



**Ambuchi v Mathonye (Environment and Land Miscellaneous Application
E004 of 2023) [2023] KEELC 18812 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023**

E ASATI, J

JULY 13, 2023

BETWEEN

Jael Anyoso Ambuchi APPLICANT

AND

Joseph Otieno Mathonye RESPONDENT

RULING

1. This ruling is in respect of the application dated February 13, 2023 stated to be brought pursuant to the provisions of Order 51 Rule 1 and sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya. It seeks for:-
 - a. an order to issue directed at the in charge Administration police Maseno to provide security to Kennedy K. Shikuku t/a Eshikoni Auctioneers to undertake the lawful process of evicting the Respondent and demolishing illegal structures erected on the suit parcel of land being Kisumu/Kogony/2228.
 - b. an order that the Respondent to bear the cost of the entire exercise
 - c. that the costs of the application be provided for
2. The application was based on the grounds that the Respondent was served with an eviction notice on June 28, 2022 giving him 90 days within which to vacate the applicant's parcel of land number Kisumu/Kogony/2228 (the suit land herein). That the 90 days have now elapsed and the Respondent has refused to vacate the property. That the Respondent has also refused to demolish the structures erected on the property. That it is in the interest of justice that the orders sought be granted. That the court has powers to grant the orders sought or make any further order as it deems fit. The application was supported by the averments in the Supporting Affidavit sworn by the applicant, Jael Anyoso Ambuchi, on February 13, 2023 and the annexures thereto.



3. The application was opposed vide the grounds raised in the Replying Affidavit sworn by the Respondent, Joseph Otieno Mathonye, on March 23, 2023. It was the Respondent's case that he was not served with any notice or court order of eviction hence the proceedings infringe on his right to family land on which he was born and has lived in throughout his entire life. That the land belonged to his late father one Mathonye Ogoye and that he is not aware who sold the land to the applicant. That in any event, he now has prescriptive rights over the land by virtue of having had adverse possession over the land. That he will suffer damage if he was to be evicted as prayed in the application as he does not have alternative accommodation.
4. The applicant stated in the Supporting Affidavit that she is the registered owner of the suit land. That the Respondent encroached onto the suit land in the year 2014 when the applicant was out of the country. That she issued the Respondent with an eviction notice. In addition to the Supporting Affidavit, the applicant filed a Supplementary Affidavit sworn on March 31, 2023 wherein she denied that the Respondent had lived on the land for 20 years because when she purchased the land, it was vacant. That the suit land does not belong to the Respondent's father. That eviction notice under section 152E of the Land Act, 2012 was served upon the Respondents, the Deputy County commissioner as well as the OCPD Maseno and the assistant Chief Kogony Sub-location
5. Directions were taken on March 27, 2023 that the application be canvassed by way of written submissions within given timelines. Written submissions dated 30th March 2023 were filed by the firm of Mose, Mose, Mose Advocates on behalf of the applicant. Counsel submitted that it is not in dispute that the applicant is the registered owner of the suit land having obtained a good title thereto. That section 152E of the Land Act provides for Eviction Notice to be issued to unlawful occupiers of private land. That there is evidence that the Respondent was served with Notice under section 152E of the Land Act. That the Respondent has not filed any case challenging the land ownership by the applicant. Counsel relied on the case of Margaret Karwira Mwongera vs Francis Kago [2019]eKLR where such an application was allowed and the case of Simon Parkoyiet Mokare vs Peter Kokai & 3 others [2020]eKLR and Ringera vs Mubindi Environment and Land Misc. Application E128 of 2021 [2021]KEELC 2481 (KLR) (July 7, 2022) Judgement. He prayed that the application be allowed.
6. The Respondent did not file any submissions.
7. I have carefully considered the application, the grounds upon which it is brought, the grounds advanced in opposition thereto and the submissions made. To the Supporting Affidavit there was annexed a copy of the title deed in respect of the suit land. It shows that the suit land was registered in the name of the applicant on 2nd February 2012. Similarly, the copy of register (green card) attached to the Further Affidavit confirms the applicant's ownership of the suit land. There is nothing on the green card to show that the suit land ever belonged to the Respondent's father as claimed by the Respondent. There is no dispute that the Respondent is in occupation of the suit land. I have taken note of the provisions of sections 152A, 152B, 152E and 152F of the Land Act on eviction of persons who are in unlawful occupation of private land. Section 152A prohibits unlawful occupation of land. Section 152B provides that evictions of people in unlawful occupation shall be undertaken according to the provisions of the Act. Section 152E provides for the eviction notice to be served upon the unlawful occupiers of private land. It provides: -

“(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 section (1) shall: -
- a. be in writing and in national 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 Commissioner in Charge of the area as well as the officer Commanding the police Division of the area”

8. The applicant deposed in the Supporting Affidavit that through her Advocates, she issued and served an Eviction Notice to and upon the Respondent on 28th June 2022 but that the Respondent has refused to comply. The applicant exhibited a copy of the Affidavit of service attached to the Supporting Affidavit and marked JAA-3 to demonstrate that the eviction notice was served upon the Respondent. Section 152E requires that eviction notice be served upon that person. This, in my view, means service of the eviction notice upon the unlawful occupier must be personal service. In the Affidavit of service sworn by Clifford Ouko Gombe on June 28, 2022, it is deposed that service was effected upon the Respondent through the Area Chief Kogony Location. The process server stated:

“That on the same day I proceeded to the area chief’s office Kogony Location situated opposite Kisumu International Airport nearly 200 metres from Kisumu- Busia road. I met the Chief in his office, introduced myself and the purpose of my visit. She confirmed to me that she was in a position to deliver the letter to Joseph Otieno Mathonye the Respondent herein who was well known to her. I tendered to her a copy of the demand letter which she accepted and acknowledged service by stamping and signing on my principal copy.”

9. There is no evidence on record of any feed back from the said area chief as to whether he ever delivered the notice to the Respondent. There is no explanation why personal service of the eviction notice was not undertaken. The law requires service of the eviction notice upon the person in unlawful occupation. While the process server deposes that the chief acknowledged receipt by stamping the principal copy, the copy of the notice filed in court with the application and marked JAA-2 bears no stamp of the area Assistant Chief or any Assistant Chief at all. Thirdly the Affidavit of service refers to the chief as “she” and “he” (I met the chief in his office.....I tendered to her...) at the same time. This raises a doubt as to whether the process server ever met the chief. The Respondent denied receipt of the eviction notice. There is no evidence of service of the notice upon the Deputy County Commissioner, the Officer Commanding Police and the area Chief as mandatorily required by law.
10. The heart of an application of this nature is prove of issuance of an eviction notice that complies with the law and service of the same upon the person in unlawful occupation, in accordance with the law. The court is not convinced that the Respondent was properly served or served at all with the eviction notice as there is no evidence to that effect. It will be unlawful and in contravention of the Constitution if this court were to order police to provide security during the eviction of the Respondent as the eviction in the circumstances, is unlawful.
11. The application dated February 13, 2023 is therefore declined. Each party to bear own costs of the application.



12. The file is closed.
13. Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 13TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Neville- Court Assistant.

No Appearance for the Applicant.

Miss Willie for the Respondent.

