



**Ndiege v Amuse & 59 others (Environment and Land Case
E004 of 2023) [2025] KEELC 5930 (KLR) (13 August 2025) (Ruling)**

Neutral citation: [2025] KEELC 5930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE E004 OF 2023
FO NYAGAKA, J
AUGUST 13, 2025**

BETWEEN

JOSEPH OBIERO NDIEGE PLAINTIFF

AND

FREDRICK OMINO AMUSE & 59 OTHERS DEFENDANT

RULING

1. Before me is an application dated 3rd June 2025. It is brought by the Decree Holder or Judgment Creditor and Section 3, 3A, 30 and 34 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Rule 9(a), (b) and c(2) and 12(b) of the [Auctioneers Rules](#) 1996 as amended, and all enabling provisions of the law. It sought among others:
 1. ... Spent
 2. That Ikimwanya Auctioneers to evict (*sic*) and put the Plaintiff on the land parcel Suna West/Wasweta II / 1037.
 3. That the Officer Commanding Oruba Police Station to provide security to Ikimwanya Auctioneers to evict all the said defendants from the suit premises Suna West/Wasweta II/1037.
 4. That the Auctioneer to demolish all the structures constructed on land parcel number Suna West/Wasweta II/1037.
 5. That the costs of this application be paid by the defendants.
2. The application was supported by the affidavit of Joseph Obiero Ndiege sworn on the same date as the application, and the grounds set out in the body of the Application. These were that the Defendants had refused to move from the suit premises after having been served with a valid decree of this Court dated 2nd October 2024. It was nine months since the judgment herein was delivered. There was hostile



environment on the ground that the auctioneers must be accompanied by the police to maintain peace during the execution of this order. Without the officers on the ground the eviction would not be executed.

3. In the supporting affidavit and the decree holder deponed that Judgment was delivered on 2nd October 2024 in the presence of the Respondents' Advocates, in favor of the Plaintiff. By it the defendants were supposed to be evicted from their suit parcel of land. The Applicant annexed and marked as JON 1 a copy of the decree. Further, that as at 2nd July 2025 the defendants were still on the land and had subdivided it and constructed new homes thereon. He annexed and marked as JON copies of photographs taken as at that date. Further, the Officer Commanding Oruba Police Station should provide security to equine Auctioneers to enable them carry out the eviction from their suit parcel of land.
4. The application was opposed through Grounds of Opposition dated 21st July 2025. The grounds were basically two. They were, first, that the application was incompetent for failure to comply with the preemptory provisions of Order 51 Rules 3 and 13 of the *Civil Procedure Rules*, and secondly, that the application was frivolous, vexatious and an abuse of the process of the court since it was fixed in a wrong forum.
5. The application was disposed of by way of oral submissions. By them the applicant argued that the Judgment was self-effecting. By it the court had given the Respondents ninety (90) days to vacate the land, the days had lapsed. There was no need even to me an application for the execution. The instant one was suppose to be ex parte.
6. On their party the Respondents argued that the application was supposed to be heard before the Deputy Registrar of the court as provided for under Order 22 of the *Civil Procedure Rules*.

Issue, Analysis and Determination

7. This Court has considered the instant application, the law and the submissions by the parties. Only two issues lie before me for determination. One is whether the application is merited, and two is who to meet the costs of the application.
8. This is a post judgment application which is meant to give effect to the judgment that is in place. It is not in dispute that the judgment was delivered on 2nd October 2024. Further, it is not in contention that as at the time of the application it nine months since the said judgment was delivered. Additionally, it is not in dispute that one of the terms of the judgment was that the Defendants, now judgment debtors, were ordered to vacate the suit land within ninety (90) days of the date of the judgment. It is common ground too that there is no stay of execution of the judgment, despite the fact that the Respondents argue, elsewhere, through a subsequent application to the instant one, but which is not before me, that they have preferred an appeal from the judgment. What is clear is that as at the time of the filing of this application the Respondents had not applied for stay of execution of the judgment pending the hearing and determination of the appeal.
9. The Respondents' opposition to the instant application is, on the one part, that it does not comply with Order 51 Rules 3 and 13 of the *Civil Procedure Rules*. The other part is that it is frivolous, vexatious and an abuse of the process of the Court.
10. Regarding the opposition based on the alleged failure of the Applicant to comply with Order 51 Rules 3 and 13 of the *Civil Procedure Rules*, this Court notes that Order 51 Rules 3 of the *Civil Procedure Rules* is to the effect that a Notice of Motion should be served on parties to the parties affected thereby. First, it is important to note that the learned counsel who raises this issue on behalf



of the Defendants represented them at the hearing and even delivery of the judgment. On the date of hearing of the application he admitted that the application was served through being slipped under the door of the firm. It is this act that actually caused him to file the grounds of opposition. It is clear that the parties he represents were duly served. This is a halfhearted and afterthought opposition to the instant application. Secondly, the learned counsel purports to speak on behalf of parties who have not instructed him, if at all. This is, to me, is a crafty way of buying time to distract and delay the due process of the Court.

11. Regarding the opposition based on Order 51 Rule 13, one thing that is clear from the provision is that the Rule is about signature on an application, and the indication thereon that if a party served does not appear at a time and place mentioned proceedings shall be taken *ex parte*, and also that the application together with authorities shall be served not less than seven clear days of the hearing. This Court has considered the application. It is duly signed on 3rd June 2025 by the counsel representing the applicant. Of course, it does not bear the writings that if a party served does not appear at a time and place stated he application shall proceed *ex parte* absence notwithstanding. However, one thing is clear, the Respondents were served and they know the Court in which and the manner they have to appear. That is why learned counsel appeared to oppose the application. Regarding the time, it is not disputed that the parties appeared and argued the application before me. There is absolutely no prejudice on the part of the Respondents for the application to have been filed and presented in the format it was drafted. This is the most flimsy and weak argument to ever put forth in opposition to an application. In any event Order 51 Rule 10 provides that an application should not be defeated for want of form and failure to cite the proper provisions under which it is brought. In any event Article 159(2) (d) obligates this Court to determine disputes before it based on substance and not on technicalities. The technicalities raised by the Applicant do not affect the substance of the application but only form and can be cured by Article 159(2)(d) of the *Constitution of Kenya* 2010.
12. The relevant law regarding execution of decrees and orders of courts in civil matters of the nature as is in the instant judgment, is provided for under Section 30 of the *Civil Procedure Act* which is to the effect that the Court which passed the decree may execute it; Section 34 respecting settlement of any questions that may arise about the satisfaction of the decree by the Court executing it; and Section 38(a) about the Court ordering the execution of a decree by the delivery of a property, on an application by the decree holder.
13. Further, it is provided for under Order 22 Rules 82 and 83 of the *Civil Procedure Rules*. Under them, Order 22 Rule 82 (1) provides that

“Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.”
14. Also, Order 22, Rule 83 of the *Civil Procedure Rules* provides that,

“Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor, or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and, where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in prison for a period of not exceeding thirty days.”



15. It is not disputed that the Respondents still remain on the suit land and that there is hostility on the ground regarding the execution of the decree. This is clear from the Applicant's deposition, which has not been controverted by way of another or Replying Affidavit to refute the deposition. Once a fact is on oath and it is not controverted by way of another oath or affidavit the fact is taken in law to be admitted by the adverse party. He cannot be heard to refute it by way of submissions. Thus, it is clear to me that there is resistance on the ground regarding the execution of the decree herein.
16. The Respondents oppose the instant application by arguing that it is placed in the wrong forum, that is to say, before the Judge and not the Deputy Registrar of the Court who should handle it. They therefore contend that the application is frivolous, vexatious and an abuse of the process of the Court.
17. This contention brings into focus the functions of the Deputy Registrar of this Court in the proceedings of this nature. Order 49 (1) of the *Civil Procedure Rules* provides that,

“Wherever in these Rules it is provided that any ministerial act be or thing may be done by the court, that act or thing may be done by the registrar or by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand.”
18. Also, Order 49 Rule 7(1)(b) of the Rules provides that,

“The Registrar may — (b) hear and determine an application under the following Orders and Rules, (x) Order 22 other than under Rules 28 and 75.”
19. The import of the two provisions reproduced above as read together and with Section 38(a) of the *Civil Procedure Act* is that an application for provision of security for execution of a decree or order of the Court does not lie for determination before the Deputy Registrar because it is not a ministerial act but the very core act of the execution of the order or decree made by the judge. The provision that refers to Order 22 of the *Civil Procedure Rules* regarding which applications the Deputy Registrar may hear uses the operative word, “may”, which is permissive. The provision does not use the term “shall” or “must”. It means an election to be made depending on the circumstances of the matter.
20. The manner of implementation of the decree is squarely within the jurisdiction of the judge. In any event there is no law that prevents the judge from handling a matter that is before his/her court but which the Deputy Registrar can handle as long as it is not administrative in nature. The instant application is not merely administrative but part of the execution process arising from the judgment of this Court.
21. In any event, there is no provision of law that bars this Court or the judge from handling any processes or acts delegated to the Deputy Registrar of the Court. On the contrary the functions and powers of the Deputy Registrar are limited to the extent the law provides that he/she cannot perform functions or the jurisdiction which only the judge can do or exercise.
22. The upshot is that the application is merited. It is allowed with costs to the Applicant. Further, and in beside the above finding, the instant application having been lost and the directions in regard to the application dated 14th July 2025 having been put in abeyance on 22nd July 2025 when this Court fixed the application dated 3rd June 2025 for Ruling today and which has now been delivered, this Court proceeds to give further directions on the application dated 14th July 2025.
23. The Respondent is given fourteen (14) days to Respond to the Application and serve the applicants. The Applicants have twenty-one (21) days to submit on the application and serve. The Respondent has



twenty-one (21) days to submit on it and serve. The submissions should not to exceed three (3) pages of New Times Roman Font 12, of 1.5 spacing. The application shall be heard on 14th October 2025.

24. The Plaintiff/Respondent in the Application to issue the Hearing Notice and remind the Respondents that the Ruling on the instant application has been delivered as scheduled.

25. Thus, in the end, it is hereby ordered that,

- a. M/S. Ikimwanya Auctioneers do evict the Defendants/ Judgment debtors forthwith from all that parcel of land, namely, Suna West/Wasweta II /1037 and put the Plaintiff onto possession of the land parcel.
- b. The Auctioneers do demolish all the structures constructed on land parcel number Suna West/Wasweta II/1037.
- c. The execution of the decree herein by way of eviction of the Defendants and the demolition of the structures erected by them or their servants and/ or agents be carried out in compliance with the law or procedures on evictions and respect of human rights and dignity.
- d. The Officer Commanding Oruba Police Station to provide security to M/S Ikimwanya Auctioneers to carry out the eviction and demolition exercise above mentioned.
- e. That the costs of this application be paid by the defendants.

26. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 13TH DAY OF AUGUST 2025.**

HON. DR. IUR F. NYAGAKA

JUDGE.

In the presence of,

Mr. Omonde Kisera Advocate for the Plaintiff/Applicant

No Appearance for Respondents (though the ruling date was given in the presence of learned counsel).

