



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

In the matter of the Estate of Nehemiah Muhati Luhya (Deceased) (Succession Cause 650 of 2012) [2022] KEHC 13494 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 650 OF 2012
WM MUSYOKA, J
SEPTEMBER 23, 2022**

IN THE MATTER OF THE ESTATE OF NEHEMIAH MUHATI LUHYA (DECEASED)

RULING

1. There are 2 applications for determination, dated March 11, 2021 and October 26, 2021.
2. The application dated March 11, 2021, as amended on February 4, 2022, seeks an eviction order against Peter Ayoyi Machika, demolition of his houses and police assistance for that process. It is at the instance of Silas Amwayi Muhati, one of the administrators, and it is predicated on orders that were made on February 21, 2020, where the court is said to have had ordered that Peter Ayoyi Machika, to vacate Butsotso/Shibeye/452 within 31 days of that order. Silas Amwayi essentially avers that Peter Ayoyi Machika has not complied with that order, hence the application.
3. Peter Ayoyi Machika reacted to the application dated March 11, 2021, by his affidavit sworn on June 25, 2021. He concedes that he does occupy a portion of Butsotso/Shibeye/452, having bought it from Wilson Mboya Muhati. He avers that Wilson Mboya Muhati had obtained orders, on March 15, 2021, in Kakamega MCL&E No E044 of 2021, between him, Wilson Mboya Muhati, and the administrators of the estate herein, restraining the administrators from interfering with the use of the portion of Butsotso/Shibeye/452 in contention. He avers that grant of the eviction orders sought herein would have the effect of setting aside the orders of March 15, 2021, adding that Wilson Mboya Muhati was intent of seeking orders that he was entitled to the land by adverse possession.
4. The application dated October 26, 2021, is by Wilson Mboya Muhati. He seeks stay of orders made herein in the ruling dated March 10, 2021, and a permanent injunction to stop the administrators from interfering with the 2.5 acres that he occupies in Butsotso/Shibeye/452. He alleges that the deceased had raised him up and gave him a portion of Butsotso/Shibeye/452 in 1973. He avers that in the ruling of March 10, 2021 he was not allocated a portion of Butsotso/Shibeye/452, which prompted him to file suit in Kakamega MCL&E No E044 of 2021, for adverse possession of that land, which he had permitted Peter Ayoyi Machika to occupy and use. He further avers that Peter Ayoyi Machika had also initiated a suit against him, in Kakamega MCL&E No E035 of 2021, with respect to the same parcel of land.



5. Peter Ayoyi Machika is named as a respondent in the application dated October 26, 2021. He has responded to it by his affidavit of January 18, 2022. He avers that that application be given priority. He reiterates that he bought a portion of Butsotso/Shibeye/452 from Wilson Mboya Muhati, a process which involved the mother of the said Wilson Mboya Muhati, who he says is a widow of the deceased herein, and the area Assistant Chief, and it was not disclosed to him that the said Wilson Mboya Muhati was not a biological child of the deceased. He has gone on to make various averments that may not be altogether relevant to the determination of the matter.
6. Silas Amwayi reacted to the application, *vide* his affidavit of January 19, 2022. He avers to be not privy to Kakamega MCL&E No E035 of 2021. He points at the judgment delivered herein on February 21, 2020, and says that the court declared that Wilson Mboya Muhati was not a child of the deceased, and was, therefore, not entitled to a share in Butsotso/Shibeye/452, and that the said Wilson Mboya Muhati had not appealed against that finding and holding. He avers that Wilson Mboya Muhati has never lived on Butsotso/Shibeye/452, for his residence was on another piece of land owned by his biological father, Jacob Ogada Omukunda. He avers that the orders sought in Kakamega MCL&E No E044 of 2021 were only designed to frustrate the instant proceedings.
7. Directions were given on January 24, 2022, for canvassing of the 2 applications by way of written submissions. Both sides have complied. I have read through their respective written submissions and noted the arguments that they have made.
8. The judgment of February 21, 2020 was by Njagi J. The court made specific findings and holdings that Wilson Mboya Muhati was neither a son nor a dependant of the deceased, and that the sale transaction between him and Peter Machika, in respect of Butsotso/Shibeye/452, was null and void ab initio. The court then ordered distribution of Butsotso/Shibeye/452 between Esther Angaya Nehemiah and Silas Amwayi Muhati, and went on to order Peter Ayoyi Machika to vacate Butsotso/Shibeye/452 within 31 days.
9. Wilson Mboya Muhati refers to orders that were made in a ruling delivered on March 10, 2021 or of that date. I have not come across any ruling dated March 10, 2021, nor does the record indicate that any was delivered on that date. The ruling that I see on record is dated February 8, 2021, and it was delivered on the same date, by F Amin J. It was in respect of an application, dated March 12, 2020, brought by Peter Ayoyi Machika and Wilson Mboya Muhati, seeking to set aside a ruling that was delivered on November 29, 2019, the judgement of February 21, 2020 and the proceedings of October 21, 2018. The court declined to grant the orders sought, on grounds that the 2 had a chance to present their case in the proceedings that led up to the judgment of February 21, 2020, but they chose to stay away, and did not file an appeal at the Court of Appeal.
10. I will first determine the application dated, October 26, 2021. The orders sought in there are not any different from those sought in the application dated March 12, 2020, the subject of the ruling of February 8, 2021. Peter Ayoyi Machika and Wilson Mboya Muhati are relitigating the matter, trying to have a second bite at the cherry. I am invited to stay execution of orders that are non-existent, for no orders were ever made on March 10, 2021. In any case, Peter Ayoyi Machika and Wilson Mboya Muhati have already obtained injunctive relief in Kakamega MCL&E No E044 of 2021, over the same parcel of land. There would be no point of giving similar orders in these proceedings.
11. Regarding the application dated March 11, 2021, I have no jurisdiction, sitting, as I am, as a Judge of the High Court, to grant any orders for eviction of anyone from land. Eviction of a person from a piece of land that they occupy is a matter of use and occupation of land. Under Article 165(5) of the Constitution, the High Court has no jurisdiction to handle any dispute which turns around the issues the subject of Article 162(2) of the Constitution. Article 162(2) envisages a specialized court



to handle disputes around title to land, and occupation and use of land. That court was established under the [Environment and Land Court Act](#), No 19 of 2011. Jurisdiction to order eviction from land is vested in that court. The jurisdiction vested by law on a probate court is about distributing property of a dead person, it does not extend to ordering removal of persons from any land. If the [Constitution](#) tells me, as a Judge of the High Court, that I have no jurisdiction to determine questions on use and occupation of land, on what basis would I then order someone to be evicted from land, which is a matter which concerns use and occupation of land. The probate court, whether the High Court or the magistrate's court, merely determines who gets the land belonging to a dead person. If any person has to be evicted or removed from such land, thereafter, those wishing to have such eviction done have to file an appropriate suit before the appropriate court, which is the Environment and Land Court, or the subordinate court to which jurisdiction has been extended.

12. For avoidance of doubt, Articles 162(2) and 165(5) of the [Constitution](#) state as follows:

“162(2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- a. ...
- b. the environment and the use and occupation of and title to, land.”

“165(5) The High Court shall not have jurisdiction in respect of matters –

- a. falling within the jurisdiction of the courts contemplated in Article 162(2).”

13. Land legislation has lengthy provisions on eviction from land. There are elaborate procedures set out therein. Before anyone is evicted from any land, due process must be followed. That process is in land legislation, not in the [Law of Succession Act](#). The relevant statute is the [Land Act](#), No 6 of 2012. The provisions are in sections 152A, 152B, 152E, 152F, 152G, 152H and 152I, and they state as follows:

“152A. Prohibition of unlawful occupation of land.

A person shall not unlawfully occupy private, community or public land

152B. Evictions to be undertaken in accordance with the Act.

An unlawful occupant of private, community or public land shall be evicted in accordance with this Act

152E. Eviction Notice to unlawful occupiers of private land.

- (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.

152F. Application to Court for relief.

- (1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to court for relief against the notice.
- (2) The court, after considering the matters set out in sections 152C, 152D and 152E may-
 - (a) confirm the notice and order the person to vacate;
 - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - (c) suspend the operation of the notice for any period which the court shall determine; or
 - (d) order for compensation.

152G. Mandatory procedures during eviction.

- (1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures-
 - (a) be preceded by the proper identification of those taking part in the eviction or demolitions;
 - (b) be preceded by the presentation of the formal authorizations for the action;
 - (c) where groups of people are involved, government officials or their representatives to be present during an eviction;
 - (d) be carried out in a manner that respects the dignity, right to life and security of those affected;
 - (e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;



- (f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
 - (g) include mechanisms to protect property and possessions left behind involuntarily from destruction;
 - (h) respect the principles of necessity and proportionality during the use of force; and
 - (i) give the affected persons the first priority to demolish and salvage their property.
- (2) The Cabinet Secretary shall prescribe regulations to give effect to this section.

152H. Disposal of property left after eviction.

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land.

152I. Demolition of unauthorized structures.

Where the erection of any building or execution of any works has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building or works, within such period as may be specified in the order.”

14. The [Land Act](#) provides that the court for the purposes of that Act is the Environment and Land Court, and that any actions, disputes, questions and proceedings that require court resolution, arising from the processes set out in the [Land Act](#), are to be litigated at the Environment and Land Court and the empowered subordinate courts. That is the purport of sections 2 and 150 of the [Land Act](#), which provide as follows:

“2. “Court” means the Environment and Land Court established under the [Environment and Land Court Act](#), 2011 (No 19 of 2011);”

“150. The Environment and Land Court established in the [Environment and Land Court Act](#) and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

15. It should be clear from the above provisions, that I have no jurisdiction to determine whether anyone should be evicted from any parcel of land, neither do I have any jurisdiction to order that anyone be evicted from any land. That then would mean that the administrators have to move the Environment



and Land Court, appropriately, for orders to have any person, who is not supposed to be occupying or using Butso/So/Shibeye/452, evicted from such land.

16. The conclusion is that I find no merit in the application dated March 11, 2021, as amended on February 4, 2022, and October 26, 2021, and I hereby dismiss the said applications. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23rd DAY OF SEPTEMBER 2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Ms. Wilunda, instructed by EA Wilunda & Company, Advocates for the administrators.

Mr. Khayumbi, instructed by Khayumbi & Company, Advocates for Wilson Mboya Muhati.

Peter Ayoyi Machika, in person.

