



REPUBLIC OF KENYA



KENYA LAW
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**Kamoing v Barchok & 3 others (Environment & Land Case
103 of 2017) [2025] KEELC 215 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 103 OF 2017
LA OMOLLO, J
JANUARY 30, 2025**

BETWEEN

JOSHUA KAMOING PLAINTIFF

AND

SIMON BARCHOK 1ST DEFENDANT

DANIEL BARCHOK 2ND DEFENDANT

PHILIP KIPSANG MARITIM 3RD DEFENDANT

**FLORENCE CHEPKWONY (SUED IN HER CAPACITY AS THE
ADMINISTRATRIX OF THE ESTATE OF THE LATE PAUL KIPYEGON
CHEPKWONY (DECEASED) 4TH DEFENDANT**

RULING

Introduction

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 23rd September, 2021. The application is expressed to be brought under Sections 1A, 3A and 98 of the *Civil Procedure Act* and Article 159 of the *Constitution*.
2. The Plaintiff/Applicant seeks the following prayers;
 - a. That the District Surveyor do visit and cause survey and sub-division of the properties known as LR No. Kericho/Boito/140 and LR No. Kericho/Boito/1218 and, prepare mutation forms to facilitate implementation of the judgement and decree of this Honourable Court dated 6th May, 2020.



- b. That the Deputy Registrar of this Honourable Court to execute application for consents to sub-divide and transfer and mutation and transfer forms for purpose of implementing the judgement of this Honourable Court dated 6th May, 2020. (sic)
 - c. That the OCS, Konoin Police Station do provide security to the Applicant and the District Surveyor for purposes of enforcing peace during the survey and subdivision exercise to be carried out on LR No. Kericho/Boito/140 and 1218, so as to facilitate implementation of the judgement of this Honourable Court dated 6th May, 2020.
 - d. That directions on the costs of this application and the costs of the survey exercise do issue.
3. The application is based on the grounds on its face and the supporting affidavit of Joshua Kamoing (the Plaintiff/Applicant) sworn on 23rd September, 2021.

Factual Background.

4. The Plaintiff/Applicant commenced the present proceedings vide the Originating Summons dated 24th August, 2017 where they sought determination of the following questions;
- a. Whether there exists a trust relationship between the Applicant and the initial registered proprietors of LR No. Kericho/Boito/95 and LR No. Kericho/Boito/140.
 - b. Whether the title numbers LR No. Kericho/Boito/1218 and LR No. Kericho /Boito/1219 should be declared null and void for breach of trust.
 - c. Whether the Applicant is entitled to 24 acres comprised in the land parcel LR No. Kericho/Boito 95 and subsequent titles on the one part and LR No. Kericho/Boito/140 on the other part by virtue of trust if any.
 - d. Whether the Applicant is entitled to costs of this suit.
5. The 1st, 2nd and 3rd Defendants/Respondents filed a Replying Affidavit sworn on 20th March, 2018 in response to the Originating Summons.
6. Judgement in this suit was delivered on 6th May, 2020. It is in the following terms;
- a. A declaration is hereby issued that there is a trust relationship between the Applicant and the 1st, 2nd and 3rd Respondents in respect of LR No. Kericho/Boito/95 and LR No. Kericho/Boito/140.
 - b. The Applicant is entitled to one third of the total acreage comprised in LR Nos. Kericho/Boito/140 and the LR No. Kericho/Boito/1218.
 - c. The titles for LR No. Kericho/Boito/1122 and LR No. Kericho/Boito/1120 currently registered in the name of Joshua Kamoing are hereby cancelled to allow for distribution of the suit property in accordance with (b) above.
 - d. Taking into account the circumstances of this case and the relationship between the parties, each party shall bear their own costs.
7. The application under consideration first came up for directions on 25th October, 2021 when the Court directed that it be canvassed by way of written submissions.



8. The matter was mentioned severally to confirm filing of submissions and the Court delivered a ruling on 24th March, 2022 where it held as follows;

“...Having this in mind, and further in consideration of the fact that the matter is before the Court of Appeal for interparty (sic) hearing on an application of stay of execution, of the judgement, decree and subsequent process which in my view could either be dismissed or allowed, and further keeping in mind that the said application was to be heard interparties (sic) on the 8th November, 2021 I am willing to indulge the Respondent by holding this application in abeyance awaiting the decision of the Court of Appeal. We can revisit this application thereafter. The matter shall now be mentioned after 30 days from today to confirm the status of the decision of the Court of Appeal and for further directions.”

9. On 17th May, 2024 it was noted that it had been over two years since the Applicant moved the court in respect of the present application as was directed on 24th March, 2022. This caused the suit to be fixed for mention on 3rd July, 2024. The Deputy Registrar served parties herein.
10. On 3rd July, 2024 parties did not attend court despite being served with the mention notice. The court noted, while giving directions, that the instant application was pending hearing and ordered that the same be heard on 23rd September, 2024. The Deputy Registrar was again directed to serve parties.
11. On 23rd September, 2024, counsel for the Plaintiff/Applicant informed the court that he had filed submissions on 26th November, 2021. Counsel for the Defendant/Respondents sought more time to file submission and the application was deferred to 1st October, 2024 for the Defendants/Respondents' submissions.
12. On 1st October, 2024, the Defendant/Respondents were absent and the matter was, nevertheless, reserved for ruling.

The Plaintiff/Applicant's Contention.

13. The Plaintiff/Applicant contends that judgement was entered in his favour on 6th May, 2020 when the Court found that he was entitled to a third of the total acreage comprised in land parcel No's Kericho/Boito/140 and 1218.
14. The Plaintiff/Applicant also contends that despite the said findings of the Court, the Defendants/Respondents have buffed his efforts to implement the judgement.
15. The Plaintiff/Applicant further contends that he has been denied use and enjoyment of about 23.8 acres being a third of the total acreage comprised in the suit properties.
16. It is the Plaintiff/Applicant's contention that the 1st, 2nd and 3rd Defendants/Respondents and their respective families are averse to having a delimitation of the suit properties as they are enjoying exclusive possession.
17. It is also his contention that owing to the 1st, 2nd and 3rd Defendants/Respondents recalcitrance, he is constrained to approach the Court seeking for further directions to facilitate the implementation of the judgement herein.
18. It is further his contention that he has been advised by his advocates on record that an order directing the district surveyor to visit the suit properties in view of determining and curving out his apportioned shares is imperative.



19. He contends that given the acrimonious nature of this matter, a further order directing the Officer Commanding Police Station, Konoin Police Station to provide security during the survey exercise is necessary to ensure peace is maintained.
20. He ends his deposition by stating that he is apprehensive that unless the Deputy Registrar of this Court is directed to execute the application for consent to sub-divide & transfer, mutation form and transfer form, ancillary to the survey exercise, the said exercise will be rendered nugatory as the Defendants/ Respondents are not likely to execute them as they are not keen to have the judgement implemented.

The 1st, 2nd and 3rd Defendants/Respondents Response.

21. The 1st, 2nd and 3rd Defendants/Respondents filed a Replying Affidavit sworn by Daniel Barchok the 2nd Defendant/Respondent.
22. He deposes that the application under consideration is tailored to frustrate the ongoing process of appeal on the judgement delivered on 6th May, 2020.
23. He also deposes that they had filed a Notice of Appeal dated 27th May, 2020 that was lodged in Court on 29th May, 2020 which appeal they are desirous of canvassing before the Court of Appeal.
24. He further deposes that the said appeal was at an advanced stage but was yet to be filed because the registry had not supplied them with certified copies of proceedings.
25. It is his deposition that vide Court of Appeal Civil Application No. E36 of 2021 the Defendants/ Respondents had sought for stay of execution of the judgement as the said orders would have occasioned them substantial loss if executed.
26. It is also his deposition the said application was served upon the Plaintiff/Applicant as directed by the Court of Appeal which Court was to hear the said application on 8th November, 2021.
27. It is further his deposition that given the pending appeal before the Court of Appeal, it is necessary that the status quo be maintained in order to safe guard and/or preserve the suit properties. He adds that if status quo orders are given, the parties will utilize their respective properties as they have done so for the past fifty years.
28. He deposes that the Plaintiff/Applicant will not suffer any prejudice if the status quo is maintained. He relies on the judicial decision of Baber Mawji v United States [*International University HCC 512 of 1976*](#).
29. He also deposes that if the application is allowed the Plaintiff/Applicant will proceed to survey and transfer the suit properties thereby rendering the intended appeal an academic exercise which will occasion him irreparable damage and justice would be defeated.
30. He further deposes that their intended appeal is arguable and unless status quo is granted, the said appeal would be rendered nugatory.
31. He ends his deposition by stating that the Plaintiff/Applicant's application should be dismissed with costs.



Issues for determination.

32. The Plaintiff/Applicant filed his submissions dated 25th November, 2021 while the Defendants/ Respondents did not file any submissions.
33. The Plaintiff/Applicant in his submissions reiterates the orders he is seeking and submits on whether he is deserving of a grant of the orders sought.
34. The Plaintiff/Applicant submits that the Court of Appeal did not grant stay of execution of judgement pending appeal.
35. The Plaintiff/Applicant also submits that the 1st, 2nd and 3rd Defendants/Respondents application dated 21st May, 2021 that had been filed before this Court seeking stay of execution had been dismissed.
36. The Plaintiff/Applicant relies on Section 98 of the *Civil Procedure Act*, the judicial decisions of Benjamin Kipsigei Arap Chumek v Reuben Cheruiyot Chepkwony [2017] eKLR, Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2018] eKLR as was cited in Paul Kibet Laboso & 3 Others v New Gatundu Mixed Farmers & another [2021] eKLR and urges the Court to allow his application as prayed.

Analysis and determination.

37. I have considered the application, the response thereto and the Plaintiff/Applicant's submissions and my view is that the only issue that arises for determination is whether the Plaintiff/Applicant's application dated 23rd September, 2021 has merit.
38. As stated in the preceding paragraphs, the application under consideration had been set down for ruling on 22nd March, 2022. When it came up for ruling, the Court held the application in abeyance pending confirmation of the status of the decision of the Court of Appeal on stay of execution.
39. As at the time of issuing directions for submissions, it was over two years and the Defendant/ Respondent, who were present, said nothing about the application pending before the court of appeal but only sought time to file submissions which they failed to do. It is upon this background and also the fact that there is no order staying execution of the judgment of this court that I shall therefore proceed and determine this application.
40. Section 34(1) of the *Civil Procedure Act* provides as follows;
 - “(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”
41. In the judicial decision of Kipungar v Tamning & 3 others (Land Case 181 of 2013) [2022] KEELC 3588 (KLR) (20 July 2022) (Ruling) the Court while considering a similar post judgement application where the Applicants had sought an order that the District Surveyor proceeds to the ground and subdivides the land into equal portions held as follows;
 - “7. When the Court rendered itself in the suit, it held, among other reliefs, that “the trust by the plaintiff is hereby terminated and an order is given that the title held by the plaintiff should be cancelled and new separate ones be issued in favour of the plaintiff and the defendants in equal shares. The decree could



not differ from the prayers in the plaint. Thus, the argument by the respondent that the prayer differed from that in the plaint was a misconception of the prayer sought in the instant application. Since the Court found that the title was to be divided in equal shares as between the plaintiff and the defendants/applicants herein, in my view, the prayer in the instant application is being sought to give effect to the decree of the Court. Such a prayer should not be inhibited by a respondent who is not keen to obey the decree of the Court, to buy time.

8. This Court therefore finds the application dated February 25, 2022 wholly meritorious and allows it with costs to the applicants.”

42. This Court in its judgement delivered on 6th May, 2020 issued the following orders;

- a. A declaration is hereby issued that there is a trust relationship between the Applicant and the 1st, 2nd and 3rd Respondents in respect of LR No. Kericho/Boito/95 and LR No. Kericho/Boito/140.
- b. The Applicant is entitled to one third of the total acreage comprised in LR Nos. Kericho/Boito/140 and the LR No. Kericho/Boito/1218.
- c. The titles for LR No. Kericho/Boito/1122 and LR No. Kericho/Boito/1120 currently registered in the name of Joshua Kamoing are hereby cancelled to allow for distribution of the suit property in accordance with (b) above.
- d. Taking into account the circumstances of this case and the relationship between the parties, each party shall bear their own costs.”

43. It is apparent that the prayers sought in the application under consideration are meant to give effect to the decree of the Court.

The 1st, 2nd and 3rd Defendants/Respondents in opposing the grant of the said orders contend that there is an application for stay of execution pending before the Court of Appeal. No order has been availed.

44. My view is that it is grossly unjust to deny the Plaintiff/Applicant the fruits of his judgment, delivered over four years ago, under the guise of an application pending before the Court of Appeal and an application whose status remains unknown.

Disposition.

45. Taking the foregoing into consideration, the application dated 23rd September, 2021 is hereby allowed in the following terms.

- a. The District Surveyor shall visit and cause survey and sub-division of the properties known as LR No. Kericho/Boito/140 and LR No. Kericho/Boito/1218 and, prepare mutation forms to facilitate implementation of the judgement and decree of this Honourable Court dated 6th May, 2020.
- b. The Deputy Registrar of this Honourable Court shall execute application for consents to sub-divide, transfer forms and mutation for purpose of implementing the judgement of this Honourable Court dated 6th May, 2020.
- c. The OCS, Konoin Police Station shall provide security to the Applicant and the District Surveyor for purposes of enforcing peace during the survey and subdivision exercise to be



carried out on LR No. Kericho/Boito/140 and 1218, so as to facilitate implementation of the judgement of this Honourable Court dated 6th May, 2020.

d. Each party shall bear own costs.

46. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 30TH DAY OF JANUARY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kipkorir for Koech for the Plaintiff/Applicants.

The firm of Onesmus Langat (Miss Cheronon) for the 1st, 2nd and 3rd Defendants/Respondents.

No appearance for the 4th Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

