



REPUBLIC OF KENYA



KENYA LAW
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**Agot v Chiambe (Environment & Land Case 7 of 2021)
[2022] KEELC 2371 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 7 OF 2021**

AY KOROSS, J

JULY 7, 2022

BETWEEN

STEWART JALANG'O AGOT PLAINTIFF

AND

FREDRICK ODHIAMBO CHIAMBE DEFENDANT

RULING

1. By a motion dated March 30, 2022, the plaintiff approached the court seeking several reliefs, some are spent and the main prayer pending determination is as follows;
 - a) An order do issue directing the Deputy Registrar of this court to execute and/or sign all necessary documents to facilitate the excision, subdivision and transfer a portion of land measuring 0.07 Ha from land parcel known as South Sakwa/barkowino/2730[suit property] in favour of the plaintiff; and
 - b) Costs of the motion be provided for.
2. The motion is based on the grounds on its face and on the supporting affidavit of the plaintiff Stewart Jalang'o Agot. In summary, the plaintiff succeeded in a claim of adverse possession over a portion of the suit property and in view of this, it was practically impossible for the defendant to execute the mutation document.
3. To effect the judgment, he had secured the services of a surveyor who had since prepared the relevant mutation form and presented it for registration at Bondo Sub County Lands Office. This mutation form was bereft of the defendant's signature and as a consequence, the relevant land registrar had declined to execute it. He urged the court to grant him the orders sought.
4. By a replying affidavit dated 5/05/2022, the defendant opposed the motion. In summary; it was his contention that he had filed a notice of appeal and his appeal had an overwhelming chance of success



and that he had filed a motion that had sought a stay of execution of the judgment and if this motion [the one that is subject of this ruling] was allowed, the appeal would be rendered nugatory.

5. The court directed the parties to canvass the motion by way of written submissions. Because the outcomes of either of the two motions; the one that is the subject of this ruling and the defendant's motion for stay of execution dated 8/04/2022, had a bearing on each other, the respective ruling dates were reserved for the same day.
6. This court found that defendant's motion dated 8/4/2022 was not merited and dismissed it with costs to the plaintiff. The issues raised in the replying affidavit were dealt with in the said ruling but in summary, this court reasoned that in the absence of a memorandum of appeal being proffered to it, it was unable to determine if the defendant had an arguable appeal. Further, the defendant had not satisfied the court that he would suffer substantial loss if the stay of execution was not granted.
7. Following the court's directions, the plaintiff filed his written submissions dated 26/04/2022. This court has perused them and they are a replication of the grounds set out in the motion and supporting affidavit and this court need not reproduce them. The plaintiff has asserted that the court was empowered by section 3A of the *Civil Procedure Act* to ensure that justice prevails. He placed reliance on the decision of Obaga J in *William Barasa Mukubuyi v Kimungui Ndamwe* [2012] eLKR.
8. In response, the defendant filed his rival submissions dated 5/05/2022. In countering the plaintiff's assertions, he asserted that Section 3A, provides that nothing in the ACT limits the inherent powers of the court and the court could issue necessary orders to ensure the needs of justice are met and prevent abuse of court process. He placed reliance on the prayers sought in his motion dated 8/4/2022 and to this end he placed reliance on the authority of *Michael Ntouthi Mitheu v Abraham Kivindo Musau* [2021] eKLR which cited with approval the authority of *Samvir Trustee Limited v Guardian Bank Limited Nairobi* [Milimani] HCCC 795 of 1997 where the court stated that the fulcrum of stay of execution is to ensure that appeals are not rendered nugatory. A copy of this authority was not availed to this court.
9. Having carefully considered the grounds on the motion, affidavits, submissions filed, authorities cited and availed to court, it is the considered view of this court that the two issues for determination are; (i) Whether the orders sought can be granted and (ii) Who pays the costs of the notice of motion?
10. The authority cited by the plaintiff of *William Barasa Mukubuyu v Kimungui Ndamwe* (supra) resonates with the circumstances of this case. In that case, the court held as follows where a party sought for the Deputy Registrar to execute documents as follows;

“I find that this is an appropriate case where the applicant ought to be assisted in realizing the fruits of his judgment”

11. This position has been upheld by several court decisions including *Shivji Naran Virji v Ogla Jemeli Barngetuny* [2021] eKLR, *John Mwangi Ndegwa v Kanyi Gichuhi* [2019] eKLR and *Mary Wairimu Gakere v Muiruri Raphael Njuguna* [2020] eKLR. Though these decisions are persuasive, I have not been convinced to depart from them.
12. As noted, the single authority cited by the defendant was not availed by either filing a list of authorities or attaching it to his submissions. Even if he had which he has not; the dismissal of his motion for stay of execution watered down the import of this citation.



13. Though both parties have cited section 3A of the Civil Procedure Act, there are specific provisions within the Civil Procedure Act that deal with motions of this nature. section 98 of the Civil Procedure Act reads as follows;

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

14. The court deemed the plaintiff an adverse possessor of a portion measuring 0.07 ha of the suit property. He secured the services of a surveyor who had prepared a mutation form. This mutation form cannot be effected without the signature of the defendant who is the current registered owner or that of the Deputy Registrar.

15. The defendant did not deny that he had failed to execute the mutation form. The defendant’s motion for stay of execution was dismissed and as it stands, nothing impedes the plaintiff from enjoying the fruits of his judgment. Further, execution is essentially a matter of procedure and operates for the purpose of enforcing judgments or orders. I therefore find that the motion is merited. It is trite law that costs follow the event and in the absence of special circumstances, I award the costs of this motion to the plaintiff.

16. Ultimately, I issue the following disposal orders;

- a) The Deputy Registrar Siaya ELC do execute and or sign all necessary documents to facilitate the excision, subdivision and transfer of a portion of land measuring approximately 0.07 Ha from land parcel number South Sakwa/barkowino/2730in favour of the plaintiff.
- b) Costs to the plaintiff.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF JULY 2022.

HON. A. Y. KOROSS

JUDGE

7/7/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Odongo for the plaintiff

Mr. Sala for the defendant

Court assistant: Ishmael Orwa

