



REPUBLIC OF KENYA



**Kola v Agola & another (Environment and Land Case E007 of 2023)
[2025] KEELC 6635 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE E007 OF 2023
SO OKONG'O, J
OCTOBER 2, 2025**

BETWEEN

SYLVANO OTIENO KOLA PLAINTIFF

AND

DANIEL OTIENO AGOLA 1ST DEFENDANT

COUNTY LAND REGISTRAR, KISUMU 2ND DEFENDANT

RULING

1. The Plaintiff brought this suit against the Defendants through a plaint dated 7th August 2023. The Plaintiff averred that at all material times to this suit, the Plaintiff was and still is the bona fide owner of all that parcel of land known as Kisumu/Kanyakwar “B”/384 (hereinafter referred to as “the suit property”). The Plaintiff averred that, sometime in 2013, he was notified by the land office that one of his parcels of land adjacent to the suit property had been irregularly transferred to another person.
2. The Plaintiff averred that he conducted an official search on the suit property, which confirmed that the suit property had been transferred to the 1st Defendant without his knowledge, consent and/or authority. The Plaintiff averred that he thereafter wrote to the 2nd Defendant notifying it of the irregularity and seeking a correction of the land records. The Plaintiff averred that on or about 16th December 2013, the 1st Defendant was summoned by the 2nd Defendant to return the title that had been issued to him for the suit property on 12th September 2013 for cancellation, but the 1st Defendant ignored the summons. The Plaintiff averred that the 1st Defendant was charged in Criminal Case No. 189 of 2014 with the offence of procuring registration of the suit property in his name by false pretences. The Plaintiff averred that the criminal case court found that someone had presented himself as the Plaintiff and fraudulently sold the suit property to the 1st Defendant.
3. The Plaintiff averred that the transfer of the suit property to the 1st Defendant was illegal and fraudulent and that the illegality and the fraud were within the knowledge of the 1st and 2nd Defendants. The



Plaintiff averred that he had never met the 1st Defendant nor sold and/or transferred the suit property to the 1st Defendant. The Plaintiff averred that despite notifying the 2nd Defendant of the irregularities on the face of its records and the outcome of the criminal case, the suit property remained registered in the name of the 1st Defendant. The Plaintiff averred that the 1st Defendant had since filed Kisumu HCC No. 44 of 2021(O.S) and Kisumu ELC No. E006 of 2023, in which the 1st Defendant sought, among others, an order of eviction against the Plaintiff.

4. The Plaintiff prayed for judgment against the Defendants for:
 - a. A declaration that the Plaintiff was the bona fide owner of the suit property.
 - b. Cancellation by the 2nd Defendant of any title held by the 1st Defendant in respect of the suit property.
 - c. A permanent injunction restraining the 1st Defendant by himself, his agents, servants and/or any other persons claiming through him from trespassing on the suit property, cultivating, constructing and/or in any other way whatsoever interfering with the Plaintiff's ownership and/or usage thereof, or in any other way dealing with the said property.
 - d. Costs of this suit.
 - e. Such further and/or other relief as the court may deem fit to grant.
5. The 1st Defendant entered an appearance on 31st August 2023 but did not file a statement of defence. The 2nd Defendant entered an appearance through the office of the Attorney General and thereafter filed a statement of defence dated 4th September 2023. The 2nd Defendant averred that its office had maintained proper records for the suit property and that the approval of registration was based on the documents presented to it. The 2nd Defendant averred that its office exercised due diligence and believed that the documents that were presented to it for registration by the 1st Defendant were genuine and were therefore registered. The 2nd Defendant prayed that the suit be dismissed.
6. Together with the plaint, the Plaintiff filed a Notice of Motion application dated 7th August 2023 seeking a temporary injunction restraining the Defendants from disposing of, transferring, leasing, alienating, clogging, and/or in any other manner interfering with the Plaintiff's title, rights, and interest over the suit property pending the hearing and determination of the suit. When the Plaintiff's application came up for hearing on 30th January 2024, the parties agreed that the status quo be maintained pending the hearing and determination of the suit. On the same date, the court fixed the suit for hearing on 29th April 2024 in the presence of the advocates for the Plaintiff and the 2nd Defendant, and the 1st Defendant, who appeared in person.
7. When the suit came up for hearing on 29th April 2024, the Defendants did not attend court. The court heard the Plaintiff's case and closed the Defendants' cases without evidence. The court thereafter directed the parties to make closing submissions in writing. The Plaintiff filed submissions while the Defendants did not. On 4th March 2025, the court delivered a judgment in the matter in favour of the Plaintiff. In the judgment, the court stated as follows in part:

“The Plaintiff produced in evidence a copy of the extract of the register for the suit property certified by the Land Registrar on 4th May 2023 which shows that the suit property was registered in the name of the Plaintiff as the first registered owner on 23rd February 1982. The said extract of the register also shows that the suit property was purportedly transferred by the Plaintiff to the 1st Defendant on 12th September 2013, and the 1st Defendant was issued with a title deed for the property on the same date. The Plaintiff has contended that he



neither sold nor transferred the suit property to the 1st Defendant and that the transfer and registration of the suit property in the name of the 1st Defendant was effected fraudulently and illegally. The Plaintiff reported the transfer of the suit property to the 1st Defendant to the police. The police, after investigations, arrested the 1st Defendant and charged him in the Chief Magistrate’s Court at Kisumu in Criminal Case No. 189 of 2014 with the offence of obtaining land registration by false pretences. The 1st Defendant denied the criminal charge, and at the trial of the criminal case, the 1st Defendant told the court that he purchased the suit property “from a person who represented himself to him as Silvano Otieno Kola”. The 1st Defendant admitted in the criminal case that the person who presented himself to him as Silvano Otieno Kola was not the person who had complained against him in the criminal case. The criminal case court stated that:

“Since the accused confirmed that he did not transact with him (Silvano Otieno Kola), then it means that the land the subject matter hereof was not sold or transferred to him by the complainant herein, Silvano Otieno Kola who was the rightful registered owner thereof at the time. It is possible as testified by the accused person that someone else could present himself to him as Silvanus Otieno Kola armed with fake/forged documents and deal with him as such in the guise of being the real Silvanus Otieno Kola.”

8. The court concluded that:

“I find that though the transfer and registration of the subject land parcel No. Kisumu/Kanyakwar B/384 in the name of the accused person was fraudulent, there is no evidence to prove that the fraud was executed by the accused person or that it was executed by another person and that the accused person was aware of it; hence willfully procured himself to be registered as such.”

With that finding, the 1st Defendant herein was acquitted of the charge of obtaining land registration by false pretence. There is no evidence that the said decision in the criminal case was appealed. In the absence of an appeal, the finding of that court that the suit property was fraudulently transferred to the 1st Defendant stands and binds the 1st Defendant.”

9. In the judgment of 4th March 2025, this court made the following orders;

- “ 1. A declaration that the Plaintiff is the lawful owner of the parcel of land known as Kisumu/Kanyakwar “B”/384.
2. An order for the 2nd Defendant to cancel the registration of the 1st Defendant as the owner of the parcel of land known as Kisumu/Kanyakwar “B”/384 and the title deed that was issued to the 1st Defendant on 12th September 2013(entries numbers 2 and 3 in the register).
3. A permanent injunction restraining the 1st Defendant by himself, his agents, servants and/or any other persons claiming through him from trespassing on, cultivating, constructing and/or in any other way whatsoever interfering with the Plaintiff’s ownership and/or usage of the parcel of land known as Kisumu/Kanyakwar “B”/384 or in any other way dealing with the said property.
4. The costs of the suit to be paid by the 1st Defendant.”



10. The said judgment was delivered in the presence of all the parties, including the 1st Defendant. What is now before the court is the 1st Defendant's Notice of Motion application dated 13th March 2025 seeking the following orders;
 1. That there be a stay of execution of the judgment delivered on 4th March 2025, and the application dated 16th August 2023 (sic) and any transfer documents should not be registered by the Land Registrar, Kisumu, until the application is heard and determined.
 2. That the costs of the application, together with interest, be provided for.
11. The application was supported by the affidavit of the 1st Defendant, sworn on 13th March 2025. The 1st Defendant averred that he was the registered owner of the parcel of land, Kisumu/Kanyakwar "B"/384 (the suit property). The 1st Defendant averred that he purchased the suit property from the Plaintiff, who thereafter transferred the property to him. The 1st Defendant averred that he sought the documents evidencing the transaction between him and the Plaintiff, which were produced in an earlier case, to use in his defence in the present suit, but was unable to get them on time.
12. The Plaintiff opposed the 1st Defendant's application through a replying affidavit sworn on 7th April 2025 and grounds of opposition dated 7th April 2025. In the replying affidavit, the Plaintiff averred that he was the registered owner of the suit property. The Plaintiff averred that the 1st Defendant's registration as the owner of the suit property was found to have been obtained fraudulently. The Plaintiff averred that the issues raised in the application were the subject of this suit and had been determined by the court. The Plaintiff averred that the application by the 1st Defendant was overtaken by events. The Plaintiff averred that the application was not grounded in law and that the 1st Defendant did not appeal the judgment of the court. The Plaintiff averred that in the absence of an appeal, there was no basis upon which the court could stay the judgment of 4th March 2025. The Plaintiff averred that the application was frivolous, bad in law, and an abuse of the process of the court. In his grounds of opposition, the Plaintiff contended that the application was a veiled attempt by the 1st Defendant to set aside the judgment of 4th March 2025 without a valid reason. The Plaintiff reiterated that in the absence of an appeal, the order of stay sought was not available to the 1st Defendant.
13. The application was argued on 8th April 2025. The 1st Defendant told the court that he did not defend the suit because he was sick. The 1st Defendant submitted that he had a good defence to the Plaintiff's claim because he purchased the suit property from the Plaintiff. The 1st Defendant submitted that if the stay was not granted, his family would suffer. The Plaintiff, in his submission in reply, relied on his grounds of opposition and replying affidavit. The Plaintiff submitted that the issues raised by the 1st Defendant had been considered and determined by the court in its judgment. The Plaintiff submitted that the 1st Defendant had not filed an appeal against the judgment of the court, which could have formed a basis for his stay application. The Plaintiff submitted that the application was incompetent and was an abuse of the process of the court.

Analysis and Determination

14. I have considered the application together with the supporting affidavit. I have also considered the replying affidavit and grounds of opposition filed by the Plaintiff in opposition to the application. Lastly, I have considered the submissions by the parties. The 1st Defendant's application was brought under Order 22 and Order 42 of the Civil Procedure Rules. Order 22 of the Civil Procedure Rules deals generally with the execution of decrees and orders, while Order 42 of the Civil Procedure Rules deals with appeals and stay of execution pending appeal. The 1st Defendant has not come out clearly under what rules in Orders 22 and 42 of the Civil Procedure Rules the application has been brought.



It is not disputed that the 1st Defendant has not appealed against the judgment of 4th March 2025. It is also not disputed that the 1st Defendant has sought neither the setting aside nor a review of the said judgment. This means that there is no lawful challenge to the judgment of the court. I agree with the Plaintiff that the issues raised by the 1st Defendant were considered by the court and determined in the judgment sought to be stayed. The only remedy available to the 1st Defendant is to challenge the judgment, which he has not done. I agree with the Plaintiff that the stay order sought by the 1st Defendant has been sought in a vacuum. It is not based on either an appeal, an application for setting aside, or an application for review. The application is misconceived and is not for granting.

Conclusion

15. I find no merit in the Notice of Motion dated 13th March 2025. The same is dismissed with costs to the Plaintiff.

DELIVERED AND SIGNED AT KISUMU ON THE 2ND DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Ms. J. Omondi-Court Assistant

