



**Atieno v Opeyo (Environment & Land Case 328 of 2016)
[2025] KEELC 1264 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 328 OF 2016
SO OKONG'O, J
MARCH 13, 2025**

BETWEEN

NICHOLAS JACOB AMOLO ATIENO PLAINTIFF

AND

VITALIS AONO OPEYO DEFENDANT

RULING

1. In the judgment delivered herein on 13th May 2021 and the decree issued on 6th July 2021, the court made the following orders, among others;
 - a) That the Defendant holds a portion of the parcel of land known as Title No. Kisumu/Marera/2504 measuring 1.01 Ha. in trust for the Plaintiff and his family.
 - b) That the said portion of the parcel of land, Title No. Kisumu/Marera/2504 measuring 1.01 Ha. shall be transferred and registered in the name of the Plaintiff.
 - c) That the Defendant shall execute all transfer documents in favour of the Plaintiff, and in default, the Deputy Registrar of the court is empowered to execute the same to give effect to the said orders.
2. The said judgment and decree have not been stayed, varied or set aside. The Defendant refused to comply with the judgment and decree of the court. On 25th January 2022, the court made the following further orders;
 1. That the Deputy Registrar executes the completion documents on behalf of the Defendant who has declined to do so.
 2. That upon execution by the Deputy Registrar of the court, the documents be deemed as sufficient instruments for completion/transfer.



3. Following the said orders, the Deputy Registrar signed the instrument of transfer of the said portion of the suit property to the Plaintiff on behalf of the Defendant and the application for the consent of the Land Control Board to subdivide the suit property on 15th June 2023. The suit property was subdivided, and the mutation form and the transfer were lodged at the Land Registry for registration. The said portion of the suit property is yet to be transferred and registered in the name of the Plaintiff, 3 years now after the judgment of the court and over 1 ½ years after the Deputy Registrar executed the instrument of transfer in favour of the Plaintiff. The delay in the execution of the court decree has been occasioned by the Land Registrar's insistence that the original title deed for the suit property must be surrendered to him for cancellation before the subdivision can be registered and the portion of the property that the court had ordered the Defendant to transfer to the Plaintiff transferred to him. The Defendant has refused to surrender the said title deed to the Land Registrar.
4. What is now before the court is the Plaintiff's application seeking an order that the Land Registrar dispenses with the production of the original title deed for the suit property and proceeds to register the mutation form for the subdivision of the suit property and the transfer in favour of the Plaintiff.
5. The application is opposed by the Defendant through a replying affidavit sworn on 31st January 2025. The Defendant has contended that the application is superfluous on the face of the orders that were granted by the court on 25th January 2022. The Defendant has averred that he was dissatisfied with the judgment of the court which is being executed by the Plaintiff and the orders made by the court on 25th January 2022, and has preferred an appeal to the Court of Appeal against the same, which appeals have high prospects of success. The Defendant has averred that all proceedings in this matter should be stayed pending the hearing and determination of his pending appeals to the Court of Appeal.
6. When the application came up for hearing on 5th February 2025, the Plaintiff relied entirely on the grounds on the face of the application and the supporting affidavit and urged the court to grant the order sought. On his part, the Defendant relied on his replying affidavit and skeleton submissions dated 4th January 2025. The Defendant contended that the court was functus officio and that the order sought by the Plaintiff amounted to an attempt to review the judgment of the court delivered on 13th May 2021.
7. Section 98 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, provides as follows:

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and the conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”
8. 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.”
9. The Plaintiff's application seeks the assistance of the court in the execution of the judgment of the court delivered herein on 13th May 2021. In the judgment, the court ordered the Defendant to transfer a portion of the suit property to the Plaintiff. The Defendant refused to sign the documents necessary for



the said transfer to be effected. The Plaintiff had to move the court to authorise the Deputy Registrar to sign the said documents on behalf of the Defendant. Even after the Deputy Registrar signed the said documents, the Defendant continued to frustrate the execution of the said judgment by refusing to surrender the original title deed for the suit property for cancellation so that the mutation form for the subdivision of the property can be registered and the portion of the property transferred to the Plaintiff. I am of the view that the conduct of the Defendant amounts to contempt of court, and the Defendant is lucky that the Plaintiff has not moved the court to have the Defendant arrested and committed to civil jail for disobeying the orders made herein on 13th May 2021. There is no justification whatsoever for the Defendant's conduct. The fact that the Defendant has appealed against the judgment of the court cannot justify the Defendant's refusal to comply with the orders given in the judgment, which have not been stayed or set aside. This court is not functus officio as claimed by the Defendant. The court has inherent power to facilitate the execution of its orders and decrees. I am satisfied that the Plaintiff's application has merit. I allow the same on the following terms;

1. The Land Registrar Kisumu shall dispense with the production of the original title deed for Title No. Kisumu/Marera/2504 and shall proceed to register the Mutation Form for the subdivision of the property into Title No. Kisumu/Marera/5489 and Title No. Kisumu/Marera/5490.
2. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU THIS 13TH DAY OF MARCH 2025

S. OKONG'O

JUDGE

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

Ms. Ochieng for the Plaintiff

Mr. Ombwayo for the Defendant

Ms. J.Omondi-Court Assistant

