



REPUBLIC OF KENYA



KENYA LAW
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**Obiba v Bwire & 6 others (Environment & Land Case 29 of 2018)
[2022] KEELC 15262 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 29 OF 2018**

BN OLAO, J

DECEMBER 9, 2022

BETWEEN

PETER JOLANA OBIBA PLAINTIFF

AND

MARY NABWIRE BWIRE 1ST DEFENDANT

REGINA WANGIRA 2ND DEFENDANT

JOHANES BOY OKOBA 3RD DEFENDANT

JAMES WAFULA WANGIRA 4TH DEFENDANT

LEONORA APONDI 5TH DEFENDANT

LAND REGISTRAR, BUSIA COUNTY 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. By a judgment delivered on June 22, 2022, Omollo J made the following disposal orders with respect to the land parcel No Bunyala/Bulemia/309 (the suit land):
 - a. “The plaintiff has acquired by way of adverse possession a portion of the LR No Bunyala/Bulemia/309 measuring 1.2Ha. Consequently, an order is hereby issued directing that the 5th defendant’s title to LR No Bunyala/Bulemia/309 be rectified to allow for sharing of the land with the plaintiff through sub-division. The 5th defendant and Kaloyi Oloo to surrender the original title as well executive requisite documents to facilitate the process.”
 - b. “An order is hereby issued directing the County Land Registrar and County Surveyor Busia to sub-divide LR Bunyala/Bulemia/309 into two portions being registered to the 5th defendant



and Kaloyi Oloo on one part and the plaintiff on the other part. The plaintiff to meet the costs of such sub-division and transfer”

- c. “A permanent injunction is hereby issued against the defendants, their servants and/or employees from entering into, carrying out any activities or interfering with the plaintiff’s enjoyment of his 1.2Ha of the said parcel of land.”
 - d. “Each party to bear their own costs.”
2. Aggrieved by that judgment, the 1st to 5th defendants lodged a notice of appeal on July 7, 2022. Meanwhile, a decree was extracted on June 29, 2022 in accordance with that judgment.
 3. It would appear that the 5th defendant and one Kaloyi Oloo have not complied with paragraph (a) of the said judgment and decree and the plaintiff is therefore unable to execute it.
 4. I now have before me for my determination the plaintiff’s notice of motion dated November 11, 2022 and filed under certificate of urgency seeking the following orders:
 1. Spent
 2. That the honourable court be pleased to review the decree in terms of paragraph 1 and order that in default of the 5th defendant and Kaloyi Oloo failing to surrender the title deed for LR No Bunyala/Bulemia/309 and execute the requisite documents for sub-division, the Deputy Registrar of the High Court be allowed to execute the requisite documents on behalf of the 5th defendant and Kaloyi Oloo and the Land Registrar to dispense with surrender of the original titles of 5th defendant and Kaloyi Oloo.
 3. That the costs of this application be provided for.
 5. The application is based on the grounds set at therein and supported by the affidavit of Peter Jolana Obiba the plaintiff herein. Annexed to the application are the following documents:
 1. Copy of the judgment delivered on June 22, 2022.
 2. Copy of the decree issued on June 29, 2022.
 6. The gist of the application is that the judgement and decree do not indicate who is to execute the requisite documents incase the 5th defendant and Kaloyi Oloo fail or decline to do so. The plaintiff therefore seeks an order that the Deputy Registrar be ordered to execute the requisite documents should the 5th defendant and Kaloyi Oloo decline to do so.
 7. When the application was placed before me on November 14, 2022, I declined to certify it as urgent. I however directed that it be canvassed by way of written submissions to be filed by the plaintiff within 7 days and the defendants within 14 days of service. The application would then be mentioned before me on December 7, 2022 to confirm compliance and take a date for ruling.
 8. On 7th December 22, only Mr Ouma counsel for the plaintiff attended court and confirmed having served the defendants with the application and submissions as directed but that he had not been served with any response or submissions by the defendants. Being satisfied from the affidavit of service dated November 24, 2022, I directed that this ruling would be delivered on December 9, 2022 by way of electronic mail. The application is therefore not opposed as there is no replying affidavit or grounds of objection filed by any of the defendants including one Kaloyi Oloo who it appears from the pleadings herein, was not a party. However, the judgment speaks for itself and I have no capacity to question it. Suffice it to state that it must be complied with unless appealed, reviewed or set aside.



9. I have considered the application, un-opposed as it is, as well as the supporting affidavit and the submissions by Mr Ouma instructed by the firm of B M Ouma & Company Advocates for the plaintiff.
10. The application is predicated upon the provisions of section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*.
11. Section 80 of the *Civil Procedure Act* provides for the court’s power to review its judgment order or decree. It states:
- 80: “Any person who considers himself aggrieved –
- a. by a decree or order from which an appeal is allowed by this Act, but from where no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act;
- May apply for review of judgement to the court which passed the decree or made the order; and the court may make such order thereon as it thinks fit”. Emphasis mine
12. Order 45 rule 1(1) of the *Civil Procedure Rules* on the other hand provides for the procedure for review in the following terms:
- 45(1) “Any person considering himself aggrieved –
- a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred; or
- b. By a decree or order from which an appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” Emphasis mine.
13. It appears to me that the provisions of section 80 of the *Civil Procedure Act* and order 45 rule 1(1) of the *Civil Procedure Rules* only apply to aid a party who is “aggrieved” with the judgment order or decree of the court. Further, it can only be invoked where the party can demonstrate that there is discovery of “new and important matter or evidence” or “some mistake or error apparent on the face of the record” or “for any other sufficient reason”. Looking at the remedies sought by the plaintiff herein, I am not persuaded that he has approached this court under the proper procedure. He is not aggrieved by the judgement delivered by Omollo J on June 22, 2022 and which is infact in his favour and neither has he pointed at any new matter or evidence, error on the face of the record or any sufficient reason to warrant a review of the judgement or decree. When Omollo J made the disposal orders above, it was to be expected that the 5th defendant and Kaloyi Oloo would comply with the directions therein. That has not been done. However, the judgement did not specify any time period within which the 5th defendant and Kaloyi Oloo were required to comply with the orders. In any event, there is nothing from the supporting affidavit to suggest that the documents were submitted to the 5th defendant and



Kaloyi Oloo who declined to execute them. This issue has only been raised in the submissions by Mr Ouma in the penultimate paragraph thereof where counsel states:

“Your lordship, the plaintiff presented the decree to the Land Registrar Busia who took upon himself to invite the 5th defendant and Kaloyi Oloo but all in vain. It is upon that basis that the Land Registrar Busia advised that this court becomes lenient to review the judgment and allow this prayer that in default of the 5th defendant and Kaloyi Oloo signing, the court executive officer do execute the transfer documents of the portion granted to the plaintiff and also dispense with the surrender of the original title in possession of the 5th defendant and Kaloyi Oloo.”

14. The land registrar did not depone to those facts and it is clear that submissions are not evidence upon which a court can base its decision – *Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & another* 2014 eKLR. This court cannot therefore conclude, simply based on those submissions, that the 5th defendant and Kiloyi Oloo have indeed been summoned to execute the said documents but have declined to do so. What was required was cogent evidence in terms of an affidavit by either the plaintiff or the land registrar.

15. Having said so and although the plaintiff has approached this court citing the wrong legal procedure, I think this application can be considered in light of section 3A of the *Civil Procedure Act* which states:

3A: “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

15. This court shall also be guided by the provisions of order 51 rule 10(2) of the *Civil Procedure Rules* which provides:

10 (2) “No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

16. Finally, article 159(2)(a) of the *Constitution* states that:

“Justice shall be administered without undue regard to procedural technicalities ...”.

17. Guided by all the above, the judgment of OmolloJ and the subsequent decree are not in doubt. Further, the application is not opposed. It is clear from that judgment that the plaintiff is entitled to a portion measuring 1.2 Hectares from the suit land. He cannot be registered as the proprietor thereof unless the original title deed is surrendered for cancellation and the requisite documents are executed by the 5th defendant and Kaloyi Oloo. Failure to do so will render the said judgment and decree hollow and of no consequences. And since there is no evidence suggesting that the 5th defendant and Kaloyi Oloo have declined to comply with the decree herein, I will allow the notice of motion dated 11th November 2022 but on the following terms:

1. The 5th defendant and Kaloyi Oloo to surrender the original title deed in respect to the land parcel No Bunyala/Bulemia/309 to the Land Registrar Busia within 45 days from the date of this ruling and also execute all the necessary documents to facilitate the transfer of a portion measuring 1.2 Hectares in the name of the plaintiff.



2. In default of the above, the Land Registrar Busia shall be at liberty to sub-divide the land parcel No Bunyala/Bulemia/309 and register a portion measuring 1.2 Hectares in the name of the plaintiff notwithstanding the absence of the original title deed.
3. The Deputy Registrar shall also after the lapse of 45 days be at liberty to execute all the relevant documents on behalf of the 5th defendant and Kaloyi Oloo to facilitate the transfer and registration of the said portion measuring 1.2 Hectares out of the land parcel No Bunyala/Bulemia/309 in the name of the plaintiff.
4. No orders as to costs.

B. N. OLAO

JUDGE

9TH DECEMBER 2022

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 9TH DAY OF DECEMBER 2022 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES.

B. N. OLAO

JUDGE

9TH DECEMBER 2022

