



**Ambwere TS & Co Advocates v Karama; Salim & 2 others (Interested Parties)  
(Miscellaneous Application 23 of 2021) [2024] KEHC 6882 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 23 OF 2021**

**G MUTAI, J**

**MAY 24, 2024**

**BETWEEN**

**AMBWERE TS & CO ADVOCATES ..... APPLICANT**

**AND**

**MOHAMED SWALEH KARAMA ..... RESPONDENT**

**AND**

**SOFIA AWADH SALIM ..... INTERESTED PARTY**

**ANISA SWALEH KARAMA ..... INTERESTED PARTY**

**NADIA OMAR AWADH ..... INTERESTED PARTY**

**RULING**

1. Before the Court is a Notice of Motion dated 6<sup>th</sup> November 2023 vide which the Applicant seeks the following orders:-
  - a. Spent;
  - b. That the court do direct the Deputy Registrar to sign the consent on behalf of the administrators of the estate Omar Awadh Karama, for half (1/2) share of property known as Title No Mombasa/Block XVII/1323, and subsequently sign the warrants for share of half (1/2) share of the respondent herein, Mohamed Swaleh Karama, or any order that that the court thinks is right to grant;
  - c. That in the alternative, the Deputy Registrar be directed to sign warrants of attachment in respect of the decree herein and decree in respect of H.C MISCH.Civil Application No E011 of 2020, in the matter of Ambwere T.S & Associates Advocates v Mohamed Swaleh Karama and the sale of ½ share of the respondent share in property Title No Mombasa/Block VX11/132; and



- d. That, the cost of this application be provided for.
2. The application is premised on the grounds stated in the body of the said Motion and also on the Supporting Affidavit of Shitakha Tom Ambwere, counsel sworn on 7<sup>th</sup> November 2023.
  3. Vide the said Supporting Affidavit, Counsel urged the court to have a look at all the decisions issued by the court in respect of the matter. He deposed that it is a fact that the applicant has two decrees against the Respondent and that he has been unable to execute the same as the only property known to him, Title No Mombasa/Block XVII/1323 is commonly owned by the Respondent and the administrators of the estate of Omar Awadh Karama; the court, in its ruling of 31st July 2023, noted that the Applicant is at liberty to execute his decree but may not sell Title No Mombasa/XVII/1323 without the consent of the co-owners, that is to say, the estate of one Omar Awadh Karama (deceased).
  4. He further stated that in an attempt to sell and obtain the consent, the applicant filed an application on 1<sup>st</sup> August 2023 at the Kadhi's Court to compel the co-owners to preserve the property and pay the decretal sum however, in his ruling of 12<sup>th</sup> October 2023 the Principal Kadhi Hon. Habib Salim Vumbi ruled that this court has power to enforce its order.
  5. He averred that from the above, it is evident the co-owners will not give consent to the sale, and that only an order of this court shall compel them to sell or give consent as it is impossible to obtain the same voluntarily. Relying on Section 91(6) of the [Land Registration Act](#), he stated that consent is not a requirement for a third party who has no relation with the land and that it is unreasonable to expect a third party to sit down with brothers and consent to sale a property commonly held. It was further urged that it is an abuse of the court process for the co-owners to refuse to consent to a share that does not belong to them and for him to enforce a judgment of this court. He urged the court to allow the application as prayed.
  6. In response, counsel for the respondent Onesmus Safari Mangaro filed a replying affidavit sworn on 14<sup>th</sup> November 2023. He stated that the Applicant had not sought leave to enjoin the interested parties, nor has he shown in what capacity they should be enjoined. The purpose of a joinder of parties to a suit is to assist the court in coming to a just and fair decision on the case before it. In this case, the judgement has already been issued, and therefore, the requirement of the interested parties has no value in this matter.
  7. He further stated that this court ruled that the suit property cannot be sold unless one of the tenants in common gives consent to the other tenant. That the applicant is not a tenant in common and, therefore, cannot be granted any consent by any of the owners of the subject land and that the Deputy Registrar has no capacity to issue consent. He stated that the court did not lock out other modes of execution with respect to the decree and that vesting orders cannot be granted as the property has not been sold to the Applicant or any other party.
  8. Counsel stated that the application is frivolous, vexatious and an abuse of court process and should be dismissed with costs. He urged the court to dismiss the application with costs.
  9. When the application came up for hearing on 14<sup>th</sup> March 2024, Mr. Ambwere, counsel for the Applicant, told the court that the Respondent, in his Replying Affidavit before the Hon Kadhi, told the Hon Kadhi that the subject property is not part of the estate of the deceased and that they had no problem the sale of the same.
  10. He further submitted that he does not need consent to sell the said property and urged the court to grant him the same as the respondent failed to do so.



11. Mr. Mangaro, counsel for the Respondent, on the other hand, submitted that the applicant did not seek leave to enjoin the Interested Parties, and the court cannot grant that which has not been sought. That the application is misconceived and that it is not within the scope of Section 91(6) of [Land Registration Act](#). He urged that the Registrar cannot sign the consent as she is not a defendant.
12. He submitted that the application is bad in law and should be dismissed under order 2 rule 15 as it does not disclose a reasonable cause of action.
13. I have considered the application, the response and the oral submissions by both counsels. It is now my duty to determine whether the orders sought should be issued.
14. Section 44 of the [Civil Procedure Act](#) provides:-
  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:  
Provided that the following shall not be liable to attachment or sale—
    - i. the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;
    - ii. the tools and implements of a person necessary for the performance by him of his trade or profession;
    - iii. where the judgment-debtor is an agriculturalist—
    - iv. books of accounts;
    - v. a right to sue in damages;
    - vi. a right of personal service;
    - vii. stipends and gratuities allowed to pensioners of the Government, or payable out of a service family pension fund notified in the Gazette by the Cabinet Secretary, and political pensions;
    - viii. two thirds of the salary of public officer or other person in employment;
    - ix. a contingent or possible right or interest, including an expectancy of succession by survivorship;
    - x. a right of future maintenance;
    - xi. any fund or allowance declared by law to be exempt from attachment and sale in execution of a decree.
15. Section 91 (6) of the [Land Registration Act](#) provides;  

No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.



16. This court, in its ruling of 31st July 2023, gave the Applicant the liberty to execute the decree in his favour but not to sell Title No Mombasa/Block XVII/1323 without the consent of the co-owner.
17. The applicant has argued that the co-owners of the property have withheld consent to the sale of the suit property, which has made it impossible for him to execute the court decree against the judgment debtor.
18. In my understanding of the law, under Section 91(6) of the said Act, property co-owned by two people in equal shares cannot be sold without the consent of the co-owner. Thus, this court still holds the same position it held in its ruling of 31<sup>st</sup> July 2023.
19. The upshot of the foregoing is that I have not found merit in the application. The same is dismissed.
20. As this is a matter arising out of succession proceedings, I make no orders as to costs.
21. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY 2024.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Ambwere for the Applicant;

No appearance for the Respondent;

No appearance for the Interested Parties; and

Arthur – Court Assistant.

