



REPUBLIC OF KENYA



**Kigano & another v Shah & 4 others (Civil Case 539 of 2007)
[2023] KEHC 20415 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 539 OF 2007
A MABEYA, J
JUNE 16, 2023**

BETWEEN

STEPHEN KIAMA KIGANO 1ST PLAINTIFF

PENELOPE WENDY KIGANO 2ND PLAINTIFF

AND

ZAVERCHAND RAMJI SHAH 1ST DEFENDANT

BEDANS AUCTIONEERING SERVICES 2ND DEFENDANT

KISAUNI PROPERTIES LIMITED 3RD DEFENDANT

REGISTRAR OF TITLES, NAIROBI 4TH DEFENDANT

**OFFICIAL RECEIVER AND LIQUIDATOR OF CONTINENTAL CREDIT
FINANCE LIMITED 5TH DEFENDANT**

RULING

1. Before me is the plaintiffs' amended Notice of Motion dated 6/5/2022 brought pursuant to Order 51 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The Motion sought the following orders: -
 - a) That the Land Registrar Nairobi be directed to dispense with the production of the original title document in respect of land parcel number LR No 4242/3 and all other documents necessary in effecting the subdivision of the land for purposes of excising 0.2277 Hectares pursuant to the judgement of this Honourable Court dated 23rd September 2019.



- b) That the Deputy Registrar of this Honourable Court be authorized to execute all documents necessary for the subdivision of land parcel number LR No 4242/3 for purposes of excising 0.2277 Hectares pursuant to the judgement dated 23rd September 2019 and the transfer documents for the portion of land so excised from LR No 4242/3 to the plaintiffs in execution of the Honourable Court's judgement dated 23rd September 2019.
 - c) That the Land Registrar Nairobi be directed to register the transfer of the portion of land excised from LR No 4242/3 in favour of the Plaintiffs as per the Honourable Court's judgement dated 23rd September 2019 without requiring the production of the pin certificates, National Identity Cards and passport-sized photographs.
 - d) That the Honourable Court be pleased to direct that the balance of the purchase price plus accrued interest in the tune of Ksh.1,830,958.90/= be deposited in court as per the judgement dated 23rd September 2019.
 - e) That the cost of this application be provided for.”
3. The application was based on the grounds that in a judgment delivered on 23/9/2019, the Court ordered the plaintiffs to pay the balance of the purchase price plus all accrued interest within 30 days of the delivery of the judgment whereupon, the 3rd and 5th defendant were to hand over to the plaintiffs' advocates, within 7 days, all the requisite documents necessary to enable the plaintiffs to transfer the suit properties to their names.
 4. That the 3rd and 5th defendant have refused to provide the bank details in which the balance of the purchase price would be deposited thereby making it impossible for the plaintiff to comply with the terms of the judgment of 23/9/2019.
 5. That the plaintiffs have written to the 3rd and 5th defendant seeking to be supplied with the transfer documents as was decreed but this has fell on deaf ears. That in the premises, the plaintiffs have been unable to enjoy the fruits of the judgment thereby necessitating the filing of the application.
 6. The 3rd defendant opposed the application vide a replying affidavit sworn on 15/6/2022 by Mugambi Imanyara.
 7. It was averred that the land parcel known as L.R No 4242/3 was subdivided and extinguished upon the registration of 21 sub divisions thus making the original title L.R No 4242/3 non-existent and unusable. That the portion of land measuring 0.2277 Hectares, is partly lying on two sub-divisions of LR No 4242/3 that is LR No 4242/48 and LR No 4242/49, respectively. That the two subdivisions were surveyed pursuant to a court order made by Ogola J in this matter on 8/6/2012 out of it an area amounting to 0.2277 Ha on which there is a house belonging to the plaintiffs was demarcated.
 8. The 3rd defendant contended that the orders prayed for by the plaintiffs in the instant application seek to effect the transfer of the parcel number LR No 4242/3 which was already extinguished and is no longer in existence therefore the plaintiffs cannot be seeking for the production and transfer of a title that does not exist. That the instant application is incompetent as it should be applying to a portion of 0.2277 hectares that should be demarcated and created for.
 9. That following the court order, a survey was carried out by M/S Thagishu & Associates that demarcated a portion on which there is a house occupied by the plaintiffs measuring 0.2277 hectares



- which no longer exists. That this is the only area under the possession of the plaintiffs which they only ought to be applying to be demarcated and created for.
10. The 3rd defendant contended that the plaintiffs are fully aware of the consent orders for subdivision, the fact of the original title document in respect of LR No 4242/3 being extinguished and being no longer in existence. That the plaintiffs have not attached an official search to demonstrate that the land parcel known as LR No 4242/3 still exists. That in the premises, the application was incompetent and ought to be dismissed as the court cannot give an order in vain.
 11. The 5th respondent opposed the application through a replying affidavit sworn on 9/11/2022 by Diana Mumo.
 12. She averred that on 4/10/2017, the 1st defendant and the plaintiff entered into a consent stating, inter alia, that the plaintiff's interest in LR No 4242/3 Kitisuru would be limited to a portion measuring 0.2277 Hectares, on which there is a house occupied by the plaintiffs. That following that consent, the plaintiffs' interest in LR No 4343/3 Kitisuru was limited to a portion measuring 0.2277 Hectares on which the house they occupied was situate.
 13. That as a result of the consent, the original title LR No 4242/3 was subdivided and extinguished and is therefore non-existent and therefore cannot be produced nor transferred. That the amended Motion was incompetent as it should have only applied for a portion of 0.2277 Hectares since that was the only available portion currently occupied by the plaintiffs.
 14. I have considered the rival contestations and submissions. What the plaintiffs are seeking is the enforcement of the judgment dated 23/9/2019 which held in part as follows: -
 - “ 68. I order the plaintiffs to pay the balance plus all the accrued interest within the next 30 days.
 69. Upon payment being made, the 3rd and 5th defendants shall, within 7 days, hand over to the plaintiffs' advocates all the requisite documents necessary to enable the plaintiffs transfer the suit property to their names.”
 15. According to the consent entered into between the parties on 4/10/2017, the plaintiffs' interest in L.R.No 4242/3 Kitisuru would be limited to a portion measuring 0.2277 hectares, on which there is a house occupied by them. This is a fact known both to the Court and the parties when the foregoing orders were being made.
 16. In this regard, my understanding of the plaintiffs' case is that the 3rd and 5th defendant have failed to comply with the aforementioned judgment by refusing to avail bank account details for payment of the balance to be made and have also refused to avail the documents necessary to enable the plaintiffs effect the transfer and excise 0.2277 hectares of L.R.No 4242/3 to themselves. Further, my reading of the application reveals that the plaintiffs only seek to have the portion of property being 0.2277 hectares excised from L.R.No 4242/3 and transferred to them.
 17. The 3rd and 5th defendant claimed that the effect of the consent order was that the original Title known as LR No 4242/3 was subdivided and extinguished and is therefore non-existent and therefore cannot be produced nor transferred.
 18. The correspondence from the plaintiffs to the 3rd and 5th defendant show that 3rd defendant had failed to supply the bank details wherein the balance of the purchase price was to be deposited. Further, the 3rd and 5th defendant had failed to produce the completion documents necessary to excise and transfer



that portion of land belonging to the plaintiffs. It is clear that the 3rd and 5th defendant's intentions is to frustrate the judgment of 23/9/2019. They have also blatantly disobeyed the court's orders.

19. Order 22, rule 1 of the *Civil Procedure Rules* states:

“All money payable under a decree or order shall be paid as follows-

- (a) into the court whose duty it is to execute the decree;
- (b) direct to the decree-holder; or
- (c) otherwise as the court which made the decree directs.”

20. Section 98 of the *Civil Procedure Act* states:

“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.”

21. Based on the above provisions, and the fact that the 3rd and 5th defendant continue to disregard the decree of this Court, there is jurisdiction for the deputy registrar to execute all documents necessary for the subdivision of land parcel number L.R No 4242/3 for the purpose of excising 0.2277 Hectares. If the same had been sub-divided as alleged, the 5th defendant with the assistance of the Land Surveyor, has the records to show what registration number the portion of 0.2277 ha that was left for the house of the plaintiffs was given.

22. The upshot is that the instant application is meritorious and the application is allowed as prayed. The 5th defendant is directed together with the Director of Survey, to prepare the necessary documents, reveal the registration number allocated to the sub-division where the plaintiffs' house stands measuring 0.2277 ha and supply the same to the deputy registrar of this Court within 30 days without failure for purposes of the deputy registrar complying with these orders. Costs of the application to the plaintiffs in any event.

It is so ordered.

DATED AND DELIVERED THIS 16TH DAY OF JUNE, 2023.

A. MABEYA, FCIArb

JUDGE

