



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 834 OF 2015

(FORMERLY CIVIL CASE NO.231 OF 2002(OS)

IN THE MATTER OF

THE PUBLIC ACCESS ROADSERVING TITLE NOS.

KISUMU /NYALENDA 'B'/599,1600,1601 &1602

AND IN THE MATTER OF

THE GEOVERNMENT LANDS ACT, (CAP 85) (REPEALED)

THE REGISTERED LANDS ACT, (CAP 300) (REPEALED)

THE LAND ACT (CAP 300)

ISAAC EDWIN NICHOLAS OKERO..... PLAINTIFF

-VERSUS-

MAURICE AKETCH ABALA.....1ST DEFENDANT

FRANCIS ONYANGO OMWEGA AYIECHA.....2ND DEFENDANT

PARMOD B. KOHLI (Sued as the administratrix of the estate of the late Pardeep
K. Kohli3RD DEFENDANT

VIJAY KOHLI.....4TH DEFENDANT

RAVINDERPAL SINGH WALIA.....5TH DEFENDANT

RAJINDER SINGH WALIA.....6TH DEFENDANT

FREDRICK OTIENO OUTA.....7TH DEFENDANT

LUCY ATIENO OKOTH.....8TH DEFENDANT

FREDRICK ENOS NYAMOLO OGADA.....9TH DEFENDANT

RULING

The matter for determination is the Preliminary Objection dated 2nd November 2020 filed by the 2nd Defendant herein on grounds that this Honourable Judge does not have jurisdiction to entertain the 6th Defendant's Application dated 19th August 2020 premised on execution proceedings of the Court of Appeal. The Preliminary Objection was canvassed by way of written Submissions.

The 2nd Defendant filed his Submissions on 20th November 2020 where it was stated that on matters of execution of decrees, orders and certificates of costs emanating from the Court of Appeal, the Judge of the High Court does not have a role to play. That once a party has made an application for execution, the Deputy Registrar only receives the decree, order or certificate of costs as provided for under Order 22 Rule 6 of the Civil Procedure Rules.

The 6th Defendant filed written Submissions in support of the Preliminary Objection on 8th December 2020. He stated that the execution application was made to this court and not to the Court of Appeal and as per the Supplementary Affidavit of the Plaintiff sworn on 3rd November 2020, there were taxation proceedings before the Court of Appeal in Civil Application No. 93 of 2019 which resulted in an order of taxation that was set aside on a reference to a single Judge who ordered that the matter be remitted back to the taxing officer for re-taxation and further directed the 3rd Respondent in the Application who is the 2nd Defendant to pay the court the amount paid by the Applicant who is the 6th Defendant, and order which the 2nd Defendant has ignored.

I have analyzed the application and in determination, I do observe that the application dated 19th August 2020 filed by the 6th Defendant sought orders of restitution by M/s N.E. Mogusu & Associates and the 2nd Defendant of payment of Kshs. 297,798.50 made by his Counsel to their agent, Pambo Investments to forestall seizure of moveable property in execution of the warrants and for the costs of the Application.

Order 22 Rules 4,5 and 6 of the Rules of the Civil Procedure Rules provides: -

“4) The court sending a decree for execution by another court shall send—

a) a copy of the decree;

b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

5) The court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the court, for any special reasons to be recorded under the hand of the judge, requires such proof.

6) Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

In the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696 the court held as follows:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.

It is clear from the court’s record that the execution application was made to this court and not to the Court of Appeal. This court has looked at the Ruling of Miscellaneous Civil Application No.93 of 2019 and it is clear from the Ruling of Justice Hannah Okwengu that the taxing officer used the wrong principles and therefore the decision of the taxing officer was set aside and ordered that the bill of costs be remitted back to the taxing officer for-re-taxing and the 2nd Defendant was ordered to pay into court the amount paid by the 6th Defendant. This court finds that the execution proceedings are proceedings of this court and therefore this court has jurisdiction to hear and determine the Application dated 19th August 2020. The upshot of the above is that the preliminary objection raised by the 2nd Defendant is not merited and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31st DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE