



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okello (Suing in his capacity as the legal Representative of Labule Okele Lutwa, Deceased) v Laly & another (Environment and Land Case Civil Suit 1784 of 2007) [2022] KEELC 3118 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3118 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT 1784 OF 2007**  
**JO MBOYA, J**  
**JUNE 16, 2022**  
**FORMALLY HCC NO. 141 OF 2006**

**BETWEEN**

**HENRY ORYEM OKELLO ..... PLAINTIFF**  
**SUING IN HIS CAPACITY AS THE LEGAL REPRESENTATIVE OF LABULE**  
**OKELE LUTWA, DECEASED**

**AND**

**SUKHDEV SINGH LALY ..... 1<sup>ST</sup> DEFENDANT**  
**LAZARUS KIBUI NDEGWA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction:**

1. *Vide* application dated 29<sup>th</sup> March 2022, the Plaintiff/Applicant seeks for the following Reliefs:
  - a. ....(Spent)
  - b. The Honourable Court be pleased to cancel the provisional certificate of title over L.R No. 209/8000/136, title number 256561/1, currently in the name of the 2<sup>nd</sup> Defendant.
  - c. The Honourable Court do issue an order to enable the Plaintiff to be issued with a provisional certificate of title over and in respect of L.R No. 209/8000/136, title number 256561/1.
  - d. Costs of the Application be provided for.
2. The subject Application is premised on the various grounds enumerated on the face thereof and same is further supported by the affidavit of the Plaintiff/Applicant sworn on even date.



3. Though the application was served, the Defendants/Respondents have not filed any response to the subject application. For clarity, there is no replying affidavit or grounds of opposition that have been filed.

**Deposition by the Applicant:**

4. *Vide* Supporting Affidavit sworn on the 29<sup>th</sup> March 2022, the deponent has averred that same filed and/or mounted the subject suit challenging the claim by the Defendants herein, in respect of ownership and/or title to the suit property.
5. Further the deponent has averred that the suit herein was subsequently heard and determined *vide* the judgment rendered by the court on the 26<sup>th</sup> July 2018, whereby the court found and held that the Plaintiff herein is the lawful and or rightful owner of the suit property.
6. On the other hand, it has similarly been averred that the court *vide* the same judgment also found and held that the 2<sup>nd</sup> Defendant does not have any lawful and legitimate title to and/or claim over the suit property.
7. Other than the foregoing, the deponent has also averred that in the course of the judgment the court also found and held that the certificate of title over and in respect of the suit property had been lost, misplaced and/or mislaid by the Plaintiff's advocate during the bomb blast.
8. Nevertheless, the deponent has averred that despite the judgment and decree of the court, it has since transpired that the 2<sup>nd</sup> Defendant herein illegally and fraudulently applied for and obtained a Provisional certificate of title over and in respect of the suit property.
9. In the premises, the deponent has averred that because of the fraudulent application and issuance of the Provisional certificate of title in favor of the 2<sup>nd</sup> Defendant/Respondent, same has been unable to actualize the terms of the judgment and the decree of the court.
10. Finally, the deponent has averred that to the extent that the Provisional certificate is in the names and hand of the 2<sup>nd</sup> Defendant/Respondent, same has not been able to undertake the administration of the Estate of the deceased, despite being the duly appointed and/or constituted legal administrator of the estate of the deceased.

**Submissions on behalf of the Applicant:**

11. The subject application came up for hearing on the 30<sup>th</sup> May 2022, when learned counsel Mr. Onsando appeared before the court and sought to have the application herein canvassed by way of written submissions.
12. Pursuant to and in line with the request, the court ordered and/or directed that the application be so canvassed by way of written submissions and that same were to be filed within seven (7) days.
13. Suffice it to note, that counsel for the Plaintiff/Applicant proceeded to and indeed filed the submissions herein on the 2<sup>nd</sup> June 2022.
14. Briefly, it is the Plaintiff/Applicant's submission that there arose a dispute between himself and the Defendants herein, pertaining to ownership and/or title over and in respect of the suit property.
15. It has been further submitted that following the dispute under reference, the Plaintiff/Applicant filed and/or commenced the subject suit, which was thereafter heard and determined *vide* judgment rendered on the 26<sup>th</sup> July 2018.



16. Besides, the Plaintiff/Applicant has further submitted that vide the judgment under reference, the court found and held that the Plaintiff was the lawful and legitimate owner of the suit property, by virtue of being the legal administrator of the Estate of the deceased.
17. On the other hand, the Plaintiff/Applicant has further submitted that the court also found and held that the 2<sup>nd</sup> Defendant herein did not have any lawful or legitimate title to the suit property.
18. Consequently and in the premises, the Plaintiff/Applicant has submitted that same therefore has the lawful rights to own, occupy and/or possess the suit property.
19. Nevertheless, the Plaintiff/Applicant has further submitted that despite the terms of the Judgment and decree, the 2<sup>nd</sup> Defendant proceeded to and procured Provisional certificate of title over and in respect of the suit property and hence there is need to revoke and/or cancel the said provisional certificate of title in the name of the 2<sup>nd</sup> Defendant.

#### **Issues for Determination:**

20. Having reviewed the Application dated the 29<sup>th</sup> March 2022, the Supporting affidavit thereto and the written submissions filed by and on behalf of the Plaintiff/Applicant, the following issues are germane for determination;
  - a. Whether the Provisional Certificate of title in respect of the suit property, held by the 2<sup>nd</sup> Defendant ought to be canceled.
  - b. Whether the Plaintiff/Applicant is entitled to be issued with a Provisional Certificate of title over the suit property to vindicate the terms of the judgment and decree of the court.

#### **Analysis and Determination**

##### **Issue Number 1 Whether the Provisional Certificate of title in respect of the Suit property, held by the 2<sup>nd</sup> Defendant ought to be canceled.**

21. During the course of the hearing of the subject matter, the parties herein, namely the Plaintiff and the Defendants tendered and/or adduced evidence before the court and thereafter the court rendered a considered judgment, declaring the rights and interests of the parties.
22. Pursuant to the judgment under reference, the Honourable court found and held that the 2<sup>nd</sup> Defendant herein did not have any lawful and legitimate rights over and in respect of the suit property. For clarity, the observation of the court to this effect are captured and reflected at paragraph 59 of the judgment.
23. Nevertheless, despite the explicit finding and holding of the court, the 2<sup>nd</sup> Defendant secretly and fraudulently proceeded to and procured a provisional certificate of title over the suit property.
24. It is evident and/or apparent that the procurement and issuance of the provisional certificate of title by and/or in favor of the 2<sup>nd</sup> Defendant, was contrary to and in contravention of the judgment of the court.
25. Essentially, by procuring and obtaining a provisional certificate of title over and in respect of the suit property, despite the judgment and decree of the court, the 2<sup>nd</sup> Defendant was effectively defeating the judgment of the court through an illegitimate and illegal process.
26. Clearly, such maneuver, applied and/or utilized by the 2<sup>nd</sup> Defendant, would negate and defeat the Due process of the law and hence same must be abated, averted and addressed.



27. Consequently and in the premises, even though the trial court did not proceed to and revoke the provisional certificate of title, which was being held by the 2<sup>nd</sup> Defendant, the existence of such provisional certificate of title in favor of the 2<sup>nd</sup> Defendant, shall negate and/or defeat the purpose and tenor of the judgment of the court.
28. Effectively and to give meaning to the judgment and decree of the court, it is therefore imperative that the illegal and illicit provisional certificate of title, which was procured contrary to the Judgment, be revoked and/or canceled.
29. I am alive to the fact that the cancelation and/or revocation of the provisional certificate of title, is a substantive order that ought to have issued after the plenary hearing, but the circumstances obtaining herein, portray exceptional and peculiar situation which requires the intervention of the court.
30. In the premises, this is a clear-cut case where the rules of Procedure and Technicalities of the law, ought not to militate against the realization of Substantive justice. Consequently, the provisions of Article 159 (2) (d) would suffice.
31. In any event, I am also emboldened by the decision in the case of *Chase International Investment Corporation and Another v Laxman Kesbra and Others*, [1978] KLR 143; [1976-80] 1 KLR 891, where Madan J A, observed as hereunder:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”

32. Based on the foregoing, I find and hold that the provisional certificate of title held by the 2<sup>nd</sup> Defendant, contrary to the terms of the judgment and decree of the court, is amenable to revocation and/or cancelation.

**Issue Number 2 Whether the Plaintiff/Applicant is entitled to be issued with a Provisional Certificate of title over the suit property to vindicate the terms of the Judgment and Decree of the court.**

33. The Plaintiff/Applicant herein emerged and was declared as the successful party after the conclusion of the subject dispute. For coherence, the court found and held that the Plaintiff is the rightful owner of the suit property.
34. To the extent that the Plaintiff was declared to be the lawful proprietor of the suit property, the Plaintiff was thus entitled to enjoy the benefit and privileges attendant to such ownership.
35. For the avoidance of doubt, the nature, scope and extent of the Plaintiffs rights to and in respect of the suit property are well delineated vide the provisions of Sections 24 and 25 of the *Land Registration Act* 2012.
36. For convenience, the said provisions are reproduced as hereunder;
  24. Interest conferred by registration Subject to this Act— (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.



25. Rights of a proprietor (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
37. Given the nature of the rights and privileges that accrue to the registered owner of the title, it is apparent that the Plaintiff herein cannot enjoy and/or benefit from the rights attendant to such ownership, if the provisional certificate of title is in the hands of a third party, namely, the 2<sup>nd</sup> Defendant.
38. Consequently and to vindicate the rights of the Plaintiff, it is therefore appropriate that an order be issued to direct the Chief Land Registrar and or the Registrar of Titles to issue a Provisional certificate of title to and in favor of the Plaintiff/Applicant.
39. To my mind, the issuance of the provisional certificate of title over and in respect of the suit property, to the Plaintiff, shall go along way in actualizing the terms and tenor of the judgment and decree of the court.
40. Lest, the Judgment and the decree of the court, would be cosmetic in nature and otherwise inconsequential.
41. To buttress the foregoing observation, it is imperative to take cognizance of the decision in the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, where the Court of Appeal observed as hereunder;
- “This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property”.
42. The foregoing observation and words of the court of appeal, obtain and reflect the status of the subject matter. Consequently, I adopt and endorse same herein, so as to actualize substantive justice and Equity.

**Final Disposition:**

43. Having dealt with and/or addressed the issues for determination that were outlined herein before, it is evident and/or apparent that the application herein is meritorious and thus ought to be allowed.
44. Consequently and in the premises, the Application be and is hereby allowed on the following terms;
- a. The Provisional certificate of title over L.R No. 209/8000/136, title number 256561/1, in the name of the 2<sup>nd</sup> Defendant, be and is hereby cancelled and revoked.
  - b. The Provisional certificate of title over and in respect of L.R No. 209/8000/136, title number 256561/1, be and is hereby issued in favor of the Plaintiff/Applicant.



- c. The Chief Land Registrar/Registrar of Titles be and is hereby ordered to comply with the terms of the orders herein and to issue the provisional certificate of title, irrespective of the provision of Section 31 of the *Land Registration Act*, 2012.
- d. Costs of the Application be and are hereby awarded to the Plaintiff/Applicant.

45. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2022.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Mr. Onsando for the Plaintiff/ Applicant.

