



REPUBLIC OF KENYA



KENYA LAW
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**Shikhaya v Shikhaya (Environment & Land Case 15 of 2021)
[2024] KEELC 674 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 674 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 15 OF 2021
DO OHUNGO, J
FEBRUARY 15, 2024**

BETWEEN

SULEIMAN AMUKOYA SHIKHAYA PLAINTIFF

AND

SHABAN TABU SHIKHAYA DEFENDANT

RULING

1. Litigation in this matter which pits brothers against each other, commenced in the High Court at Kakamega as HCCC No. 49 of 2012. The matter was heard, and judgment was delivered on 18th September 2014 by Said J. Chitembwe J as follows:

In the end I do find that although the plaintiff is registered as the proprietor of S.wanga/ekero/2491, the defendant is equally entitled to reside on the suit land. The defendant has been asking for the one acre portion he has been occupying as per paragraph 4 of his defence and I will grant him that one acre. I do order that the suit land plot number S.wanga/ekero/2491 be subdivided and a portion measuring one acre to be transferred to the defendant Shaban Taabu Shikhaya. The defendant to meet the costs of the subdivision and transfer. Each party shall meet his own costs of this suit.

2. The matter was later transferred to this court in the year 2021, hence its current case number. Earlier, the defendant had filed Notice of Motion dated 4th April 2020, which is the subject of this ruling. The application was pending as at the time of transfer. The following orders are sought in the application:
 1. [Spent]
 2. That the firm of Okeyo Ochiel & Co. Advocates be granted leave to come on record and act for the Applicant herein.



3. That this Honorable Court be pleased to issue a conservatory order restraining any dealings on land parcel number South Wanga/Ekero/4349 pending the hearing and determination of this application.
 4. That this Honorable Court be pleased to amend the Decree issued by this court on 29th September 2014 to have the property indicated as land plot number S. Wanga/Ekero/2491 to read South Wanga/Ekero/4349.
 5. That the costs of this application be provided for.
3. The grounds stated on the face of the application are that although the judgment was in respect of parcel number South Wanga/Ekero/2491, the plaintiff subdivided the said parcel severally before execution of the decree thereby rendering execution impossible. That the plaintiff is the proprietor of parcel number South Wanga/Ekero/4349 which is the physical position that was occupied by the defendant prior to the filing of this case.
 4. The application is supported by an affidavit sworn by the defendant. He reiterated the grounds of the application and added that the plaintiff subdivided parcel number South Wanga/Ekero/2491 on 10th June 2013.
 5. Although evidence of service of the application upon the plaintiff neither filed a response nor written submissions. The defendant filed submissions wherein he urged the court to allow the application since it is unopposed.
 6. I have considered the application and the submissions. The issues that arise for determination are whether the court has jurisdiction and whether the orders sought should issue.
 7. Jurisdiction, as has been stated severally, is everything. A court of law cannot take any valid step in the absence of jurisdiction. The court's jurisdiction flows from either the Constitution or legislation or both and it can only exercise jurisdiction as conferred on it by law. See Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. Any order or step taken by a court in the absence of jurisdiction is a nullity. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
 8. One instance in which a court loses jurisdiction is when it is functus officio as far as its power to determine the parties' respective claims in the matter is concerned. As noted earlier in this ruling, this matter was heard, and judgment was delivered on 18th September 2014. The case that was pleaded before the trial court concerned land parcel number South Wanga/Ekero/2491 and not South Wanga/Ekero/4349. If circumstances made it impossible to enforce the decree that was obtained, parties have to explore whether a fresh suit can be sustained. The decree cannot be leapfrogged from land parcel number South Wanga/Ekero/2491 to South Wanga/Ekero/4349. Simply put, the court is *functus officio* and does not have jurisdiction to change the decree as sought or to enquire into matters that were not placed before it by the parties. See Raila Odinga & others v IEBC & others [2013] eKLR.
 9. In view of the foregoing, Notice of Motion dated 4th April 2020 is struck out. Considering the family relationship between the parties and since the plaintiff did not resist the application, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE



Delivered in open court in the presence of:

The Plaintiff present in person

Ms Anono holding brief for Ms Okeyo for the Defendant

Court Assistant: E. Juma

