



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

**AT MOMBASA**

**ELC CIVIL SUIT NO. 237 OF 2012**

**HELEN NEKESA NIELSON.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PAUL FRIEDRICK NIELSON.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**DOROTHY NELIMA WAFULA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE ESTATE OF THE LATE JOHANNES**

**FRIEDRICK WILLIAM LOWE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The background to this application is that the plaintiff obtained judgement in her favour on 15<sup>th</sup> June 2015. This judgement has not been varied or set aside. In the final orders given by Mukunya J, he said thus:

**i) The suit property be held by the plaintiffs and the defendants as the tenants in common in equal shares (1/4 each).**

**ii) The suit property be surveyed and the plaintiffs shall get ½ share of the same, the costs of the survey be shared equally.**

2. The plaintiffs averred that they have received resistance in implementing this judgement and therefore need the intervention of this Court thus necessitating the filing of their application dated 20<sup>th</sup> January 2017. In the application, they have sought for orders that:

**a) Spent**

**b) That this Honourable Court be pleased to Order that Survey and Partition of KWALE DIANI EBACH BLOCK/372 in the names of four persons namely HELLEN NEKESA NIELSEN, PAUL FREDRICK NIELSEN, DOROTHY NALIMA WAFULA AND THE ESTATE OF JOHANNES FRIEDRICK WILHELM LOWE be effected.**

**c) That the 2<sup>nd</sup> Defendant DOROTHY NELIMA WAFULA and/or her agents and servants and assigns to not in any way resist/obstruct/stop/attempt to resist/obstruct/stop survey and**

**partition and to authorize survey to be done and/or carried out and not in any way intimidate, or show any violence against the Surveyors and all their servants from carrying on the survey in the said property.**

**d) That the cost of this Application to be provided for.**

3. The application is supported by the affidavit of the 1<sup>st</sup> plaintiff in which she deposed that she acquired the services of a professional surveyor who sought to visit the suit property on 13<sup>th</sup> January 2017 but was denied access by the 2<sup>nd</sup> defendant who stays on a part of the suit property. The plaintiffs therefore request this Court to give them an order to authorize the surveyor to enter the premises and conduct the survey & partition. Secondly that the O.C.S Diani Police Station do provide security.

4. The application is opposed by the defendants vide the replying affidavit sworn by the 1<sup>st</sup> defendant. She deposed that this application is made in bad faith as there is a pending appeal in the Court of Appeal vide case No 50 of 2016 and a ruling on the interlocutory application was to be read on 3<sup>rd</sup> March 2017. That an appeal No 50 of 2016 is challenging the entire judgement. The 1<sup>st</sup> defendant also deposed that I had granted stay of execution pending filing of the appeal. She asked the Court to dismiss this application.

5. Parties offered oral submissions which I have considered. In brief, the respondents submit this application is premature as the parties herein being tenants in common have equal rights. Accordingly, the respondents are entitled to a say on who the surveyor should be, the cost of such survey and the date of survey and actual physical position on the ground.

6. The Respondents did not annex any document to show there was a stay of execution given by the Court of Appeal staying the execution of the judgement of 15.6.2015. It is trite law that the pendency of appeal per se does not amount to stay of execution(as per the provision of Rule 5 (2) (b) of the Court of Appeal Rules). As it is now either of the parties are at liberty to execute the judgement. The Judge made an order that the suit property be surveyed so that the plaintiffs can get their half share. In my understanding of this order, any party executing is not necessarily asserting more rights than the other.

7. Further the learned trial Judge did not direct that the parties had to agree on the surveyor, the date of survey or the physical position on the ground. Therefore the submission by the Respondents on this line amounts to a variation of the order given. The parties can choose to share the cost of the survey or either can meet the entire cost if one is not co-operating and recover such costs if he/she deems fit. In my opinion, once the plaintiffs identified a surveyor, all they needed to do is notify the defendants the details of the surveyor, the costs and the date of the surveyor's visit. This may have not been done but it does not render the application premature in the face of hostility between the two parties.

8. I therefore find nothing wrong with the applicants seeking this Court's assistance to realize the fruits of her judgement. Accordingly I find merit in the application and grant the orders sought. With the costs of the application awarded to the applicants. Going forward, I direct that the surveyor appointed by the applicant is at liberty to visit the suit premises on any date convenient to him after giving the Respondent at least 3 days notice before the actual date of site visit. The Respondents are also at liberty to have their surveyor present on that date for purposes of carrying out the survey. The O.C.S Diani Police Station is directed to provide security.

**Dated, signed & delivered at Mombasa this 8<sup>th</sup> Day of May 2017**

**A.OMOLLO**

**JUDGE**