



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 140 OF 2017

FLORENCE CHERUGUT.....PLAINTIFF/RESPONDENT

VERSUS

CHEPTUM MUREI ANNAH.....DEFENDANT/APPLICANT

RULING

(On whether to issue an order of inhibition and cancellation of title transferred to the plaintiff upon execution of a court's decree)

1. By a Notice of Motion dated 26/7/2021 filed on 29/7/2021, the Defendant/Applicant, one **Cheptum Murei Annah**, moved the Court under **Sections 1A, 1B, 3, 3A, 63(E), and 94** of the **Civil Procedure Act, Order 21 Rule 8(2)** and **51 Rule 1** of the **Civil Procedure Rules** and **Section 68** of the **Land Registration Act, Act No. 3 of 2012**. She sought the following specific orders:

1. ...spent

2. **THAT this Honourable Court be pleased to place an inhibition order on the Title No. Kitale Municipality Block 15/Koitagos/1956 while pending the hearing and determination of this application and pending the hearing and determination of the appeal preferred to the court of Appeal by the applicant.**

3. **THAT this Honorable Court be pleased to order the cancellation of the title Number Kitale Municipality Block 15/Koitagos/1956 (the 'suit land'-mine) while pending the hearing and determination of the Civil Appeal preferred by the applicant to the court of Appeal.**

4. ...spent

5. **THAT costs be provided for.**

2. The Application was premised on a number of grounds and supported by her affidavit sworn on **28/07/2021** and a further one sworn on **16/11/2021**. The grounds were that the respondent transferred the suit land into her name following the judgment of the Court, without following the due process; the applicant had preferred an appeal to the Court of Appeal and she stood to suffer prejudice if the orders sought were not granted since the respondent may dispose of the property or deal with it in a manner that would prejudice her.

3. Her supporting affidavit expounded on the grounds stated above. She swore that prior to the conclusion of the suit she was the registered proprietor of the suit land; however, her registration was cancelled by the Court order obtained by the Applicant herein upon successful litigation in that respect wherein she had instituted the suit claiming adverse possession. She stated that this Court entered judgment in favour of the plaintiff against her on the **30/6/2020**. She was dissatisfied with the judgment of the court, she preferred an appeal challenging the impugned judgment by lodging a Notice of Appeal dated **17/8/2020** in Court on **18/8/2020**.

4. The crux of her case was that the title to the suit land was cancelled on **15/10/2020** and registered in the name of the respondent herein and that since the Notice of Appeal was filed, her advocates filed an application for stay of execution pending appeal vide **Eldoret Civil Application No. 145 of 2020**. The Application was fixed for hearing on the **26/1/2021** but before it could be heard, she investigated and through conducting an official search on the suit land and learnt that it had already been transferred to the name of the respondent. She then deponed that for that reason her Advocate chose to withdraw the Application for stay of execution pending appeal. That was done on **26/1/2021** under **Rule 52** of the **Court of Appeal Rules**. She annexed to the Affidavit a letter showing the evidence of the withdrawal.

5. She sought to challenge the procedure in which the decree was issued and executed. According to her, first, costs ought to have been taxed before execution could commence. Secondly, the decree ought to have been drawn by the plaintiff's advocated and cause service upon her advocate to clarify on it and respond if it was not compatible to the judgment or to correct any errors on it (emphasis mine), and give opinion on whether or not they agreed with it. For that, she pointed out that the respondent skipped a vital procedure to defeat her appeal. Finally, she asked this court to grant her the orders sought.

6. She swore a further affidavit on **16/11/2021** and filed it on **17/11/2021**. It was a repetition of what was contained in the supporting affidavit.

7. The Application was opposed. The plaintiff prepared a replying affidavit and swore and filed it on **16/8/2021**. Her response was that by the judgment delivered on **30/6/2020**, she was declared the owner of the suit land by way of adverse possession and the court ordered the cancellation of the defendant's title and its registration in her name. She then executed the decree. She caused the cancellation of the defendant's title and it's registered in her name.

8. She stated that the Applicant did not move this Court for stay of execution pending appeal. However, there was an application for stay of execution pending appeal before the Court of Appeal as at December, 2020. The application was filed after she had executed the decree by way of transfer of the suit land. She deponed that the application was overtaken by events since she withdrew the one for stay of execution in the Court of Appeal and the instant application was meant to substitute one for stay of execution pending the intended appeal.

9. To sum it up, she stated that the order of inhibition sought could not obtain because it can only be issued upon the success of an Application of stay of execution yet the judgment of **30/6/2020** had been fully enforced. She stressed that it was not true that she had obtained the title irregularly because she did it by a court order.

Submissions

10. The Application was disposed of by way of written submissions. Only the Applicant filed hers.

Analysis, Issues and Determination.

11. This court anxiously but carefully considered the application, the rival affidavits of parties, the submissions on record as well as the case law cited together with the Sections of statutes cited. It found the following issues for determination:

a) Whether the execution of the decree was lawful;

b) Whether an order for inhibition and cancellation of title should issue;

c) What orders to issue including who bears the costs?

12. The first issue is ***whether the execution process was lawful***. It is a common denominator that this Court delivered judgment on **30/6/2020**. Thereafter, the Plaintiff drew a decree therefrom and executed it. It is that decree that the Applicant challenged that it was executed unprocedurally. There is no point at which the Applicant challenged the contents of the decree or raised an error that it was wrong or at variance with the judgment of the Court. It appears that the decree extracted herein agreed with **Order 21 Rule 7** of the **Civil Procedure Rules** which requires that the decree must agree with the judgment. What she faulted was the procedure it was extracted.

13. This court then interrogates the question: what is then the procedure of executing a decree? It has been the procedure of courts that once a court delivers its judgment under **Order 21** of the **Civil Procedure Rules**, execution commences immediately as provided by **Order 22** of the **Rules**. Execution takes different forms on a case to case basis and depending on the mode the decree holder applies for permission to use. However, in some cases, the decree is self-executing. That is to say when the orders of the decree are directed to a certain person or body to perform a task, then the person so directed must do perform that duty in satisfaction of the decree.

14. The defendant stated that the procedure which the plaintiff applied in executing the decree was improper. She submitted that the plaintiff failed to serve her counsel with a draft decree to approve before it was extracted taken for signature. The Applicant did not point out to the Court which Rules of procedure were breached. She did not submit on that either. But a reading of the Civil Procedure Rules makes this Court to take the view that she complained of **Order 21 Rule 8** of the **Civil Procedure Rules**. This is the provision which gives the procedure of approval of a decree or order. **Order 21 Rule 8 (2)** provides that a party in the High Court may prepare a draft decree and pass it over to the other to approve or amend as appropriate before it is given to the Court for signature if the Court is satisfied that it is in line with the judgment. The operative word in the provision is "may". The term "may" has been interpreted to mean permissive or optional. It is not compulsory for a party to do so. However, Brian A. Garner in **Black's Law Dictionary, 11th Edition**, Thompson Reuters, **2009, pg. 1172-3** gives three meanings of the terms. In the third one he states that loosely it means one is required to do something. He then says that in dozens of cases it has been taken to be synonymous with "shall" or "must" so as to effectuate the legislative intent.

15. Having brought out the meaning, a further reading of the **Order** imports a situation where the Court can approve a decree without the procedure of drafting and exchanging drafts thereof. **Order 21 Rule 8(7)** provides that a Court can approve a decree upon pronouncement of the judgment. In my view if the Court can do so, it presupposes that it is the Court that in actual sense drafts the decree and approves it at the time of pronouncing judgment and not the parties. I say so because it is inconceivable that any of the parties can know the final determination of a matter in advance of delivery or pronouncement and prepare a draft decree that the Court will approve at the time of delivery of the decision. If it were so, that would directly manifest corruption and irretrievably flawed system. In my view, where the Court approves the decree in such a manner, the parties have no role to play in its preparation.

16. An important point that should come out clear is that the Order was introduced by the Rules Committee to take care of some mischief. What was it? The main idea behind the enactment was to on preparation of decrees and orders following that process was to avoid situations where parties extracted decrees that would be at variance with the final adjudication of the Court or so to say, that would suit their interests. It was not to act as a hurdle for the successful party to in a cause when realizing the fruits of his judgment. Otherwise, if no execution could occur without the approval of the decree by the other party, mischievous ones would lie in wait for such step to be started and then erect a range of "bulwarks" of objections to delay the execution, after all they have all to lose if it came to pass.

17. My understanding of the provision is that where a party drafts a decree containing errors of omission or inclusion of non-existent orders in a judgment, that is to say, where the decree does not tally with a judgment, then the Deputy Registrar would reject it and order the parties to make the necessary rectification or submissions as to the correct version. The import of the above mentioned provision is to cure any defect in the decree. However, where the decree is free from any defect, then it is executed as it is; provided it does not contravene the orders contained in the judgment. Where such defect arises as it may at times, the provision comes to the aid of the affected party.

18. Whereas Courts have held at other times that decrees extracted without being passed over to the other parties for approval are nullities, see, for instance, in *China Wu Yi Company Limited v Belgo Holding Limited [2018] eKLR*, *Landmark Holdings Limited v Robert Macharia Kinyua [2018] eKLR*, among others, it has not been without cause. It has often been where the decree is wrought with errors, thereby tainting the proper import of the judgment or ruling. Where errors occur in the decree or order, they move with an injustice with must be corrected speedily by Courts by way of reversing whatever process that led to the error and the effects of that flaw in the process of the Court which includes execution. The Courts will not close eyes to or wink on an injustice arising from an illegality: they will and must act swiftly. But where there is none, and the party is only crying “wolf” and splitting hairs the Courts will and should be extremely cautious and hesitant to disturb the process.

19. On this view, I would agree with and be guided by the Judge in *Eco Bank Ltd v Elsek (Kenya) Limited & 3 Others [2015] eKLR* where he stated as follows:

“The Plaintiff has not denied it did not forward the draft Decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the Decree was shown not to conform the judgment....”

20. It is not every other failure to forward a decree for approval by learned counsel results in setting aside execution. For a party to rely on such a failure to challenge execution and pray that it be set aside for skipping the step, particularly where the decree corresponds with the terms of the judgment, it in my view amounts to nothing except a fine technicality which **Article 159(2)(d)** of the 2010 Constitution came in to cure perfectly.

21. I am in full agreement with the holding of my sister **Kasango J.** in *Eco Bank Limited v Elsek & Elsek (Kenya) Limited & 3 others [2015] eKLR* where the learned judge held as follows:

“The plaintiff, has not denied it did not forward the draft decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgment”.

22. I perused the decree and judgment herein, they are not at variance. Perhaps that explains why the Applicant was silent on the fact that the decree was correct. That being the case, I find no reason to interfere with the execution that has already taken place due to a valid order of the Court. The further argument by the Defendant that the Plaintiff executed the decree before costs were ascertained and that the plaintiff’s learned counsel ought to have been informed, I am of the view that it is not merited. As long as there was no irregularity that took place, that did not prejudice the Defendant. There are many judgments and orders that have been executed in the past before the ascertainment of costs.

23. The defendant has also stated that the transfer papers were not presented to her to sign in favor of the Plaintiff. I have perused the judgment of the court and found that the same did not order the defendant to sign the forms in favour of the Plaintiff. The transfer was to be effected through a court order which was self-executory. In any event, what good faith in regard to executing the transfers could have been found in a party such as the Applicant who is challenging the already executed transfer if the papers were presented to her for signature? I may be wrong but I doubt if there could be any. If she were truly genuine in this argument that she did not receive any transfer papers for her to append a signature she would not be raising the issue now: she would have been thankful for the process having proceeded without taking any much more of her resources such as time and a pen and energy to use to sign the papers, otherwise she must be a generous party in spending the meagre life resources that people are struggling to get and use! Therefore, in that regard, this court is of the humble considered view that the execution and particularly the transfer were effected through a valid court order and should not be disturbed unless a higher order or other valid order to the contrary given.

24. The only way that was available to the plaintiff then was to file an application for stay of execution of the decree and to challenge the decree accordingly. She made no such application in this Court commending the court to stay its execution. She stated that her learned counsel filed an application for stay of execution of the decree before the Court of Appeal which she later withdrew under **Rule 52 of the Court of Appeal Rules** when she realized that the title had been transferred to the plaintiff. In the case of *Michael Bartenge v Stephen Bartenge [2007] eKLR* the court held that:

“By virtue of section 30 of the Civil Procedure Act; “A decree may be executed either by the court which passed it or by the court to which it is sent for execution.” In effect, it is the court which executes decrees. The party, who holds a decree which is in his favour, only applies to the court to execute the decree. Therefore, if the order to stop the execution was issued in the nature of an injunction, it would effectively be addressed against the court. And, as it is the duty of the court to execute its decrees, an injunction to restrain it from so doing would be purporting to stop the court from performing one of its roles. That, in my considered view, would not be proper, even if the orders were clothed in such language as suggested that the orders were directed against the defendant. The only manner in which courts are stopped from taking steps to execute decrees is through orders for stay of execution. No such order has been sought herein.”

25. Having found that the court decree was proper and was properly executed, this court is now tasked to embark to determine the second issue before it; which is: *Whether an order for inhibition and cancellation of title should issue.*

26. The Applicant prayed for the Court to issue an inhibition order on the title of the suit land. To begin with, it is prudent to note that in so

far as the Applicant lodged an appeal by way of a Notice of Appeal, the subject matter is before the Court of Appeal. The applicant informed the Court as much and annexed a copy of the Notice of Appeal to the application. As it stands therefore, the subject of these proceedings lay before the appellate court. The Appropriate prayer should have been one for stay of execution pending the intended appeal and then its merits be considered bearing in mind that execution had already taken place.

27. The Applicant invoked the provisions of Section **68 of the Land Registration Act** in bringing this application. They are to the effect that:

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

28. Inhibition orders would take the form of and result from an order of injunction where a party moves a Court for it for fear of the subject matter, before the determination of the rights of the parties, may be transferred or wasted. An inhibition is an order usually issued at the interlocutory stage of proceedings in a matter before a court of competent jurisdiction (***Emphasis mine***). In the case of **Dorcas Muthoni & 2 Others...Vs...Michael Ileri Ngari (2016)eKLR**, the court held that :-

“An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”

29. It is not in dispute that this Court delivered its judgment on **30/6/2020**. I have stated elsewhere in this ruling that the decree subsequent to the judgment was a **valid one** which has since been executed accordingly. The defendant being aggrieved lodged an appeal therefrom, that was her right. But the suit land changed hands as it has been registered in the name of the plaintiff in satisfaction of this court’s decree. Bearing in mind the doctrine of *functus officio*, I would sum it here that the Court completed its work. Moreover, therefore, **there is no subject matter left to be litigated on before this court**. I repeat, authoritatively, this court became *functus officio* when it delivered its judgment, issued its decree and which was executed as per the law. By the Court being *functus officio* it means that it does not have the **jurisdiction** to issue such orders (*of inhibition and cancellation*) as prayed by the defendant herein: doing so would be absurd as the court would be reversing its orders without it being asked to and without the aggrieved party satisfying it that they deserve the orders sought. The only forum that is seized with the jurisdiction to issue the order is the Court of Appeal where the subject matter is pending determination. This court cannot make any such further orders since there is nothing left before it to determine.

30. Again, the Applicant invited this court to cancel the title deed registered in the name of the Plaintiff and ordered it to revert back to the her (the defendant’s) name. I have found that the further steps the Plaintiff already took in the execution of the decree were as a result of valid Court orders. It would be an absurdity to find the decree valid and at the same time order that the execution that took place as a result of it be reversed by way of cancellation of the title. For that reason the Court refuses to be persuaded and moved by the Applicant’s prayer and the entire application.

(c) What orders to issue and who to bear the costs of the Application?

31. I have found that the Application is unmerited. I do no better than to order that it be and is hereby dismissed with costs to the Respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15TH DAY OF FEBRUARY, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE