



REPUBLIC OF KENYA



KENYA LAW
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**Kisumu Guest House Limited v Ouma & 17 others (Environment & Land
Case 628 of 2017) [2025] KEELC 3353 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 628 OF 2017**

AA OMOLLO, J

APRIL 24, 2025

BETWEEN

KISUMU GUEST HOUSE LIMITED PLAINTIFF

AND

**L OUMA & 17 OTHERS & 17 OTHERS & 17 OTHERS & 17
OTHERS DEFENDANT**

RULING

1. For determination is the Defendants' application dated 24th July, 2024 and brought under the provisions of section 3 & 3A of the *Civil Procedure Act*. The Applicants seek orders;
 - a. That the Court be pleased to order the Plaintiff/Respondent to stop further encroachment of the Defendants' portion of the suit property Nairobi block 72/1988 pursuant to a judgement delivered on 6th October, 2021.
 - b. That the Plaintiff be summoned to show cause why he cannot be punished for not complying with order 2c of the decree
 - c. That in the alternative, the Court be pleased to authorize the Defendants at their expense to pay the Government surveyor to re-survey the suit property and remove the wall fence erected by the Plaintiff and to recover the costs from the Plaintiff.
2. The application is premised on the three grounds stated on its face and the affidavits of Johnson Nguyo sworn on 24th July 2024 and 19th December, 2024 respectively. The Applicants depose that they have a decree which the Plaintiff has failed to comply with. In response to the preliminary objection taken out by the Plaintiff, Mr Nguyo deposes that as a party to these proceedings, he has locus and has a right over the portion in dispute as one of the purchasers.



3. He avers that the fact of the Plaintiff filing an appeal before the court of appeal is not a bar to execution of the judgement since there is order of stay of execution from this court or the Court of Appeal.
4. Vide the preliminary objection dated 3rd September, 2024, the Plaintiff stated thus:
 1. The Notice of Motion dated 24th July, 2024 is Nullity and void-abinitio and the same should be struck out ex-debito justitiae.
 2. Judgment was entered herein on 6th October, 2021 which judgment is the subject of an Appeal in Civil Appeal No. E716 of 2021 pending before the Court of Appeal and the Applicants have not complied with the Provisions of Order 9 Rule 9 of the Civil Procedure Rules. To this extent, the present Application is an abuse of the Court Process.
 3. The Application dated 24th July, 2024 seeks Orders for Execution of the Decree and there is no known procedure in Law Under the *Civil Procedure Act* and Rules (Order 22) for Execution of a Decree through a Notice of Motion Application.
 4. The Application dated 24th July, 2024 is incompetent, Frivolous, Mischievous, Vexatious, Inept and is grossly Unprocedural/Irregular and the same should be dismissed or struck out with costs.
5. Further to the P.O, the Plaintiff through the replying affidavit sworn on its behalf by Abok James Odera deposes inter alia that as of June, 2022, both parties had filed submissions to the appeal filed before the court of appeal. That they are only waiting directions from the Court of Appeal for a date for highlighting the said submissions. Mr Abok avers that since the original two parcels numbers 1988 and 1544 were closed on subdivision, amendments and amalgamations and no-longer existed hence the inability to effect order 2c of the decree.
6. Consequently, it is deposed that it is inconceivable that the Plaintiff can encroach on a portion of land L.R. No Block 72/1988 which is non-existent and that the Lands office stated they could not re-survey L. R 1544 which had been subdivided and gave rise to other number including no. 2919. That the Court has no role in directing and or authorizing the Defendants to execute a decree in their favour as sought in prayer 5 of the application since the execution process is provided for in order 22 of the Civil Procedure Rules. The Plaintiff urged that the present application be dismissed with costs.

Analysis and Determination:

7. I have considered the pleadings presented by both sides and raise the following questions to determine the application;
 - i. Whether the person who swore the affidavit has the capacity to bring this application.
 - ii. If yes, whether the orders sought can issue
8. The Respondent argues that since all the Defendants did not sign authority to John Nguyo to bring the application, he lacks locus and so the application is incompetent. In response, Mr Nguyo stated that since he is a party to the case, he is entitled to bring the present application. I agree with Mr Nguyo that nothing stops him from bringing the present application as each of the Defendants were sued in their individual capacities. He was sued as the 8th Defendant.
9. Further, it is settled in law that a preliminary objection must raise a pure point of law and in this instance, there is no point of law that has been stated in the grounds in support of the P.O. The only legal ground raised is whether the Applicants require leave of the Court to execute the decree in lieu



of the provisions of order 22. Therefore, the objection is an opposition to the grant of orders and not insufficiency in terms of want of capacity.

10. On merits of the application, the Applicant argued that since there is no stay of execution that has been issued, there is nothing stopping the court from granting the order of execution. He asserted it is important the orders be issued since the Plaintiff is still encroaching on the suit portion contrary to the judgement of the court. Reading the arguments put forth by the Applicant, he actually answered himself as he confirms that the Plaintiff has not commenced the process of complying with paragraph 2c of the decree.
11. If there is no order of stay of execution in force, the Defendants do not require leave of the court to execute the decree that was issued in their favour. These include taking steps to ensure the property is subdivided and also taking out contempt proceedings if deemed necessary. Thus, the orders sought in the present application are premature and as deposed to by the Respondent, the Defendants don't require the order of this court to initiate the process of survey.
12. In sum, the application is struck out for being premature. The Plaintiff having responded to the application, is entitled to costs and I so award.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2025.

A. OMOLLO

JUDGE

