160 of 2015) [2025] KEELC 1303 (KLR) (18 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 160 OF 2015
SO OKONG'O, J
MARCH 18, 2025**

BETWEEN

JOSEPH OMOLLO ODAM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KONEL ADAM OMOLLO - DECEASED) 1ST PLAINTIFF

ROSE AUMA OMOLO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF RICHARD OMOLO OYOO - DECEASED) 2ND PLAINTIFF

AND

JILL OWINO ODINGO & 11 OTHERS DEFENDANT

RULING

1. The court delivered a judgment herein on 27th October 2022 and a decree was extracted therefrom and issued on 23rd January 2023. In the decree, the court ordered as follows;
 - “a) The 1st Plaintiff is entitled to 1/3 of his father’s share in the suit land.
 - b) The 2nd Plaintiff is entitled to 2.5 acres in the suit land having acquired the same by adverse possession.
 - c) The Plaintiff is hereby awarded half the costs against the Defendants except the 6th Defendant who was wrongly sued as he is not the registered owner.”
2. The said judgment and decree have not been stayed, varied or set aside. What is now before the court is the Plaintiffs’ application brought by way of Notice of Motion dated 10th June 2024 under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 22 of the Civil Procedure Rules, 2010. In the application, the Plaintiffs seek the following orders;
 - a. That the court be pleased to grant an order cancelling all the subdivisions emanating from land parcel No. Kisumu/Konya/817;



- b. That the court does direct that the 1st Plaintiff gets 1/3 share of his father's share in the land parcel No. Kisumu/Konya/817;
 - c. That the court does direct that the 2nd Plaintiff gets 2.5 acres of the land parcel No. Kisumu/Konya/817 having acquired the same by adverse possession; and
 - d. That the costs of the application be provided for.
3. The application which is supported by the affidavit of the 2nd Plaintiff sworn on 10th June 2024 was brought on several grounds. The Plaintiffs averred that in its judgment, the court ordered that the 1st Plaintiff was entitled to 1/3 share of his father's share in land parcel No. Kisumu/Konya/817 while the 2nd Plaintiff was entitled to the portion of land parcel No. Kisumu/Konya/817 measuring 2.5 acres having acquired the same by adverse possession. The Plaintiffs averred that land parcel No. Kisumu/Konya/817 (hereinafter referred to as "the suit property") had been subdivided into twelve (12) portions namely; land parcel Nos. Kisumu/Konya/3476-3487 (hereinafter referred to as "the subdivisions"). The Plaintiffs averred that in the process of executing the said decree in their favour, they lodged the decree at the Land Registry for registration. The Plaintiffs averred that the Land Registrar declined to register the decree arguing that the decree was not clear as to the land that was awarded to the Plaintiffs. The Plaintiffs averred that it was necessary for the subdivisions of the suit property namely, land parcel Nos. Kisumu/Konya/3476-3487 to be cancelled and the suit property restored for the execution of the decree to be effected.
 4. The application was served upon the Defendants who had defended the suit but none of them responded to the same. On 23rd October 2024, the court directed that the application be argued by way of written submissions. The court granted leave to the 6th Respondent to file submissions limited to the issues of law raised in the application.
 5. The Plaintiffs filed submissions dated 27th January 2025 on the same date in which they reiterated the grounds on the face of the application and the supporting affidavit. The 6th Defendant filed submissions dated 30th January 2025 on 7th February 2025. The 6th Defendant submitted that the application was incompetent in that a court can only grant reliefs sought in the plaint. The 6th Defendant submitted that the orders sought by the Plaintiffs in the application were not sought in their plaint and that the application was an attempt by the Plaintiffs to amend the plaint after judgment. The 6th Defendant averred that the court, having rendered its judgment, was functus officio and could not grant the orders sought by the Plaintiffs.

Analysis and determination

6. Section 34(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides as follows:
 "All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."
7. In my view, the Plaintiffs' application seeks the assistance of the court in the execution of the judgment of the court delivered herein on 27th October 2022. In the judgment, the court did not nullify the transfer of the suit property to the 1st Defendant, the subdivision of the suit property and the transfer of the subdivisions of the suit property namely; land parcel Nos. Kisumu/Konya/3476-3487 to the 1st to 11th Defendants. This means that the court upheld the transfer of the suit property to the 1st Defendant, its subdivision by the 1st Defendant and the transfer of the subdivided portions thereof to the 1st to 11th Defendants.



8. In the circumstances, the court's finding that the 1st Plaintiff was entitled to 1/3 share of his father's share "in the suit land" could only have meant land parcel Nos. Kisumu/Konya/3476-3487. The same applies to the court's finding that the 2nd Plaintiff was entitled to 2.5 acres "in the suit land" having acquired the same by adverse possession.
9. According to the mutation for the subdivision of land parcel No. Kisumu/ Konya/817 ("the suit property") which was produced in evidence at the trial, land parcel Nos. Kisumu/Konya/3476-3487 measured in total approximately 1.04 Ha. (2.57 acres) excluding access roads. According to the judgment of the court, it is from this 1.04 Ha. (2.57 acres) that the 1st Plaintiff should get 1/3 share of his father's share in land parcel Nos. Kisumu/Konya/3476-3487 and the 2nd Plaintiff, land measuring 2.5 acres. The problem that has been presented to the court for determination by the Plaintiffs is how the Plaintiffs would get their court-declared shares in land parcel Nos. Kisumu/Konya/3476-3487. I believe this is an issue that the court can deal with under Section 34 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya cited above. The Plaintiffs do not need to file a new suit. The court is not functus officio, as claimed by the 6th Defendant. The Plaintiffs are not seeking any new relief from the court. The court awarded the Plaintiffs land parcel Nos. Kisumu/Konya/3476-3487 but in different shares. What the Plaintiffs have sought from the court is an order that would make it possible for the Plaintiffs to execute the judgment so that the 1st and 2nd Plaintiffs can have their respective shares in the land parcel Nos. Kisumu/Konya/3476-3487.
10. In addition to the powers granted to the court under Section 34 of the [Civil Procedure Act](#) aforesaid, the court has inherent power to facilitate the execution of its orders and decrees. The decree issued by this court is in the process of being executed or realised. Any issue arising during this process can only be determined by this court. From the comments that have been made by the Land Registrar on the Plaintiffs' application to register the decree, I am of the view that if the court does not intervene, the judgment of the court delivered herein on 27th October 2022 would be rendered otiose and the decree of this court would have been issued in vain. I cannot see any prejudice that can be suffered by the 6th Defendant if the court steps in to aid in the execution of its decree that has not been stayed. I therefore find merit in the Plaintiff's application. I have however agonized over the appropriate order or direction to give in the matter. I agree with the 6th Defendant that this court cannot cancel the titles for land parcel Nos. Kisumu/Konya/3476-3487 since the trial court had declined to do so. I am of the view that the Plaintiffs must take land parcel Nos. Kisumu/Konya/3476-3487 as given by the court. However, the Plaintiffs can only share between them land measuring approximately 1.04Ha. (2.57 acres) which is the total measurement of land parcel Nos. Kisumu/Konya/3476-3487. The 1st Plaintiff's father would have been entitled to 1/3 share of the total land measuring 2.57 acres which comes to 0.86 acres. This is what the 1st Plaintiff is entitled to under the judgment of the court. This would leave land measuring 1.71 acres only for the 2nd Plaintiff. I am of the view that the 2nd Plaintiff will have to accept the loss of land measuring 0.79 acres out of the land measuring 2.5 acres that was awarded to him by the court. I do not think that it would have been the intention of the court to award parties nonexistent land.
11. In conclusion, I make the following orders in the matter;
 1. The Land Registrar Kisumu shall register the decree issued herein on 23rd January 2023 against the title of each of the land parcel Nos. Kisumu/Konya/3476-3487.
 2. The 1st and 2nd Plaintiffs may apply to the Land Registrar to be registered as the owners of each of the land parcel Nos. Kisumu/Konya/3476-3487 as tenants in common in shares of 1/3 and 2/3, respectively, representing (in total), land measuring approximately 0.86 acres (0.35 Ha.) for the 1st Plaintiff and land measuring approximately 1.71 acres (0.69 Ha.) for the 2nd Plaintiff.



3. The 1st and 2nd Plaintiffs may thereafter share land parcel Nos. Kisumu/Konya/3476-3487 by transferring the same to each other according to the 1/3 and 2/3 shares indicated in order number 2 above taking into account that the 2nd Plaintiff's share must include her homestead.
4. The 1st and 2nd Plaintiffs, once registered as the owners of the land parcel Nos. Kisumu/Konya/3476-3487 may as an alternative to order number 3 above, consider amalgamating/consolidating the twelve (12) parcels of land and thereafter sharing the amalgamated/consolidated parcel in shares of 1/3 and 2/3 indicated in order number 2 above, again taking into account that the share of the 2nd Plaintiff must include her homestead.
5. The orders given in 2, 3 and 4 above are optional for the Plaintiffs and shall only become effective if wholly accepted by both Plaintiffs.
6. The Deputy Registrar of the court is authorised to execute any document that may be necessary for the implementation of the orders made herein subject to order 5 above.
7. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 18TH DAY OF MARCH 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Khisa h/b for Ms. Akinyi for the Plaintiffs

N/A for the Defendants

Ms. J.Omondi-Court Assistant

