



**Shebani & 39 others v Rashid & others (Land Case 208 of 2013)
[2023] KEELC 20216 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 208 OF 2013
LL NAIKUNI, J
SEPTEMBER 25, 2023**

**IN THE MATTER OF: PLOT NO. 24/11/MN C.R. NO. 1223 MEASURING 19.12 ACRES
IN THE MATTER OF: APPLICATION FOR DECLARATION THAT
THE APPLICANTS/PLAINTIFFS HAVE OBTAINED OWNERSHIP
OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION**

BETWEEN

BAKARI SHEBANI & 39 OTHERS PLAINTIFF

AND

KHADIJA SAID RASHID & OTHERS DEFENDANT

RULING

i. Introduction

1. The Defendants/ Applicants herein – Bakari Shebani & 39 Others, moved this Honorable Court for its determination through filing a Notice of Motion application dated 31st August, 2021 against the Plaintiffs/Respondents herein. It was brought under the dint of Order 51 Rules 1 & 2 of the [Civil Procedure Rules](#) 2010, Section 3A of the [Civil Procedure Act](#) Cap 21.
2. Despite having been served, the Respondents did not file their responses to the Application.

ii. The Defendants/Applicants' case

3. The Defendants/Applicants seeks for the following orders:-
 - a. Spent.
 - b. That the Plaintiffs do vacate and give vacant possession of the premises Plot No. 24/II/MN CR No. 1224 to the Defendant.



- c. The OCS Junda Police Post Mshomoroni do provide security during the eviction of the Plaintiff from the premieres Plot No.24/II/MN CR 1224.
 - d. Costs of the case be provided by the Plaintiff.
4. The Application is based on the grounds, testimonial facts and the averments made out under an 8th Paragraphed Supporting Affidavit sworn by Rukiya Said Rashid and dated 25th November, 2021 with one (1) annexure thereto and marked as “RSR – 1” annexed thereto. The Defendants/ Applicants averred:
- a. The Plaintiffs trespassed onto the Defendant premises Plot NO. 24/II/MN CR 1224 and sued the Defendant for ownership by way of adverse possession. A copy of the decree annexed and marked as “RSR – 1”.
 - b. The Court dismissed the Plaintiff claim and therefore, the Plaintiff had no right over the property.
 - c. The Plaintiffs had no right over the suit property pursuant to the dismissal of their claim.
 - d. The Plaintiffs had refused to give the vacant possession of the premises in peace hence the need for security.
 - e. It was just and fair that the Officer In Charge of Police Station (OCS) Junda Police Post do provide security during the eviction of the Plaintiffs to maintain Law and order.

i. Submissions

5. On 23rd February, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 31st August, 2021 be disposed of by way of written submissions. From the records, it was only the Defendant/Applicant who complied on 24th April, 2023. Court directed that a ruling date on merit was reserved on Notice by the Honourable Court accordingly.

a. The Written Submissions by the Defendants/ Applicants

6. On 14th March, 2023, the Learned Counsels for the Defendants/ Applicants herein through the Law firm of Messrs. Khatib & Company Advocates filed their submissions dated 13th March, 2023. M/ s. Omondi Advocate commenced the submission by stating that the application was the Notice of Motion application dated 31st August, 2021 seeking the following orders that:
- a. Spent
 - b. That the Plaintiffs do vacate and give vacant possession of the suit premises Plot No. 24/II/ MN CR No. 1224 to te Defendant.
 - c. The OCS Junda Police Post Mshomoroni do provide security during the eviction of the Plaintiff from the premises plot No 24/II/MN CR 1224.
 - d. Cost of the case/ Application be provided by the Plaintiff.
8. The Learned Counsel submitted that despite of the application being served, the same was not opposed by the Plaintiffs/Respondents as the same was served to the Plaintiffs/Respondents Counsel who refused service on allegations that his client had taken away the physical file from him. The Honourable Court directed Counsel for the Plaintiffs/Respondents to be served again as he was still on record and



had not filed any application to cease from acting for the Plaintiffs/Respondents as required by law – Order 9 Rule 12 of the *Civil Procedure Rules*, 2010.

9. The Learned Counsel argued that the issues for this Honourable Court’s determination are:
 - a. Whether this Honourable Court can issue orders of vacant possession to the Plaintiffs/ Respondents to vacate the suit premises?
 - b. Whether this Honourable Court can issue order to direct OCS Junda Police Post Mshomoroni to provide security during eviction of the Plaintiff from the suit premises?
9. The Learned Counsel submitted that the Plaintiffs/ Respondents trespassed on Defendants/ Applicants’ suit property Plot No. 24/II/MN CR 1224 and sued the Defendants/Applicants in the year 2013 for a claim of adverse possession. The Plaintiffs/Respondents’ claim against the Defendants/ Applicants ordered and directed the Plaintiffs/Respondents to vacate the suit property and to remove all the structures in the suit property within 30 days from the date of the judgment.
10. The Learned Counsel argued that the Judgment in this matter was delivered on 26th May 2015 by Justice A. Omolo, seven years had lapsed since the Judgment and the Plaintiffs/Respondents had refused to comply with the Court Order hence necessitating the instant Application. Although the Plaintiffs/Respondents did appeal against the Judgment delivered by Justice A. Omolo on 26th May 2015 in the Court of Appeal. In spite of this, the Court of Appeal did dismiss the Plaintiffs/ Respondents Appeal with costs on 17th February 2017. As it stood the Judgment delivered by Justice A. Omolo on 26th May 2015 was not challenged and there were no orders of stay of execution of the Judgment.
11. Subsequently, the Learned Counsel told the court that the general rule was that the successful party is entitled to the fruits of his judgment on any decision of the Court giving with success at any stage. On the part of the Defendants/Applicants, this had not been so as the Plaintiffs/Respondents had refused to abide by the orders of the Court and to give vacant possession of the suit property despite this Honourable Court directing them to do so. The Defendants/Applicants had not enjoyed the fruits of their Judgment delivered by this Court on 26th May 2015. Ideally, the Plaintiffs/Respondents were in contempt of Court Orders and hence the Counsel prayed for this Honourable Court to punish them for willfully disobedience to Court Orders.
12. To buttress on this point, the Learned Counsel relied on the case of “Machira T/A Machira & Company Advocates – Versus - East African Standard (2002) KLR where the Court held that:-

“ the ordinary principle is that the successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage.”
13. In conclusion, the Learned Counsel prayed that this Honourable Court allowed the Defendants/ Applicants’ Application dated 31st August 2021 filed on 26th November 2021 as prayed and to Order the Plaintiffs/Respondents to give vacant possession to the Defendants/Applicants. Additionally, the Court should direct the OCS Junda Police Post Mshomoroni to provide security during the eviction of the Plaintiffs/Respondents from the suit property Plot NO. 24/II/MN CR 1224.

I. Analysis and Determination

14. I have considered all the pleadings filed in this matter, being the Notice of Motion application dated 31st August, 2021 by the Defendants/Applicants herein, the responses, the written submissions, the



plethora of cited authorities by the Defendant/Applicants, the appropriate and relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

15. For the Honorable Court to reach an informed, reasonable, a just and fair decision on the subject matter, it has framed the following salient two (2) issues for its determination before this court:-
 - a. Whether the Notice of Motion application dated 31st August, 2021 is merited and hence entitled to the relief sought?
 - b. Who will bear the costs?

Issue No. a). a) Whether the Notice of Motion application dated 31st August, 2021 is merited and hence entitled to the reliefs sought?

16. Under this Sub – heading, the Honorable Court takes note that through a judgment delivered by Justice A. Omolo on 26th May, 2015 dismissing the Plaintiffs’ claim of adverse possession, and the Plaintiffs’ appealed in the Court of Appeal and the Court of Appeal dismissed the Appeal with costs on 17th February 2017 leaving the judgment delivered by Justice A. Omolo unchallenged and there were no orders as to the execution of the same.
17. The Application before the Honourable Court is for the for the Plaintiffs to give vacant possession of the suit land. It has been more than 6 years since the judgment by the Court of Appeal. Vacant possession means the eviction of the Plaintiffs from the suit property in accordance with the provisions of Section 152E (1) and (2) of the *Land Act*, 2012. Additionally, the eviction order is backed by the provision of Part 4 of the Ministry of Lands Eviction and Resettlement Guidelines of October 2009 provides for Eviction and Resettlement Guidelines. The guidelines provide that the Government shall set appropriate procedure: protection and due process to 'be followed during all evictions. These guidelines among many others include, the presence of Local government officials or their representatives during eviction or demolitions and the presentation of formal authorization for the action. The court can also order that the eviction be done during the day and in a humane manner.
18. Rule 9 of the *Auctioneers Rules, 1997* also provides that an Auctioneer who believes that there may be a breach of peace resultant from seizure or repossession or attempted seizure or repossession of any property is to request for police escort from the nearest police station in order to carry out their duties peacefully. Such an application is supposed to be made to the court.
19. In the case of “*Joseph Nyakundi Orina – Versus - Joseph Ambuka [2019] eKLR*” where the application was brought seeking inter alia, an eviction order against the defendant against whom judgement had been entered but who had refused to vacate the suit property despite being served with a decree to do the same. The Honourable Justice Munyao Sila in granting the orders sought and also ordered the OCS Bondeni Polices Station to provide the court bailiff/ auctioneer with police escort tb effect the eviction. The Judge added that the applicant was entitled to the fruits of the judgment which he would not be able to enjoy if the respondent continued to be in occupation of the suit property.
20. Further, I wish to cite the case of “*Lucy Ghati – Versus - Alex Wambura John & another [2019] eKLR*” the application that was brought before the Honourable court sought inter alia, eviction orders against the Plaintiff/Respondents who, despite Judgment being entered against them and the applicant following the procedures that were set out in the Judgment had refused to vacate the suit property. The Honourable Court in granting the orders sought said that the applicant had complied with the judgment and since the judgment had not been set aside, varied or challenged on appeal or at all an eviction order had to be issued.



21. The provision of Article 159 (2) (b) of *the Constitution* mandates that justice ought not to be delayed. I agree with the Defendants submissions that the general rule is that the successful party is entitled to the fruits of his judgment on any decision of the Court giving with success at any stage.

Issue No. c). Who will bear the costs of the application?

22. It is well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is given after the conclusion of any legal action, process or proceedings of any litigation. The provision of Section 27(1) of the *Civil Procedure Act* holds that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings thereof.
23. In this case the Defendants/ Applicants had succeeded in the Application. Being though that this Honourable Court is currently functus officio to make orders on costs; there shall be no orders as to the costs of this application.

i. Conclusion & Disposition

24. In the long run, after conducting an in-depth and elaborate analysis of the framed issues hereof, the Honourable Court is of the strong view that the Defendants/ Applicants herein has been able to successfully establish their case on preponderance of probability. Thus, in the view of the foregoing and for avoidance of doubt I do order as follows:-
- a. That the Notice of Motion application dated 31st August, 2021 by the Defendants/ Applicants herein be and is hereby found to have merit and is hereby allowed in its entirety.
 - b. That this Honourable Court orders that the Plaintiffs do vacate and give vacant possession of the premises Plot No. 24/II/MN CR No. 1224 to the Defendants pursuant to the provision of Section 152E (1) and (2) of the *Land Act*, No. 6 of 2012.
 - c. That the OCS Junda Police Post Mshomoroni do provide security during the eviction of the Plaintiff from the premieres Plot No.24/II/MN CR 1224.
 - d. That the matter be and is hereby closed.
 - e. That there shall be no orders as to Costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 25TH DAY OF SEPTEMBER, 2023.

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HON. JUSTICE L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. No appearance by the Plaintiffs/ Respondents.
- c. No appearance by the Defendants/ Applicants

