



**Kamotho v Kamotho (Environment & Land Case 300 of 2024)  
[2025] KEELC 1439 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1439 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 300 OF 2024  
OA ANGOTE, J  
MARCH 20, 2025**

**BETWEEN**

**EUNICE WAMBUI KAMOTHO ..... PLAINTIFF**

**AND**

**MARIANNE NYOKABI KAMOTHO ..... DEFENDANT**

**RULING**

1. Before this court is a Notice of Motion application filed by the Plaintiff/Applicant dated 18<sup>th</sup> July 2024, pursuant to Sections 152A, 152B, 152E, 152G and 152F of the *Land Act* 2012, Sections 3 and 3A of the *Civil Procedure Rules* and Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act* 2010. The Plaintiff has sought the following orders:
  - i. That the Honourable Court be pleased to issue an eviction order against the Defendant from all that parcel of land known as L.R. No. 17/417 and L.R. No. 17/418, herein referred to as “the suit property” forthwith.
  - ii. That this Honourable Court be pleased to issue restraining orders against the Defendant from trespassing or dealing in any other way with land parcel L.R. No. 17/417 & L.R. No. 17/418 during the subsistence of the Plaintiff’s life interest.
  - iii. That Joel Mwanzia Velela t/a Betabase Auctioneers do effect and execute the above eviction orders.
  - iv. That the Officer Commanding Station, Spring Valley Police Station do supervise the eviction.
  - v. That this Honourable Court be pleased to give any other relief that this Honourable court deems fit to meet the ends of justice.
  - vi. That the costs of this application be borne by the Defendant.



2. The grounds of the application are set out in the Supporting Affidavit sworn by the Plaintiff, Eunice Wambui Kamotho. She deposed that she is one of the administrators of the estate of John Joseph Kamotho (deceased) and that the Succession Court at Nairobi on 8<sup>th</sup> March 2024 in Succession Cause No. 1096 of 2017 issued a Certificate of Confirmation of Grant vesting the net estate and the matrimonial home erected on land parcel numbers No. 17/417 & L.R. 17/418 to herself as a tenant for life and thereafter to her children as tenants in common in equal shares.
3. She avers that following the said confirmation, she issued a notice to vacate to the Defendant, her daughter; that the Defendant has, however, adamantly refused to vacate the said premises and has stated that she will never move out and that the Defendant's occupation of the suit property is unlawful, illegal and amounts to trespass because the Defendant has no right to occupy the subject land having unsuccessfully protested the confirmation of grant.
4. The Plaintiff claims that the Defendant has an alternative abode and means to afford decent living elsewhere but has insisted on continually and illegally occupying her matrimonial property; that the Defendant is a well-established practicing advocate of 21 years standing, and the proprietor of Nyokabi Kamotho Legal Consultancy Limited, and that no prejudice will be suffered by the Defendant if the orders herein are granted.
5. According to the Plaintiff, unless this court urgently intervenes and orders the eviction of the Defendant, she continues to illegally and unlawfully occupy the subject land and that her health and welfare stands to be continually jeopardized.
6. She contends that the Defendant has unrepentantly abused her and without her prior consent, has commenced material repairs on the matrimonial home in a bid to provoke her and that the Defendant's continued presence in the house threatens her health and wellbeing.
7. The Defendant opposed the application vide a Replying Affidavit sworn on 1<sup>st</sup> November 2024. She deposed that while a Certificate of Confirmation of Grant vested the Plaintiff/Applicant with a life interest over the suit properties, the same does not equate to exclusive possession and does not grant the Plaintiff the authority to exclude other lawful beneficiaries or administrators, including herself.
8. It is the Defendant's argument that as a daughter of the late Joseph Kamotho, a co-administrator and a rightful beneficiary of the estate, she is entitled to occupy the family home in harmony with the terms of the grant and that the Applicant's attempt to evict her is contrary to the principles of family property and inheritance law as well as the intent of the court when issuing the grant.
9. According the Defendant, the suit properties are family homes intended for the benefit of all beneficiaries during the Applicant's lifetime and thereafter and that the Applicant cannot lawfully use the life interest given to her by the court to exclude other family members of their right to reasonable access or use of the premises.
10. The Defendant denies ever interfering with the Applicant's life interest or use of the property. She also denies receiving any eviction notice from the applicant as alleged and contends that if such notice does exist, it was designed to unfairly target and intimidate her into vacating the premises without due regard to her legal rights as a beneficiary and co-administrator.
11. The Defendant deposed that she does not have an alternative abode or the financial means to afford a decent living elsewhere because her limited resources have been depleted and that she faces financial hardships that led to her being auctioned, leaving her without sufficient income or assets to sustain independent accommodation.



12. She asserts that she is the subject of Insolvency Case No. E020 of 2024 which is ongoing, and she is at risk of being declared bankrupt and that she has made efforts to support the household by contributing to some of the utility bills, such as electricity and water, demonstrating her commitment to coexisting peacefully with the Applicant.
13. The Respondent deposed that the Applicant's accusations of emotional abuse and confrontation are baseless and unsubstantiated and are designed to discredit her and that this application is res judicata as the issues were conclusively determined in Civil Case No. E6834 of 2020 in the ruling dated 21<sup>st</sup> May 2021 which dismissed the Applicant's application seeking to evict her from the suit premises.
14. The application was canvassed through written submissions which I have considered.

### Submissions

15. Counsel for the Plaintiff submitted that she has a legal right over the subject property and that the adverse party was served with the notice of eviction. Counsel submitted that the Judgment and Certificate of Confirmation of Grant delivered by the High Court (Family Division) in Nairobi on 8<sup>th</sup> March 2024 in HC Succession No. 1096 of 2017 vested the matrimonial home on land parcel numbers L.R. No. 17/417 & 17/418 to the Plaintiff as a tenant for life and thereafter to her children as tenants in common, in equal shares.
16. It was submitted by counsel that the notice to vacate was served on the Defendant in March 2024 and she was required to vacate the suit property by 30<sup>th</sup> June 2024, which period was more than the statutory three month's notice of eviction. Counsel relied on the case of *Atik Mohamed Omar Atik & 3 others v S Joseph Katana & Another* [2019] eKLR on the procedure for eviction of persons unlawfully occupying public, community or private land.
17. Counsel urges that the Defendant's occupation of the suit property during the life of the Plaintiff upon service of the notice to vacate amounts to illegal occupation and trespass, and thus warrants the order of eviction sought herein. Counsel relied on the cases of *Jaber Mohsen Ali & Chelugoi Mohsen Ali vs Priscillah Bolt & James C. Bolt* [2014] KEELC 132 (KLR) and *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR.
18. Counsel for the Defendant submitted that a life interest is not equivalent to absolute ownership. Counsel relied on Section 35 (1) of the *Law of Succession Act*. Counsel submitted that the Plaintiff cannot alienate, transfer or dispose of the property as if she were the absolute owner and that her interest does not override the rights of other lawful beneficiaries such as the Respondent, who are entitled to the use and occupation of the family home.
19. Counsel for the Defendant also relied on the decision *In re Estate of Julius Mimano (Deceased)* [2019] KEHC 10103 (KLR) where the court held that a life interest does not amount to absolute ownership and that beneficiaries are entitled to reasonable access to family property. Counsel also relied on the case of *Tau Katungi vs Margrethe Thorning Katungi & Another* [2014] eKLR.
20. Counsel submitted that that the Defendant/Respondent being a co-administrator and daughter of the deceased, cannot be evicted from the family home without lawful cause and the Plaintiff's claim of exclusive possession is legally flawed.
21. It is counsel's submission that the Applicant has not adduced any documentary evidence before court to prove service of the alleged eviction notice. He denied that the Defendant was properly served with any eviction notice. Counsel relied on the case of *Atik Mohamed Omar Atik, Abdalla Omar, Ai Omar Atik & Esha Omar Atik vs Joseph Katana & Samuel Ongesa* [2019] KEELC 552 (KLR).



22. The Defendant's Counsel further submitted that this application is res judicata. Counsel invited the court to take judicial notice that the Applicant's eviction claim was previously litigated and dismissed in Civil Case No. E6834 of 2020, where the court held that the Respondent is a lawful beneficiary and co-administrator and that her occupation of the property was not unlawful.
23. It was submitted that the application has been made in bad faith. Counsel relied on Order 2 Rule 15(1)(b) of the Civil Procedure Rules as well as the cases of *Kuria & Others vs Attorney General* [2002] 2 KLR 69 cited with approval in Hamisi Tsuma Mwero, Steven Mboga Mbinu, Daniel Jira Bekwekwe, Katembe John, Salim Mwamgedza, Mohamed Ndegwa, Abdalla Tsuma, Chime Ndegwa, Ali Mwanaloma & Charo Chimera vs Director of Public Prosecution, Senior Resident Magistrates Court at Kwale OCS Kinango through the Inspector General of Police & Colfax Holdings Ltd [2016] KEHC 6245 (KLR).

### **Analysis and Determination**

24. This court has given due consideration to the application, replying affidavit and the submissions of the parties. The issues for this court's consideration are as follows:
  - a. Whether the application is *res judicata*.
  - b. Whether the Plaintiff has a right to evict the Defendant
  - c. Whether this court should grant the orders sought.
25. The facts of this suit are that the Plaintiff is the Defendant's biological mother. The parties are both beneficiaries of the estate of John Joseph Kamau (deceased), whose estate was the subject of Succession Cause No. 1096 of 2017.
26. On 8<sup>th</sup> March 2024, Honourable Justice Reichi issued the Certificate of Confirmation of Grant in the said Succession Cause No. 1096 of 2017. In the said Grant, the suit property, LR 17/417 and LR 17/418, which was the matrimonial home of the late John Joseph Kamotho and the Plaintiff, was vested to the Plaintiff for life and thereafter to the children of the deceased, Charles Githii Kamotho, Marianne Nyokabi Kamotho (the Defendant) and David Waweru Kamotho as tenants in common in equal shares.
27. The Plaintiff asserts that she issued to the Defendant a notice to vacate the matrimonial home. The Plaintiff has annexed an undated letter which required the Defendant to vacate the suit property on 30<sup>th</sup> June 2024. According to the Plaintiff, she has an exclusive legal right over the suit.
28. The Defendant has opposed the application on grounds that it is res judicata. It is her position that a similar application was heard and determined on its merits in Civil Case No. E6834 of 2020 in the ruling dated 21<sup>st</sup> May 2021, which dismissed the Applicant's application seeking to evict her from the suit premises.
29. She further argues that under the Grant issued by the Succession Court, the Plaintiff has been granted a life interest in the suit property, which is not equal to exclusive possession of the suit property. She contends that as a beneficiary of the estate, she has a right to reasonable access and use of the family home.



30. The doctrine of res judicata is prescribed under Section 7 of the *Civil Procedure Act*, which states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

31. The rationale of the doctrine of res judicata is based on the principle of finality, which is one of the pillars upon which the judicial system is founded.

32. The doctrine of res judicata is applicable where the following elements are demonstrated: there was a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and there had to be between the first and the second action identical parties, subject matter and cause of action.

33. The Defendant contends that this application is res judicata as a similar application was disposed of in Milimani Commercial Civil Case No. E6834 of 2020. The Defendant has annexed the ruling dated 21<sup>st</sup> May 2021 for this court’s consideration.

34. The said suit was between the Defendant and the Plaintiff herein. The Defendant (Plaintiff in Civil Case No. E6834 of 2020) had sought the following orders:

- i. That pending the hearing and determination of this suit, this honourable court do at the first instance find that the Plaintiff is a protected person within the meaning of the *Protection against Domestic Violence Act* No. 2 of 2015).
- ii. That pending the hearing and determination of the suit the defendant of the suit be removed from the plaintiff’s premises and thereafter without the plaintiff’s express consent be restrained from entering, remaining in or on any property, land, building where the Plaintiff is present in circumstances that would otherwise constitute a trespass.
- iii. That pending the hearing and determination of the suit the defendant be restrained from engaging or threatening to engage in any behavior including intimidation or harassment on the Plaintiff and which behavior amounts to emotional, verbal or psychological abuse on the Plaintiffs.
- iv. That the police or local area administration be used to enforce the order above and the same be granted.
- v. That pending the hearing and determination of this application and this suit the defendant be restrained from making any contact, communicating with the plaintiff through whatsapp, short messaging (sms), email and/ or in any other media.

35. The Honourable magistrate dismissed the application for lack of merits. In consideration of the prayer for eviction, the court was of the view that the said orders could not be granted as at that time because the suit property was still subject to the succession court. The court further found that the Plaintiff had not established that the Defendant had engaged in threats, intimidation or harassment of the Applicant as she did not present any of the messages sent to her.



36. With respect to the prayer for eviction, it is apparent that the issue was not determined by the Honourable magistrate on its merits. Indeed, there was no substantive order or direction arising therefrom. This application, which is seeking for orders of eviction against the Plaintiff, is therefore not barred by the doctrine of *res judicata*.
37. Notably, the circumstances which barred the magistrates' court from considering the application for eviction have since changed, the Succession Court having issued a Certificate of Confirmation of Grant. This matter is therefore rightly before this court. The next issue for this court's consideration is whether the Plaintiff has a right to evict the Defendant.
38. The Defendant has argued that though the Plaintiff has been vested with a life interest in the suit property, this does not equate to exclusive possession to the family home. She contends that as a daughter of the late John Joseph Kamotho, co-administrator and beneficiary of the estate, she has a right to reasonable access and use of the suit property.
39. The Defendant has relied on Section 35(1) of the *Law of Succession Act*, which provides that:
- “Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:
- Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”
40. Section 37 further provides that a surviving spouse, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance. In the case of land, the exercise of that power shall always be subject to the consent of the court.
41. She has also relied on the case of *In re Estate of Julius Mimano (Deceased)* [2019] KEHC 10103 (KLR) where the court held that a surviving spouse enjoys a life interest in the net intestate estate and holds the estate as a trustee and must render accounts in accordance with the law.
42. She further relied on *Tau Katungi vs Margrethe Thorning Katungi & another* [2014] eKLR, where the court considered the tenor and meaning of a “life interest”. It stated:

“The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the



concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”

43. The court further held that life interest is a convergence of the interests of the surviving spouse and those of the children. It stated.

“Where the deceased therefore is survived by both a spouse and children, the net intestate estate will not pass absolutely to either of the two categories of survivors during the life time of either. The holder of the life interest in this case is still alive, and has not remarried, she is therefore still entitled to the property at this time and the same cannot be conveyed to the children. Conversely, all the children of the deceased are still alive, consequently the widow cannot have the property absolutely to herself, but she is entitled to whatever income that derives from it.”

44. The Plaintiff’s right to the property is limited under Section 37 of the Law of Succession Act, under which she may only dispose of the property upon obtaining the consent of the court and of her children. As noted in the case of In re Estate of Julius Mimano (Deceased) [2019] KEHC 10103 (KLR), the surviving spouse holds the net intestate estate as a trustee for their children. This means that in addition to the children being the automatic beneficiaries of the estate, the surviving spouse has a fiduciary duty to manage the estate to the best interests of children.

45. While the Defendant has argued that she, as of right has a reasonable right to access and use the suit property, this right would only arise upon the demise of the Plaintiff. In the Plaintiff’s lifetime however, as the Plaintiff exercises ownership rights over the suit property, albeit limited, she retains the right to exclude and to possession, which are within her life interest to the suit property.

46. The upshot of the foregoing is that the Plaintiff therefore holds the right to evict the Defendant.

47. The Plaintiff has sought that this court issues eviction orders as well as restraining orders against the Defendant. Section 152E of the Land Act provides for the issuance of an eviction notice to unlawful occupiers of private land. It prescribes as follows:

1. If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
2. The notice under subsection (1) shall –
  - a. be in writing and in a national and official language.
  - b. in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
  - c. specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
  - d. be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”

48. The parties have both relied on the case of Atik Mohamed Omar Atik & 3 others vs Joseph Katana & another [2019] KEELC 552 (KLR) which set out the provisions of Section 152E of the Land Act.



49. As noted above, the Plaintiff has annexed an undated letter which required the Defendant to vacate the suit property by the end of June 2024. The Plaintiff's Counsel submitted that the notice was issued in March 2024, but a consideration of the contents of the letter indicate that it was drafted on 12<sup>th</sup> June 2024.
50. I say so because the Plaintiff references events that took place 'yesterday morning 11<sup>th</sup> June 2024.' The notice issued to the Defendant to vacate the suit property, was thus only for 19 days, falling short of the statutory requirement of three months' notice.
51. In any case, the Plaintiff has not presented any evidence to show that the notice was served upon the Defendant. This is critical as it would prove that the Defendant was duly informed of the impending eviction. This court cannot proceed to allow the orders of eviction in the absence of proof of service of the notice as that would visit injustice upon the Defendant.
52. Moreover, the Plaintiff has not proved that the notice was served on the Deputy County Commissioner in charge of the area as well as the officer commanding the police division of the area. The Plaintiff has accordingly not satisfied the requirements set out in Section 152E of the Land Act for issuance of a three-month notice of eviction.
53. In conclusion, while this court has found that the Plaintiff/Applicant has the right to evict the Defendant, she has not satisfied the requirements under Section 152E of the Land Act of issuing a three months' notice of eviction. The Plaintiff's application is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH, 2025.**

**O. A. Angote**

**Judge**

In the presence of;

Ms Amondi holding brief for Ms Wanyonyi for Plaintiff/Applicant

Mr. Ndungu for Kimathi for Defendant/Respondent

Court Assistant: Tracy

