



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 135 OF 2011**

**1. MWALIMU KALUME CHARO**

**2. FRANCIS TSALWA WASHIALI..... PLAINTIFFS**

**=VERSUS=**

**KIFALU KARISA KITSAO.....DEFENDANT**

**RULING**

1. On 22<sup>nd</sup> July 2016, the Honourable Justice Oscar Angote then sitting in Malindi delivered Judgment herein in which he struck out the Plaintiffs/Respondents suit with costs. In the said suit commenced by way of an Originating Summons the Plaintiffs/Respondents sought an order of cancellation of the title deed that was issued to the Defendant/Applicant herein and for a declaration that they(plaintiffs) are the legal/or beneficial owners of parcel of land number Kilifi/Mtondia /116.

2. The Originating Summons was principally based on the grounds that it is the Plaintiffs' father who was originally allocated the suit property by the Settlement Fund Trustees and that the Defendant or his father perpetrated a fraud by illegally obtaining a title for the suit land in the year 2007. The Originating Summons was further premised on the grounds that it is the Plaintiffs who occupy the land and that they have utilized it for a very long time.

3. Having heard the Parties, the Learned Judge determined that the property the subject matter of this suit had been registered Pursuant to the provisions of the Registered Land Act (now repealed). It was the Court's findings that although Order 37 Rule 8 of the Civil Procedure Rules allowed for filing of Applications under the said Registered Land Act to be made by way of Originating Summons, the same Rule prohibits the court from dealing with a suit filed pursuant to the provisions of Section 143 of the RLA (which allow the court to cancel titles) by way of an Originating Summons. In addition, the court determined that the issue of the Defendant having obtained the title deed fraudulently was too complex to fall within the limited and narrow scope of proceedings brought by way of an Originating Summons and proceeded to strike it out on that basis.

4. Subsequent to the Judgment, a decree was issued by this court on 31/10/2016. The said decree annexed to the Defendant's Notice of Motion application filed herein dated 11/11/2016 reads in part:

IT IS HEREBY ORDERED AND DECREED

**1. The suit by the Plaintiffs is dismissed.**

## **2. Costs of the suit are awarded to the defendant.**

5. Having extracted the decree, the Defendant/Applicant brought this application before the court. The Notice of Motion brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act seeks the following substantive Orders:

**1. That this Honourable court be pleased to Order the court Bailiff to oversee the Execution of the Decree issued by the court by supervising the eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and/or agents, servants, workmen etc(sic) from the parcel (of land) number Kilifi/Mtondia/116**

**2. That the Honourable court be pleased to order the Officer Commanding Station, Kilifi Police station to offer security to the court Bailiff during the eviction exercise.**

6. In support of the application, the Defendant contends that it is more than six months since delivery of the Judgment and the Plaintiffs have not appealed against it. He further depones that the Plaintiffs are still in occupation of the suit property and it is only fair that he be allowed to enjoy the fruits of the Judgment. He concludes that unless the orders sought herein are issued, it will be difficult for him to enjoy the outcome of this case.

7. In their response, the Plaintiffs/Respondents have filed a Replying Affidavit sworn by the 2<sup>nd</sup> Plaintiff/Respondent in which they contend that the Judgment delivered aforesaid means that they as Plaintiffs have another window for filing a proper suit before the court “for all the outstanding issues to be settled.”. It is their further firm conviction that there is no decree in this suit capable of being enforced in the manner proposed and accuse the Defendant of attempting, as it were, to use the back door, to evict them from the suit property.

8. I have carefully read the Judgement delivered herein on 22/7/2016, the Notice of Motion Application dated 10/11/2016 brought by the Defendant and the response thereto by the Plaintiffs. *Section 38 of the Civil Procedure Act* Defines the Jurisdiction and powers of the court to enforce execution. The manner of execution of a decree is accordingly laid down under the Rules in Order 22. In his prayers, the defendant/Applicant is asking this court to Order the court Bailiff to oversee the execution of the decree issued herein ‘by supervising the eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff...from the parcel of land number Kilifi/Mtondia/116’ In addition, he requests the court to order the OCs Kilifi Police Station to offer security during the intended eviction exercise.

9. At the very outset, I must mention that there are two issues that struck me as being odd with the intended execution process. First and foremost, there is no evidence that the decree referred to herein was drafted and sent for approval of the opposite party to the suit before it could be issued and/or executed. Order 21 Rule 8 of the Civil Procedure Rules provides that:

**“8(1) A decree shall bear the date of the day on which the Judgment was Delivered.**

**(2) Any party in a suit in the High court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the Judgement, shall sign and seal the decree accordingly.**

10. In this case, a draft decree appears to have been forwarded by the Applicant to the Deputy Registrar on 31/10/2016 who upon being satisfied therewith proceeded to sign and seal the same. In my view however, save for the aspect that the Originating Summons was “struck out” and not “dismissed” as shown in the decree, the substance and effect of the Judgment delivered on 22/7/2016 is largely captured in the decree howsoever extracted.

11. Secondly, it is evident from the court file that no costs have been taxed herein. In my view, even

where the decree holder may be entitled to other orders, taxation of costs is part and parcel of the execution process. Indeed Section 94 of the Civil Procedure Act provides as a general rule that execution of orders of the court should await the confirmation of the costs by taxation unless the court grants leave for execution before taxation of the costs. There is no evidence herein that the costs due to the Applicant have either been taxed and/or that the High Court has given an order for the execution to proceed before the costs incurred is taxed. These two issues should have in my view, been sufficient to dispose of this application.

12. Whatever the case, having perused the decision and the decree extracted herein on 31/10/2016, I am satisfied that there is no positive or enforceable order, other than an order for costs which is capable of execution in the manner envisaged by the Defendant/Applicant arising from the Judgment delivered by the Honourable Justice Angote on 22/7/2016. The orders of eviction sought by the applicants in the Notice of Motion application dated 10/11/2016 do not relate to the Judgement and the decree extracted by the applicant himself.

13. In the circumstances, I find the application dated 10/11/2016 misconceived and I dismissed same with costs.

**Dated, signed and delivered in Malindi on 17<sup>th</sup> day of March 2017.**

**J. O. OLOLA**

**JUDGE**