



**Chepchirchir v Kiprono (Environment & Land Case 37 of 2017)
[2024] KEELC 1716 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 37 OF 2017**

**MC OUNDO, J
APRIL 11, 2024**

BETWEEN

MERCY CHEPCHIRCHIR PLAINTIFF

AND

CHARLES KIPRONO DEFENDANT

RULING

1. Vide an application dated 28th September 2023, the Applicant herein seeks orders stopping any dealings in respect to properties known as LR No. Kericho/Silibwet/ 5686 and 5688 situated in Bomet County and registered to the Respondent herein. The Applicant further seeks that the said properties be advertised and sold by public auction to recover the outstanding Decree to a sum of Ksh. 2,458,725.22/= and fee owed to Solai auctioneers amounting to Ksh. 200,609.30/=, together with all the accrued interest until payment in full.
2. That there be free and unlimited access to the subject properties for the purpose of inspection and valuation, there be costs of the valuation and that the court gives a convenient date before the Deputy Registrar for the settlement of the terms and conditions of the sale of the properties. Lastly, the Applicant seeks for costs of the application.
3. The application was supported by the grounds therein as well as the supporting affidavit of the Applicant sworn on 28th September 2023 to the effect that pursuant to a judgment having entered against the Respondent for the payment of a sum of Ksh.1,260,000/= together with interests from 13th June 2018 until payment in full, and Ksh. 281,665/= being the Advocates taxed costs which had been issued on 27th June 2018, the Respondent had failed to pay the said sums of money and therefore the outstanding sum of money as at 2nd October 2022 was Ksh. 2,458,725.22/=. That the Respondent's movable properties had initially been auctioned wherein Solai auctioneers had raised a sum of Ksh.50,000/= only wherein there had accrued further auctioneer's charges of Ksh. 200,609.30/=.



4. That having conducted a search at the lands registry and having established that the Respondent was the registered proprietor to the said parcels of land, she was apprehensive that he would dispose them off to third parties as he had initiated the process of sub dividing the same into several portions.
5. The application was opposed by the Respondent's Replying Affidavit sworn on 8th November 2023 to the effect that vide the said judgment, the court had rightly pronounced itself that the suit property was matrimonial property and hence the orders sought by the Applicant could not issue.
6. That the suit property having been matrimonial property the family had made a decision to subdivide the same and transfer it to two individuals who were entitled to ownership, which action had taken place on 18th February 2023.
7. That LR No. Kericho/Silibwet/ 5686 and 5688 were no longer his properties as transfer process had been initiated prior to the filing of the present application. That the new owners of the said suit properties were not parties to the suit.
8. That he had already served a term in civil jail having been committed by the Applicant who had rightly informed the court that he had no property capable of attachment. That the application was an afterthought and had been overtaken by events. The court had become functus officio.
9. In response, though a further affidavit sworn on 14th November 2023, the Applicant deponed and that the Respondent had transferred the suit parcels of land to his sons so as to defeat her application and an attachment of the said subject properties.
10. The application was disposed of by way of written submissions to which the Applicant submitted that pursuant to the delivery of the judgment on 13th June 2018, the Applicant had come before court for execution of the same and therefore it cannot be said that the court was functus officio. Reliance was placed on the provisions of Order 22 Rule 6 of the Civil Procedure Rules. That further the provisions of Order 22 Rule 48(1) of the Civil Procedure Rules prohibit anybody, including third parties, from taking any benefit from a purported transfer of charge. That the Applicant had a valid decree which had not been satisfied by the Respondent and was entitled to reap the fruits of her judgment by executing the Decree through various legal means allowed by the law.
11. That the purported transfer of the property to third parties was void and was done solely to defeat the Applicant's interest and therefore the purchasers cannot be termed as bona fide purchasers for value without notice as they were sons to the Respondent and had been aware of the legal dispute over the subject parcels of land.
12. The Respondent having considered to have transferred the subject parcels of land to his sons wherein they were registered as proprietors a few days prior to the mention of the matter, there were no sale agreements, the evidence of payment certificate of search and green card to show that the transferees were bona fide purchasers for value without notice, they were therefore holding the properties for the benefit of the Respondent. That the application had merit and the same ought to be allowed.
13. The Respondent in his submission on the other hand framed his issues for determination as follows;
 - i. Who is the registered owner of the properties sought for attachment.
 - ii. Are the subject properties former suit properties.
 - iii. Whether at the time of execution the property belongs to the JD.
 - iv. What is the effect of the orders sought on third party rights not before court.



- v. Is the decretal sum in dispute.
14. On the first issue for determination, the Respondent submitted that he had filed two copies of title deeds demonstrating the actual owners of the properties which the Applicant sought to attach and which titles were in the name of Vincent Rono and Bernard Rono.
 15. The Respondent then relied on the provisions of Sections 26 and 24 (a) of the *Land Registration Act* as well as the holding in the case of Dr Joseph Arp Ngok v Justice Moiyo Ole Keiwa & Others CA Civil Appeal No. 60 of 1977 to submit to that, the said suit properties which the Applicant sought to attach were not registered in his name.
 16. On the second issue for determination, the Respondent submitted that the properties in question both measuring 0.12 hectares were not a subject of the former suit property which had measured 0.64 of an acre as stated by the court at paragraph 22 of its judgment, and therefore the allegation that the entire land comprised of the suit property was misleading.
 17. The Respondent further submitted that he did not have disposing powers to the properties sought for attachment nor were the same held for his benefit and therefore they were not liable for execution as per Section 44 of the *Civil Procedure Act*. That the registered proprietors of the properties as sought to be attached were third parties and not parties before the court and therefore they needed to be accorded an opportunity to be heard.
 18. Lastly, the Respondent submitted that the decretal sum was disputed for reason that there had been a previous execution against this parcel of land for which the Applicant had not rendered accounts and/or disclosed material facts. That in addition his cattle had been sold to offset the decretal sum to which an account had not been rendered by the Applicant to reduce the decretal sum. He sought for the application to be dismissed with costs.

Determination.

19. I have considered the application herein, the opposition thereto and the submissions in support of and against the same. The Applicant brings this application to enforce/execute a judgment and/or decree delivered by the court on 13th June 2018, wherein she seeks that LR No. Kericho/Silibwet/5686 and 5688 situated in Bomet County and registered to the Respondent, the judgment debtor herein, be sold by way of public auction to realize the decretal sum owed to her to the tune of Ksh. 2,458,725.22/= as at 2nd October 2022.
20. The application has been opposed by the Respondent for reasons that he was not the registered proprietor of the suit parcels of land sought to be attached and sold to satisfy the alleged outstanding decretal sum.
21. It is therefore not in contention that the Applicant herein holds a valid judgment/decree which was delivered and/or issued on the 13th June 2018 which is approximately five years ago and which decree has not been perfected.
22. The issue that therefore stands for determination is whether there should be prohibitive orders issued as restricting any dealings in relation to properties known as LR No. Kericho/Silibwet/ 5686 and 5688 situated in Bomet County, so that they can be advertised and sold by public auction to recover the Applicant's outstanding decretal sum of Ksh. 2,458,725.22/= together with all the accrued interest until payment in full.



23. Indeed it has been held by the courts that a court is functus when it has performed all its duties in a particular case, and that Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected.
24. The provisions of Section 44(1) of the *Civil Procedure Act* stipulate as follows on the Property liable to attached and sold in execution of a decree
- (1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:
25. From the above captioned provisions of the law, it is clear that property liable for attachment and sale in execution of a Decree ought to belong to the judgment debtor, the Applicant herein seeks to attach and sell LR No. Kericho/Silibwet/ 5686 and 5688 which land, as evidenced by the title deed annexed to the Respondent's Replying Affidavit and marked as CK 1, belong to Bernard Rono and Vincent Rono respectively, persons who are and were not party to the suit herein and neither has there been evidence adduced to prove that they held the properties herein on behalf of the Respondent.
26. Indeed the provisions of Section 24 of the *Land Registration Act* are clear to the effect that:
- “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
27. Further the provisions of Section 26 of the same act provide as follows;
- “Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
28. In addition, it is trite that adverse orders likely to affect parties not joined to the suit, ought not to be issued unless the parties to be affected are given an opportunity to be heard.
29. It is obvious that the Applicant seeks to attach properties that are not registered to the Respondent but to third parties herein without giving them an opportunity to be heard and although the Applicant submits that the said properties were registered to third parties so as to defeat the purpose



of attachment, the provisions of Section 26(1) (a) & (b) of the *Land Registration Act* are clear on circumstances where title to a registered proprietor can be impugned.

30. Given the circumstances herein above stated, I am not satisfied that the Applicant deserves the orders herein sought and proceed to dismiss the application dated 28th September 2023 with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 11TH DAY OF APRIL 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

