



REPUBLIC OF KENYA



**Makumu & another v Kreszenntia & 3 others (Environment & Land  
Case 388 of 2010) [2025] KEELC 3200 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3200 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 388 OF 2010  
SM KIBUNJA, J  
APRIL 8, 2025**

**BETWEEN**

**PAULINE MUTEI MAKUMU ..... 1<sup>ST</sup> PLAINTIFF**

**KILUNGU JUSTUS MULI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**URSULA KRESZENNTIA ..... 1<sup>ST</sup> DEFENDANT**

**MONIKA HERKENRATH ..... 2<sup>ND</sup> DEFENDANT**

**JAFARALI KASSAM ABDULLA ..... 3<sup>RD</sup> DEFENDANT**

**OSCAR JUMA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**[Notice of Motion Dated 26th October 2024]**

1. The 3<sup>rd</sup> defendant/applicant moved the court through the notice of motion dated 26<sup>th</sup> October 2024, seeking for the following orders:
  - a. “Spent.
  - b. Spent.
  - c. This Honourable Court be pleased to issue orders preserving the suit premises in the names of the plaintiffs pending the hearing of Civil Appeal no. E049 of 2024 by way of orders of Injunction restraining the Plaintiffs from selling, leasing, subdividing, developing or dealing with the suit premises in any manner that may prejudice the outcome of that appeal.



- d. The 4<sup>th</sup> Defendant be compelled to surrender the Original Provisional Title of the suit premises to the court to be held by the court pending the hearing and determination of Civil Appeal No. E049 of 2024.
- e. Costs of this application be provided for.”

The application is premised on the twenty one (21) grounds on its face and is supported by the affidavit of Jafarali Kassam Abdulla, the 3<sup>rd</sup> defendant, sworn on 26<sup>th</sup> October 2024, in which he inter alia deposed that he filed Civil Appeal No. E049 of 2024 against the judgement dated 23<sup>rd</sup> September 2019 and has urged the Court of Appeal to fast track it after failing to secure a stay of execution from the same court; that he did not respond to an earlier notice of motion by the plaintiff dated 22<sup>nd</sup> May 2024 which mainly sought for the surrender of the provisional title to subdivision 2444/I/MN (Original 1938/1/I/MN), as the plaintiffs had already unlawfully registered a transfer of the same property to their names, and that the said application was only to sanitize the illegality they had committed; that, the plaintiffs advocates emailed the court’s order dated 2<sup>nd</sup> October 2024 which allowed the above application and ordered the surrender of the said title; that the order was per in curiam as the Transfer had already been effected on 26<sup>th</sup> April 2024; that under section 33 of the Land Act 2012, the provision does not provide alternatives through court orders where a Transfer is effected through provisional titles; that the suit property has rate arrears of Kshs. 4,012,932 as at 1<sup>st</sup> October 2024 and the Transfer would not have been possible without the rates clearance certificate; that he is also uncertain whether the plaintiffs paid stamp duty; that under section 38 of the Land Registration Act, the Registrar should not register any instruments with pending outstanding rates; that his former advocate John Oscar Juma has the said provisional title and upon request by his advocates to release the said title to them, the said advocate became evasive; that he made efforts to recover the provisional title from the 4<sup>th</sup> defendant, but it was in vain and thus he cannot be compelled to release title which he does not have; that he has requested the Registrar to enter a restriction; that the provisional title held by the 4<sup>th</sup> defendant should be deposited in court pending the hearing and determination of Civil Appeal no. E049 of 2024; that the Plaintiffs now have the ability to dispose the suit property.

2. The application is opposed by the plaintiffs through the replying affidavit of Pauline Mutee Makumu, the 1<sup>st</sup> plaintiff, sworn 15<sup>th</sup> November 2024, inter alia deposing that the application is bad in law and intended to defeat the decree dated 23<sup>rd</sup> September 2019 that was issued on 4<sup>th</sup> November 2022; that the 3<sup>rd</sup> defendant had filed an application dated 11<sup>th</sup> April 2024 seeking stay of registration of the respondents in Civil Appeal No. E049 of 2024 which was dismissed by the Court of Appeal with costs on 25<sup>th</sup> October 2024; that she obtained the said order dated 2<sup>nd</sup> October 2024 and issued on 15<sup>th</sup> October 2024 on their application dated 24<sup>th</sup> May 2024, which the 3<sup>rd</sup> defendant is yet to comply with by surrendering the original provisional certificate of title; that the 1<sup>st</sup> to 3<sup>rd</sup> defendant have never made any effort to comply with the said court order and the allegation that the 3<sup>rd</sup> defendant does not have title is a mere ploy to mislead this court; that the 3<sup>rd</sup> defendant is in contempt of court orders and under section 98 of the Civil Procedure Act the court has the discretion to nominate such other person to execute a conveyance where the person to whom the order has been directed to refuses to comply; that the 3<sup>rd</sup> defendant has not produced any evidence to show that the plaintiffs had unlawfully registered the title in their names and that no reasons have been given to warrant stay of execution order being issued.
3. The court issued directions on filing and exchanging submissions on the 18<sup>th</sup> November 2024, but by the next mention of 24<sup>th</sup> February 2025, only the learned counsel for the plaintiffs had filed theirs dated the 17<sup>th</sup> February 2025, which the court has considered.
4. The issues for the court’s determinations are as follows:



- a. Whether the 3<sup>rd</sup> defendant/applicant has met the threshold for interlocutory injunction order to issue pending the hearing and determination of the appeal.
  - b. Whether the 3<sup>rd</sup> defendant/applicant has made a reasonable case for surrender order to be issued against the 4<sup>th</sup> defendant.
  - c. Who bears the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by the 3<sup>rd</sup> defendant and 1<sup>st</sup> plaintiff, submissions by the learned counsel for the plaintiffs, superior courts decisions cited thereon, and come to the following determinations:
- a. The main prayers for the court's determinations are (c) and (d) for preservation of the suit property through an injunction and surrender of certificate by the 4<sup>th</sup> defendant respectively. The deposition by the plaintiffs' that an application dated 11<sup>th</sup> April 2024, to stop the plaintiffs from being registered with the title had been made by the 3<sup>rd</sup> defendant before the Court of Appeal and dismissed on 25<sup>th</sup> October 2024 has not been rebutted or challenged by the 3<sup>rd</sup> defendant. I have perused the Court of Appeal ruling delivered on the 25<sup>th</sup> October 2024 that is annexed to the replying affidavit, and confirmed that it dismissed the 3<sup>rd</sup> defendant's application with costs. Indeed, the purport and intent of the application filed before the Court of Appeal by the 3<sup>rd</sup> defendant that was dismissed cannot be said to have been any different from prayer (c) of the instant application. In view of the fact that the Court of Appeal has already considered a prayer in application by the 3<sup>rd</sup> defendant that was similar to prayer (c) herein, the same cannot be considered by this court, as it is not only *res judicata* and a contravention of section 7 of [Civil Procedure Act](#) chapter 21 of Laws of Kenya, but also an abuse of court process
  - b. On prayer (d) of surrendering the certificate, directed against the 4<sup>th</sup> defendant, the rule of evidence requires the one who alleges to tender prove, even in a situation like this where the 4<sup>th</sup> defendant has not participated in the hearing of the application. That is the essence of section 109 of the [Evidence Act](#) chapter 80 of Laws of Kenya. The only piece of evidence that the 3<sup>rd</sup> defendant availed in support of that prayer is a letter dated the 17<sup>th</sup> October 2024 to the 4<sup>th</sup> defendant, requesting the 4<sup>th</sup> Defendant to hand over the original certificate of title. This letter was done on 17<sup>th</sup> October 2024, which is only about ten (10) days before the instant application was filed on 26<sup>th</sup> October 2024, and I do not have evidence of when it was received, if at all. Though the 3<sup>rd</sup> defendant has deposed that the 4<sup>th</sup> defendant became evasive there are no particulars tendered to substantiate that claim. That even if the court was to consider the prayer favourably, I find it would not serve any purpose in view of the fact already admitted by the 3<sup>rd</sup> defendant that the plaintiffs have been registered with the title. To consider that prayer at this stage, the court would in effect be engaging in an academic exercise. That accordingly, prayer (d) also fails.
  - c. There is no specific prayer by the 3<sup>rd</sup> defendant in the application relating to his claim that unspecified amount of stamp duty and Kshs.4,012,932 in rates arrears were not paid by the plaintiffs when effecting the transfer. That as the relevant public agencies concerned are not parties in this suit which is anyway finalised, the 3<sup>rd</sup> defendant should consider playing his civic duty and report to the relevant tax collecting and investigating agencies for necessary actions.
  - i. Under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, costs follow the event unless where otherwise ordered by the court. That the 3<sup>rd</sup> defendant has failed in his application



and the plaintiffs have been successful in defending it. In respect of prayer (e) on costs, the 3<sup>rd</sup> defendant will bear the plaintiffs' costs.

6. From the foregoing determinations, I find and order as follows:

- a. That the 3<sup>rd</sup> defendant's notice of motion dated October 26, 2024, is without merit and is struck out.
- b. 3<sup>rd</sup> defendant to meet the plaintiffs' costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 8<sup>TH</sup> DAY OF APRIL 2025.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In the Presence of:

Plaintiffs : M/s Umara

Defendants : M/s Muyaa for 3<sup>rd</sup> Defendant

Shitemi – Court Assistant.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

