



REPUBLIC OF KENYA



KENYA LAW
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**Kipungar v Tamning & 3 others (Land Case 181 of 2013)
[2022] KEELC 3588 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE 181 OF 2013
FO NYAGAKA, J
JULY 20, 2022**

BETWEEN

TITUS KUTO KIPUNGAR PLAINTIFF

AND

SELINA TAMNING 1ST DEFENDANT

PIUR ROTICH 2ND DEFENDANT

MUSA KOSGEI 3RD DEFENDANT

JAMES KIPYEGO 4TH DEFENDANT

(The instant application is a post-judgment one. It was brought following the judgment of the court delivered on November 7, 2016 from which the respondent appealed from in Eldoret Court of Appeal in Civil Appeal No 7 of 2017.)

RULING

1. The application before me is the notice of motion dated February 25, 2022 brought by the defendants. It was filed under section 1A, 1B, 3 and 3A of the [Civil Procedure Act](#). It sought only one order, which was:
 1. That this honourable court be pleased to issue an order directing the County Surveyor, West Pokot, to visit land parcel No West Pokot/Siyoi/263 and subdivide the parcel of land into two equal portions for the plaintiff and defendants.
2. The application was based on only one ground which was to the effect that the County Surveyor required an order of the court to enable him carry out subdivision of the suit land as appropriate. It was supported by the affidavit of one, Musa Kosgei sworn on February 25, 2022 and filed same date. Apart from the affidavit restating the ground in support of the Application the deponent recalled that on January 31, 2022 the County Surveyor served both parties with a letter indicating that he intended



to carry out the survey. He annexed and marked as MK 1 a copy of the letter. On February 15, 2022 the Surveyor went to the parcel of land and informed them that he could not carry out the survey because there was no express order from the court, directing him to do the exercise. He implored the applicants to seek an order of the court for the exercise.

3. The application was opposed the plaintiff strongly. The respondent relied on the grounds that the application was defective; the prayer sought was a departure from the prayers in the plaint; and that the application was an abuse of the process of the court.
4. The parties did not submit on the application. They left it for the court to determine the application.
5. I have considered the application, the law and the facts of the instant case. The instant application is a post-judgment one. It was brought following the judgment of the court delivered on November 7, 2016 from which the respondent appealed from in Eldoret Court of Appeal in Civil Appeal No 7 of 2017. Judgment in the appeal was delivered on July 25, 2019, dismissing the appeal. It thus was left for the judgment and decree of this court to be implemented. In the circumstances, in relation to the second ground of opposition, namely, that the application was a departure from the prayers in the plaint, behooves this court compare the prayer in the instant application, the pleadings, the judgment delivered on November 7, 2016 and decree extracted thereto.
6. The reliefs sought by the Applicants in the initial pleadings were the dismissal of the plaintiff's suit. However, the same parties filed a counterclaim in which they played for the reliefs which were replicated in the decree of this court made on November 7, 2016 and issued on November 17, 2016. On the one hand, by his plaint, the respondent prayed for an order of eviction to demolish all houses and any other structures build by the defendants on LR No West Pokot/Siyoi/263 and to remove the defendants from the said parcel of land, and costs of the suit. On the other hand, the defendants prayed, in their defence, for the dismissal of the suit and filed a counterclaim in which they prayed for an order of a declaration that the plaintiff held LR No West Pokot/Siyoi/263 in trust for himself and the defendants; an order that they (defendants) occupied the land lawfully; costs of the suit, and any other relief.
7. When the court rendered itself in the suit, it held, among other reliefs, that "the trust by the plaintiff is hereby terminated and an order is given that the title held by the plaintiff should be cancelled and new separate ones be issued in favour of the plaintiff and the defendants in equal shares. The decree could not differ from the prayers in the plaint. Thus, the argument by the respondent that the prayer differed from that in the plaint was a misconception of the prayer sought in the instant application. Since the court found that the title was to be divided in equal shares as between the plaintiff and the defendants/ applicants herein, in my view, the prayer in the instant application is being sought to give effect to the decree of the court. Such a prayer should not be inhibited by a respondent who is not keen to obey the decree of the court, to buy time.
8. This court therefore finds the application dated February 25, 2022 wholly meritorious and allows it with costs to the applicants.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JULY, 2022.

DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

