

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 378 OF 2017

CAROLYNE BUSHURU SHYANGUYA.....1ST PLAINTIFF
TIMOTHY MALINGI KOE.....2ND PLAINTIFF

VERSUS

CHRISTOPHER MITEI.....DEFENDANT

RULING

(In respect of the Plaintiffs/Applicants application dated 23rd October, 2023)

Introduction

1. This Ruling is in respect of the Plaintiffs/Applicants' Notice of Motion dated 23rd October, 2023 brought under the provisions of Order 22 Rule 48(1) of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1, 1A, 3A, 3B and 63(e) of the Civil Procedure Rules, Section 68 of the Land Registration Act and Sections 13 and 19 of the Environment and Land Court Act. The Application, which is anchored on the grounds set out on its face and supported by the affidavit of Bushuru Shyanguya, seeks the following substantive orders:

(1) Spent.

(2) That the Defendant/Respondent, being a judgment debtor, be prohibited from transferring or charging the property, identifiable as TITLE NO. KAJIADO/KITENGELA/21086 and

TITLE NO. KAJIADO/KITENGELA/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945 all excised from original TITLE NO. KAJIADO/KITENGELA/21232 in any way and all persons be prohibited from taking any benefit from any purported transfer or charge.

(3) That a prohibitory order be registered against the titles of the properties being TITLE NO. KAJIADO/KITENGELA/ 21086 and TITLE NO. KAJIADO/KITENGELA/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945 all excised from original TITLE NO. KAJIADO/KITENGELA/21232 until so removed by an order of this court.

(4) That the Plaintiff be granted leave to proceed with execution of the decree by attachment and sale of the applicant's TITLE NO. KAJIADO/KITENGELA/21086, TITLE NO. KAJIADO /KITENGELA/ 63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945 in full and final settlement of the decretal sum.

(5) THAT the Defendant be directed to deposit all the original title deeds in court to be held as security and to provide written undertaking as to damages within fourteen (14) days from the date hereof failure to which the court be at liberty to proceed with settlement of terms of sale of the listed properties in settlement of decretal sum plus interests.

(6) That in the alternative this Honourable court be pleased to Order the registration of TITLE NO. KAJIADO/KITENGELA/21086 and TITLE NO. KAJIADO/KITENGELA/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945 in the joint names of the Plaintiffs and the Deputy Registrar be ordered to execute all the relevant transfer forms in execution of the decree.

(7) That this honourable court be pleased to issue an order directing OCS Kitengela Police Station to enforce the order of this honourable court.

(8) That costs of the Application be provided for.

(9) That such other and or further relief be granted as this honourable court may deem just and fit in the circumstances of this matter.

2. It is affirmed that through a judgment delivered on 9th March, 2023, the Defendant was directed to reimburse the Plaintiffs Ksh.6,000,000/= with interest as court rate from the date of deposit. The Plaintiffs allege that the Defendant's counsel extracted a decree dated 12th July 2023 without their participation and that the said decree failed to specify the interest awarded by the Court. The Deponent, however, concedes that the court subsequently re-issued the decree duly incorporating the applicable interest.
3. The Plaintiffs fault the Defendant for his failure, neglect, refusal, and/or indifference to settle the outstanding decretal sum as at July 2023, notwithstanding that a ten-day notice to execute had been duly issued and served upon him through his Advocate.
4. The Plaintiffs contend that the Defendant intends to dispose of the suit property to unsuspecting members of the public and third parties before satisfying the decree of the court. They aver that such action is questionable, actuated by bad faith, and ill-will and amounts to contempt of valid court orders. It is calculated to defeat the ends of justice. It is

further argued that, pending full satisfaction of the decree, the Defendant ought neither to remain in possession of the suit property nor to retain the title documents.

5. The Plaintiffs assert that they stand to suffer irreparable loss and damage should the suit property be disposed of, thereby permanently depriving them of the fruits of the judgment issued in their favour. They assert that, having established a strong prima facie case with a probability of success, and the balance of convenience tilting in their favour, they are entitled to the orders sought, which, in any event, would occasion no prejudice to the Defendant, who has had sufficient time to settle the decretal sum together with accrued interest.
6. The Defendant, Christopher Mitei, responded to the Plaintiffs' case through his Replying Affidavit sworn on 5th February 2024, in which he affirms that he is satisfied with the judgment of the Court. The Court held that the Plaintiffs were only entitled to a refund of the partially paid purchase price in the sum of Kshs. 6,200,000/= together with interest at court rates from the date of deposit until full reimbursement.
7. The Defendant asserts that efforts to settle the decretal sum through the utilization of one of the subject properties, following discussions with the 2nd Plaintiff, have not borne fruits. This, he states, led him to engage

other prospective purchasers in an attempt to raise funds to reimburse the Plaintiffs.

8. The Defendant contends that, notwithstanding his willingness to settle the decretal amount, the Plaintiffs frustrated the efforts by chasing away potential buyers and that the existence of prohibitory orders has further impeded the sale of the disputed properties. In the circumstances, and with the objective of satisfying the decretal sum, the Defendant urges the Court to lift the existing orders and to grant him a period of six (6) months within which to identify suitable buyers.

Court's Directions

9. The Plaintiff's Application was canvassed by way of written submissions in compliance with the Court's directions issued on 29th March 2023.

Analysis and Determination

10. The central issue before this Court is whether the Plaintiffs, as decree-holders, should be allowed to proceed with the execution of the judgment delivered on 9th March 2023 through the attachment and sale of the Defendant's properties listed in the application.
11. Under **Order 22 of the Civil Procedure Rules**, a party who has obtained a money decree is entitled to execute using the various modes provided for

therein. The record indicates that despite a judgment for **Kshs. 6,200,000/- plus interest** being entered in favour of the Plaintiffs against the Defendant on 9th March 2023, the Defendant has failed to satisfy the same to date. While the Defendant argues that he requires the lifting of prohibitory orders to sell the parcels of land privately, the Court must balance this with the Plaintiffs' right to a certain and time-bound recovery/execution process.

12. The Court finds that the Defendant's plea for another six (6) months to seek "suitable buyers" is speculative and lacks the requisite guarantee of settlement of the decretal amount. In any event, the plea is not in form of a formal application that the court may consider and determine. It is lacking in commitment and seriousness.

13. A prohibitory order under **Order 22 Rule 48** is a necessary legal precursor to execution by attachment. It ensures that the subject property(s), is not dissipated or transferred to third parties to the detriment of the decreeholder. Under rule 49, the attachment will be deemed withdrawn where the amount decreed together with costs and all charges and expenses resulting from the attachment of any property(s) are paid or satisfaction of the decree is otherwise made through the court or is certified by the court or the decree is set aside or reversed. The Defendant/Judgement-

debtor therefore holds the key to the lifting or withdrawal of the attachment.

14. The Defendant has not demonstrated a concrete plan for settlement of the decreed amount since the judgment was delivered in this matter. In the absence of evidence of full settlement of the decretal amount, deposit of the full decretal sum into court or a bank guarantee, the Plaintiffs are legally entitled to move the machinery of the court to realize the judgment debt. To deny the application would be to condemn the Plaintiffs to a state of perpetual "litigation without end." They are entitled to the fruits of their lawfully obtained judgement.

15. The court therefore issues an order of prohibition in terms of rule 48(1) of Order 22, prohibiting the Defendant/Judgement-debtor from transferring or charging the subject properties in any way and all persons from taking any benefit from such purported transfer or charge. The order shall be registered against the titles of the subject properties being Title No. Kajiado/Kitengela/21086 and Title No. Kajiado/Kitengela/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945.

16. There is however one shortcoming in the Plaintiffs' application; the value of the subject properties is not disclosed. The court is not in a position to determine whether it is necessary to direct the sale of all or just a few of the properties by public auction to settle the decretal amount. That is dependent on their value.

17. The court recognizes that for execution to be **fair and just**, the property must be sold at their market value to ensure the debt is covered while also protecting the Defendant from a gross undervaluation of his assets.

18. Consequently, the court directs the parties within fourteen (14) days, to appoint a joint registered valuer to determine the current market value and the forced sale value of the subject properties being Title Nos. Kajiado/Kitengela/21086 & Title No. Kajiado/Kitengela/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945. In default of agreement on a joint valuer, after the expiry of the fourteen (14) days from the date of this order, the Director of Valuation Ministry of Lands, Public Works, Housing, and Urban Development in the Ministry of Land and Physical Planning, is hereby appointed to conduct the valuation and file a report in court within thirty (30) days, after the expiry of the fourteen (14) days. The cost of the valuation shall be borne

by the Plaintiffs in the first instance, to be recovered from the Defendant/Judgement-debtor as part of the execution costs.

19. The court will issue the order of sale, if the decretal amount will still be outstanding, upon submission of the valuation report. The costs of the application are awarded to the Plaintiffs in any event.

20. Consequently, the Plaintiffs' application is partially allowed and the court issues the following orders;

A. An order of prohibition is hereby issued prohibiting the Defendant/Judgement-debtor from transferring or charging the subject properties in any way and all persons from taking any benefit from such purported transfer or charge. The prohibition order shall be registered against the titles of the subject properties being Title No. Kajiado/Kitengela/21086 & Title Nos. Kajiado/Kitengela/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945.

B. The court directs the parties, within fourteen (14) days, to appoint a joint registered valuer to determine the current market value and the forced sale value of the subject properties being Title No. Kajiado/Kitengela/21086 and Title Nos. Kajiado/Kitengela/63935,

63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945. In default of agreement on a joint valuer, after the expiry of the fourteen (14) days from the date of this order, the Director of Valuation Ministry of Lands, Public Works, Housing, and Urban Development in the Ministry of Land and Physical Planning, is hereby appointed, without any further reference to court, to conduct the valuation of the subject properties being Title No. Kajiado/Kitengela/21086 & Title Nos. Kajiado/Kitengela/63935, 63936, 63937, 63938, 63939, 639340, 63941, 63942, 63943, 63944, and 63945 and file a report in court within thirty (30) days.

C. The cost of the valuation shall be borne by the Plaintiffs in the first instance, to be recovered from the Defendant/Judgement-debtor as part of the execution costs.

D. The costs of this application are granted to the Plaintiffs in any event.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 19th Day of January 2026.

**M.D. MWANGI
JUDGE**

In the virtual presence of:

Mr. Mengich for the Plaintiffs/Applicants

Mr. Kiptoo for the Defendant/Respondent

Court Assistant: Mpoye

**M.D. MWANGI
JUDGE**

COPY