



**Makumu & another v Kreszenntia & 4 others (Environment & Land
Case 388 of 2010) [2024] KEELC 325 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 325 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 388 OF 2010
SM KIBUNJA, J
JANUARY 31, 2024**

BETWEEN

PAULINE MUTEER MAKUMU 1ST PLAINTIFF

KILUNGU JUSTUS MULI 2ND PLAINTIFF

AND

URSULA KRESZENNTIA 1ST DEFENDANT

MONIKA HERKENRATH 2ND DEFENDANT

PETER JURGEN HERKENRATH 3RD DEFENDANT

JAFFARALI KASSAM ABDULLA 4TH DEFENDANT

OSCAR JUMA 5TH DEFENDANT

RULING

1. Vide the notice of motion dated the January 18, 2023, the plaintiffs prays for the Registrar of Titles Mombasa to be authorized and directed to sign the transfer of Subdivision No. 2444 (Original Number 1938/1) of Section 1/Mainland North and register the said title in the names of Pauline Muteer Makumu of Identity Card No. xxxx and Kilungu Justus Muli of Identity Card No. xxxxx, as equal shareholders, subject to the payment of assessed stamp duty and registration charges, in place of Ursula Kreszenntia, Monika Herkenrath and Peter Jurgen Herkenrath, in compliance with item 5 of the court's decree of September 23, 2019 that was issued on the November 4, 2022. The application is based on the eight (8) grounds on its face and supported by the affidavit of Pauline Muteer Makumu, the 1st plaintiff, sworn on the January 19, 2023 inter alia deposing that pursuant to the court decree of September 23, 2019 and issued on the November 4, 2022, that has been registered by Registrar of Titles, their advocates prepared the transfer and forwarded it to the counsel for the 1st and 2nd



defendants on the November 10, 2022 for execution; that there has been no response from the counsel of the 1st and 2nd defendants and hence this application.

2. The 3rd defendant opposed the application through the preliminary objection dated November 27, 2023 summarized as follows; that the duty of the Registrar of Titles is to register instruments presented and not to sign transfers; that allowing the application would amount to unlawful alteration of the decree and that the Registrar of Titles is not a party in the suit.
3. The court issued directions on the March 8, 2023 on filing and exchanging replies and submissions. The record confirms that only the counsel for the plaintiffs' filed submissions dated the May 9, 2023, which the court has considered.
4. The following are the issues for the court's determinations:
 - a. Whether what the plaintiffs' are seeking flows from the court's judgement and decree.
 - b. What orders to issue in the circumstances.
5. The court has carefully considered the grounds on the application, the affidavit evidence, the grounds on the preliminary objection, submissions by the learned counsel, the record and come to the following conclusions:
 - a. That it has not been disputed, and the record has confirmed, that the court entered judgement in favour of the plaintiffs against the 1st to 3rd defendants jointly and severally through the judgement dated the September 23, 2019, and a decree thereof was issued on the November 4, 2022.
 - b. The plaintiffs' application is aimed to giving effect to order number 5 that directed that:

“ 5. That an order of specific performance of the Deed Agreement dated 27/10/2003 and a mandatory injunction is hereby issued compelling the 1st and 2nd defendants to within 30 days of the order, perform their obligations under the agreement by executing a transfer of Plot No. 2444/MN/1 and to perform every other act and avail every other document required by the land office and/or any other authority for prompt and effective registration of the foresaid suit property to the plaintiffs as equal shareholders.”

The plaintiffs' deposition that their advocate had on the November 10, 2022 forwarded through a letter the transfer document to the 1st and 2nd defendants through their advocates for execution has not been challenged or rebutted. It has also not been disputed that the 1st and 2nd defendants' advocates had not responded to the said letter and hence this application. That indeed, the 1st and 2nd defendants have not filed any opposition to the application as provided for under order 51 rule 14 of the [Civil Procedure Rules](#).

- c. The 3rd defendant's opposition is through the preliminary objection dated the November 27, 2023 as summarized above. On the November 28, 2023, their counsel moved the court to treat the preliminary objection as the 3rd defendant's reply to the plaintiffs' application. That as only matters of laws are expected to be raised through preliminary objections, and the 3rd defendant has not filed any affidavit evidence in rebuttal to the plaintiffs' deposition, the preliminary objection cannot be a sufficient rejoinder to the plaintiffs' factual position. Worse still, the 3rd defendant did not file any submissions in support of the statements in their preliminary objection.



- d. That though the plaintiffs' sought to have the Registrar of Titles empowered and directed by the court to execute the transfer in place of the 1st and 2nd defendants so as to give effect to the court order, I am of the view that it would be better if the said document was executed by the Deputy Registrar instead. That will leave the Registrar of Titles to deal with the registration process that will follow thereafter. In the cases of *Simon Pkite Chemoltor versus William Loishakou* [2017] eKLR and *Fredrick Nyakagwa Osoro versus Hezron Mogere & another* [2016] eKLR, the court empowered the Deputy Registrar to execute the transfer documents after judgement debtors declined to sign.
- e. That as this application has been necessitated by the failure by the 1st and 2nd defendants to execute the transfer document in favour of the plaintiffs, they will pay the costs.
1. Having found merit in the plaintiffs' notice of motion dated the January 18, 2023, the court orders as follows:
 - a. That the said application is allowed as prayed in terms of prayer 2, save that the transfer be executed by the Deputy Registrar of this Court.
 - b. The 1st and 2nd defendants to pay the plaintiffs' costs in the application.
 - c. The 3rd defendant to meet his own costs of defending the application.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 31ST DAY OF JANUARY 2024

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFFS : M/s Umara

DEFENDANTS : Mr. Muthuri for 3rd Defendant.

WILSON – COURT ASSISTANT.

S. M. KIBUNJA, J.

ELC MOMBASA.

