



**Amuhaya v Kadanye (Environment & Land Case 151 of 2016)
[2024] KEELC 3445 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 151 OF 2016
DO OHUNGO, J
APRIL 30, 2024**

BETWEEN

MOSES SHIVANDA AMUHAYA PLAINTIFF

AND

TOROKASI KAVERE KADANYE DEFENDANT

RULING

1. Judgment was delivered in this matter by N.A. Matheka, J. on 21st July 2021. The court found

“that the defendant in this case despite accepting the purchase price she fraudulently resold the same suit land [land parcel No. S. Kabras/Chesero/1200] to a third party DW2 [Simon Shamalla]. DW2 testified that he bought the land in 2008 and took possession and that the plaintiff does not live there. After succession was done by the defendant he got the land. It is in evidence that the defendant signed the two sale agreements PEx1 & 4 and she is now the administratrix of the estate of the Late Lukas Lumadede. PW2 the Land Registrar produced a transfer by personal representative by person entitled by a will or on an intestacy dully signed by the defendant relating to the suit land PEx9. The certificate of confirmation of grant dated 1st November 2012, clearly shows that the plaintiff was entitled to 5.5 acres of the suit land PEx3. The defendant cannot dismiss this as a mistake. She cannot now turn round and say that she had no capacity to enter into the said agreement. I find that the defendant resold the suit land to a DW2 and for this reason the Court cannot award specific performance when it is incapable of enforcing the order. I find that the defendant is liable to refund the money which she took from the plaintiff with her husband and then failed to transfer the land to the plaintiff but resold the same suit land to DW2.”



2. The court then proceeded to enter judgment in favour of the plaintiff and ordered the defendant to refund the sum of Kshs 780,000 plus interest at court rates from the date of filing this suit. Costs of the suit were awarded to the plaintiff.
3. Subsequently, the plaintiff filed a party and party bill of costs which was taxed on 5th August 2022 at Kshs 152,340. Later, the plaintiff filed Notice of Motion dated 21st July 2023, which is the subject of this ruling. The application is expressed to be brought under Order 22 Rule 9 (a) (b) and Rule 10 of the *Civil Procedure Rules*. The plaintiff seeks leave to execute the judgment herein by attaching 1.0 acres of land parcel number S. Kabras/Chesero/1200 belonging to the defendant/judgment debtor, an order that the County Land Registrar excises the 1 acre and that the resultant parcel be sold by public auction to settle the decretal sum, an order that the plaintiff be granted leave to bid at the auction and that the court gives directions as to how the auction should be conducted.
4. The application is based on the grounds stated on its face and is supported by an affidavit sworn by the plaintiff. The plaintiff deposed in the affidavit that the court awarded him Kshs 780,000 and that the defendant had not made any attempt to settle the said sum. That an auctioneer visited the defendant's home but found no movable property to attach. He further deposed that the defendant is the registered proprietor of land parcel number S. Kabras/Chesero/1200 and annexed a copy of the register in respect of the parcel.
5. When the application came up for inter parte hearing, there was no appearance for the defendant who had equally filed no response. Upon the plaintiff availing evidence of service, hearing of the application proceeded. Counsel for the plaintiff urged the court to allow the application.
6. I have considered the application and the submissions. under Order 22 Rule 9 (a) (b) and Rule 10 of the *Civil Procedure Rules* under which the application is brought provide for particulars to be included in an application for attachment of immovable property and empower the court to require certified extract from Land Registries in in such cases. In particular, Order 22 Rule 10 provides that

“Where an application is made for the attachment of any land which is registered in the Land Registries, the court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing, any transferable interest in the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.”
7. The plaintiff has availed a certified copy of the register in respect of land parcel number S. Kabras/Chesero/1200. A perusal of the said register shows that pursuant to entry number 10 dated 7th December 2010 in the proprietorship section, the registered proprietors of the parcel are Torokasi Kavere Kadanya (1.0 acres), Stephen Abacha Kadanye (2.0 acres), John Anyangu (3.0 acres), Simon Lubwa (1.0 acres), and Samuel Kofia Kona (1.0 acres).
8. As noted earlier, in the judgment delivered on 21st July 2021, the court found that the defendant sold land parcel number S. Kabras/Chesero/1200 to a third party who testified in this matter as DW2. I have perused the record and I note that DW2 was Simon Shamalla. Simon Shamalla is not party to the suit and equally not party to the present application. His interest having been noted by the court in the judgment, the court cannot then proceed to disregard that interest by making contrary orders pursuant to an application filed after delivery of the judgment.
9. The judgment was delivered over a decade after the aforesaid entry number 10 dated 7th December 2010. If the plaintiff thinks that the court got it wrong in its rendition of the status in the register, the



appropriate recourse would be to appeal and not to invite this court to make an order that may be in direct conflict with the judgment.

10. The matter is now at the execution stage. The invitation made in the application for the court to order excision of 1.0 acres of land parcel number S. Kabras/Chesero/1200 is a substantive relief which cannot be made at this stage through an application, more so considering that the parcel is held in tenancy in common with other registered proprietors who are not parties to this suit. I also bear in mind that land parcel number S. Kabras/Chesero/1200 was the suit property in this matter at the time of hearing and determination. I am not inclined to make any orders that have potential to be in conflict with the judgment. The court is *functus officio* in terms of the case that was pleaded before it.
11. I find no merit in Notice of Motion dated 21st July 2023 and I therefore dismiss it. Considering that the defendant did not resist the application, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Plaintiff

No appearance for the Defendant

Court Assistant: M Nguyayi

