



**Osangire v Ipaye (Environment & Land Case 52 of 2019)
[2023] KEELC 20091 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 52 OF 2019**

**BN OLAO, J
SEPTEMBER 28, 2023**

BETWEEN

JOHN ISAAC OSANGIRE PLAINTIFF

AND

BENARD OKAPESI IPAYE DEFENDANT

RULING

1. The dispute between John Isaac Osangire (the plaintiff) and Benard Okapesi Ipaye (the defendant) over the land parcel No South Teso/amukura/188 (the suit land), was heard and determined by Omollo J. Vide a judgment delivered on April 28, 2022, the judge made the following disposal orders:
 - a. “A declaration that the defendant holds LR South Teso/amukura/188 on his behalf and in trust of the plaintiff and their brother Abraham Ogema.”
 - b. “An order be and is hereby made that the defendant does sub-divide LR No South Teso/amukura/188 and transfer to the plaintiff a portion measuring 3½ acres (1.45 ha) plus provision for road of access.”
 - c. “In default, the Deputy Registrar to execute all the sub-division and transfer documents to effect the transfer of the portion measuring 1.4 ha in the name of the plaintiff.”
 - d. “The plaintiff to meet the costs of the sub-division and transfer process for his portion.”
 - e. “Each party to bear their costs of this suit.”
2. No appeal appears to have been filed against that judgment and the defendant confirmed when he appeared before me on September 27, 2023 that indeed he has not appealed the judgment.



3. The plaintiff has now moved this court through his notice of motion dated May 8, 2023 founded upon the provisions of sections 1A and 3A of the Civil Procedure Act. He seeks the following substantive orders:
 - 1: “That the production of the original title deed for LR No South Teso/amukura/188 to the Land Registrar at the time of carrying out the sub-division be and is hereby dispensed with.”
 - 2: “That costs be in the cause.”
4. The application is premised on the grounds set out therein and supported by the plaintiff’s affidavit of even date.
5. The gravamen of the application is that the execution of the judgment herein will require the production of the original title deed of the suit land to the Land Registrar. However, the defendant has declined to produce the same thus necessitating this application.
6. The application is opposed and the defendant has filed a replying affidavit dated September 22, 2023 in which he has deposed, *inter alia*, that the application lacks merit and is introducing fresh issues.
7. That the plaintiff is engaged in land grabbing and has not informed the court that their father had already distributed his land among his sons. That this being family land, the consent of the whole family is required before it is distributed. This application should therefore be dismissed and the matter referred to the family for determination.
8. The application has been canvassed orally.
9. I have considered the application, the rival affidavits and the oral submissions by Mr Otanga counsel for the plaintiff and by the defendant who opted to address the court in person after his counsel Mr Ouma failed to turn up for the hearing.
10. The disposal orders made by the court in its final judgment dated April 28, 2022 with respect to how the suit land was to be shared among the parties is very clear as indicated above. For that judgment to be executed, the Land Registrar will require the original title deed to the suit land. The defendant, upon being questioned by the court, admits that he has the original title deed. Clearly, therefore, he has declined to avail it to the Land Registrar in order to frustrate the execution of the judgment which he has not appealed. Instead, he claims that the suit land being family land, this dispute should be referred to the family for determination.
11. I agree that the determination of disputes involving family is best done outside the toxic environment of the court. That is why courts have now embraced and encouraged the alternative justice system. Further, article 45 of the Constitution recognizes the family as “the natural and fundamental unit of society and the necessary basis of social order.” It is therefore important to maintain cohesiveness within family by settling any family disputes amicably. However, that can only be done with the consent of the parties themselves. It cannot be imposed on the parties by the court and neither can it achieve its objective if one of the parties clearly demonstrates lack of good faith in the process or where it is too late in the day to make any useful progress in the matter.
12. In the circumstances of this case, it is clear that the defendant has no intention of appealing the judgment. In paragraph 5 of his judgment, the plaintiff has deposed that the defendant has “declined to sign documents of sub-division and transfer” of the suit land as decreed. A party, like the defendant, who has refused to obey the orders of a court is unlikely to obey any other orders that may be issued by the family as suggested by the defendant. I am not persuaded that this is a matter to refer to the family and it is rather too late in the day to do so. The ship has already left the dock.



13. Ultimately, therefore, and having considered the notice of motion dated May 8, 2023, I allow it and make the following orders:
1. The defendant shall within 15 days of this ruling avail to the Land Registrar Busia the original title deed to the land parcel No South Teso/amukura/188 to facilitate the sub-division thereof in accordance with the judgment herein.
 2. In default of (1) above, that title shall be cancelled and the Land Registrar and surveyor Busia shall proceed and sub-divide the land parcel No South Teso/amukura/188 in compliance with the judgment of this court and notwithstanding the absence of the original title deed.
 3. Each party shall meet their own costs as they are a family.

BOAZ N. OLAO

JUDGE

28TH SEPTEMBER 2023

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 28TH DAY OF SEPTEMBER 2023.

Mr. Otanga for Plaintiff present

Defendant present in person

Ajwang' Court Assistant present

BOAZ N. OLAO

JUDGE

28TH SEPTEMBER 2023

