



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 502 OF 2013**

**SAMMY NDUNGU MUNGAL.....PLAINTIFF**

**VERSUS**

**DANIEL MACUA NDONGA.....1<sup>ST</sup> DEFENDANT**

**NAKURU DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 30<sup>th</sup> April 2019 this court delivered judgment herein as follows:

*a) The plaintiff's prayer for an order of specific performance requiring the 1<sup>st</sup> defendant to avail all transfer documents in relation to the suit property is dismissed.*

*b) Judgment is entered for the plaintiff against the 1<sup>st</sup> defendant for KShs 5 million plus interest to be calculated at court rates from the date of filing this suit until 20<sup>th</sup> April 2016 and at 35% per annum from 21<sup>st</sup> April 2016 until payment in full.*

*c) Since the plaintiff and 1<sup>st</sup> defendant have each had a measure of success in their respective claims against each other, I order that each of them bears own costs.*

*d) The plaintiff to release to the 1<sup>st</sup> defendant the original title documents for Nakuru Municipality Block 6/134 upon payment in full of the amounts ordered above.*

*e) The plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is dismissed with costs.*

2. Subsequently, the plaintiff filed Notice of Motion dated 6<sup>th</sup> June 2019 seeking the following orders:

i. *Spent*

ii. *That a prohibitory order do issue and be registered against parcel of land known as Nakuru Municipality Block 6/134 registered in the name of Daniel Macua Ndonga, the 1<sup>st</sup> defendant herein in execution of the decree herein.*

iii. *That costs of this application be borne by the 1<sup>st</sup> defendant.*

3. The application is supported by an affidavit sworn by the plaintiff. The 1<sup>st</sup> defendant opposed it through Grounds of Opposition dated 12<sup>th</sup> June 2019. The other defendants did not respond to the application. I however note that the orders sought target only the 1<sup>st</sup> defendant.

4. The applicant contends that despite the judgment herein and despite the 1<sup>st</sup> defendant being served with duly extracted decree, the 1<sup>st</sup> defendant is yet to pay the sum of KShs 13,530,000 as specified in the decree issued on 29<sup>th</sup> May 2019. The applicant fears that the 1<sup>st</sup> defendant may sell or charge the parcel of land known as Nakuru Municipality Block 6/134 (the suit property) to defeat recovery of the decretal sum. He therefore urges the court to grant the orders sought.

5. The 1<sup>st</sup> defendant's stance is that the court is functus officio, that the application is an abuse of Order 22 Rule 48 of the Civil Procedure Rules and that no sale can take place without knowledge of the applicant since he is in possession of the original title document of the suit property.

6. The application is brought under Order 22 Rule 48(1) of the Civil Procedure Rules. The rule provides:

**48. (1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.**

**(2) A copy of the order shall be affixed on a conspicuous part of the property.**

7. The side note to the rule states "Attachment of immovable property". As far as I understand, the rule provides for the manner in which attachment of immovable property is to be made. Attachment is itself the process through which a decree is executed. There is no dispute that a decree for KShs 13,530,000 was issued in this matter in favour of the applicant and against the 1<sup>st</sup> defendant on 29<sup>th</sup> May 2019 and that the decree has not been stayed. The 1<sup>st</sup> defendant has not provided any evidence to show that he has paid the sum stated in the decree. In essence therefore there would be no bar to execution of the decree.

8. The rules provide a procedure to be used to apply for execution of a decree. In that regard, Order 22 Rule 6 of the Civil Procedure Rules provides:

**Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A: ...**

9. Further, Order 22 Rule 7 (2) provides:

**(2) Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars— ....**

10. There are additional provisions under Order 22 Rules 9 and 10 which are specific to attachment of immovable property. There is good sense in these requirements since after all, procedure is the handmaiden of substance. Among others, just the same way a party must pay court fees when filing a plaint, there are fees payable prior to execution. I have perused the record herein and I have not seen any application of the sort contemplated under Order 22 Rules 6 and 7. Notice of Motion dated 6<sup>th</sup> June 2019 cannot certainly be said to be the application contemplated under those rules. Since delivery of judgment, the applicant has had more than adequate time to make the necessary application for execution considering that there has been no order staying execution. Even if the applicant fears that the 1<sup>st</sup> defendant may sell or charge the suit property to defeat recovery of the decretal sum, there is no reason why the simple step of filing the requisite application for execution was not taken even as the present application was being filed. In a way, the 1<sup>st</sup> defendant is thus right when he says that that the application is an abuse of Order 22 Rule 48 of the Civil Procedure Rules. The applicant is placing the cart before the horse. That said, the reality is that we have an unsatisfied decree. I have therefore agonised over whether to dismiss the application so that the applicant complies with the rules. Ultimately, I am inclined to adopt a course that affords the applicant an opportunity to comply with procedure and so get the orders sought. In that regard, I am guided by the statement of the Court of Appeal in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR** as follows:

**... In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ..., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...**

11. In view of the foregoing, I make the following orders:

- i. The applicant to comply with the procedure for execution of decrees.
- ii. Upon such compliance, a prohibitory order to issue and be registered against the parcel of land known as Nakuru Municipality Block 6/134 in execution of the decree herein.
- iii. The present application was really not necessary at this point in time. For that reason, I make no order as to costs.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of June 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Ndegwa holding brief for Mr Matiri for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents

Court Assistants: Beatrice & Lotkomoi