



REPUBLIC OF KENYA



KENYA LAW
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**Ogwindo & another v Oriyo (Environment & Land Case E001 of 2022)
[2023] KEELC 391 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E001 OF 2022**

**DO OHUNGO, J
JANUARY 31, 2023**

BETWEEN

MACDUFF ONGOYO OGWINDO 1ST PLAINTIFF

JANE NAMWANYA ANABWANI 2ND PLAINTIFF

AND

SAMWEL PATRICK ORIYO DEFENDANT

JUDGMENT

1. By originating summons (OS) dated December 13, 2021, the plaintiffs claimed to be entitled to the parcel of land known as Butsotso/Esumeiya/2060 (suit property) and sought the determination of the following questions:
 1. Whether the plaintiffs are now entitled to have land parcel Butsotso/Esumeiya/2060 registered in their name by virtue of having been declared the rightful owners of the said parcel by judgment of Justice N.A. Matheka sitting in the Environment and Land Court in ELC Case No. 464 of 2014.
 2. Whether the defendant ought to be ordered to transfer the said land in the name of the plaintiffs failing which the Deputy Registrar/ Executive Officer of this court do sign such and all transfer documents in favour of the plaintiffs.
 3. Whether the defendant ought to be ordered to pay costs of this suit.
2. The OS was supported by an affidavit sworn by the first plaintiff who deposed that vide an agreement dated May 22, 2004, the defendant herein sold him the suit property at KShs 270,000, that he paid the purchase price and immediately moved into the suit property and has been in occupation ever since. He further deposed that the defendant gave him the original title of the suit property immediately after purchase and that the defendant has not signed the transfer documents despite his efforts to get him to



sign. That on April 11, 2011, the defendant filed Kakamega ELC Case No. 464 of 2014 seeking orders inter alia that the agreement entered into on May 22, 2004 be declared null and void; eviction of the first plaintiff herein and an injunction restraining the first plaintiff herein from trespassing into the suit property. That judgment was delivered in the matter in favour of the plaintiffs herein on March 20, 2019 and that the judgment has never been overturned. He therefore concluded by stating that having proven their case before a court of competent jurisdiction, it is fair that the defendant be forced to sign transfer documents in the plaintiffs' favour.

3. The defendant opposed the OS through a replying affidavit filed on May 30, 2022 wherein he deposed that he was not satisfied with the judgment in Kakamega ELC No. 464 of 2014 and filed a notice of appeal against it. He further deposed that the sale agreement is null and void since no consent of the Land Control Board was obtained and that the agreement was frustrated by the plaintiffs who failed to pay the purchase price. The defendant further deposed that the judgment never awarded the suit property to the plaintiffs since the court dismissed the case and that the court never gave any orders in favour of the plaintiffs. The defendant therefore urged the court to dismiss the suit with costs.
4. The application was canvassed through written submissions which both parties filed.
5. The plaintiffs submitted that the defendant's notice of appeal filed on March 26, 2019 does not serve as an appeal and that there are no reasons advanced as to why the defendants have never followed up on the appeal and as such the judgment ought to be enforced. The plaintiffs therefore urged the court to grant the prayers sought.
6. The defendant argued that no orders were made in the judgment in favour of the plaintiffs herein and further that a judgment cannot be enforced through a separate suit as the plaintiffs herein have sought. That this suit is an abuse of the court's process and that the agreement can only be enforced by filing a substantive suit. The defendant therefore urged this court to dismiss the OS.
7. I have carefully considered the parties' pleadings, evidence, and submissions. The plaintiffs seek to enforce the judgment delivered in Kakamega ELC No. 464 of 2014 on March 20, 2019. As correctly submitted by the defendant, enforcement of a judgment must be in the same suit. That is the law as provided at section 34 (1) of the *Civil Procedure Act* which provides that 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. No valid reason has been given to warrant departing from those mandatory provisions by filing a new suit, more so considering that the plaintiffs herein were defendants in Kakamega ELC No. 464 of 2014 and the defendant herein was plaintiff in the said case. I agree with the defendant that this suit is an abuse of the court process.
8. Even assuming for a moment that it was possible to enforce the judgment through this suit, a perusal of the judgment shows that the case was dismissed. There is thus nothing to be enforced by the plaintiffs through this suit.
9. The upshot of the foregoing is that the plaintiffs' case is without merit. I dismiss it with costs to the defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiffs



Mr Kombwayo holding brief for Mr Manyoni for the defendant

Court Assistant: E. Juma

