



Khimji v Nyambu & 4 others (Representing Over Three Hundred Residing on Land Parcel No. MN/11/277, MN/11/271, MN/11/276, MN/11/231 and MN/11/27) (Miscellaneous Civil Application E046 of 2023) [2023] KEELC 22171 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E046 OF 2023
NA MATHEKA, J
DECEMBER 13, 2023**

BETWEEN

ALPHESH KHIMJI APPLICANT

AND

SAFARI CHENGO NYAMBU 1ST RESPONDENT

NZINGO KATANA GONA 2ND RESPONDENT

MASHA JOHN GONA 3RD RESPONDENT

KATANA KAHINDI NG'AMBO 4TH RESPONDENT

FLORENCE MALEMBA MWAZIGHE 5TH RESPONDENT

**REPRESENTING OVER THREE HUNDRED RESIDING ON LAND PARCEL
NO. MN/11/277, MN/11/271, MN/11/276, MN/11/231 AND MN/11/27**

RULING

1. The application is dated 17th August 2023 and is brought pursuant to order 51 rule 1 of the *Civil Procedure Rules* and the Court order of 22nd April 2022 issued in Mombasa ELC No. 9 of 2021 seeking the following orders;
 1. That the application herein be certified as urgent and dispensed with ex-parte in the first instance.
 2. That the OCS Bamburi Police station in conjunction with officer commanding Kiembeni Police Station do enforce compliance with the notice to vacate issued on 8th February 2023.
 3. That the costs of this application be awarded to the applicant.



2. It is founded on the following grounds that on 21st April 2022, this Honourable Court delivered its ruling in Mombasa ELC No. 9 of 2021 finding inter alia that the plaintiffs' suit stood dismissed for basing the said suit on a non-existent title. The effect of the said ruling is that the respondents' earlier granted injunction orders were vacated forthwith and any continued occupation by the respondents on the applicant's property is illegal. The applicant has now resorted to this Honourable Court to intervene and issue eviction orders against the respondents, who continue to invade the applicant's property in large numbers. This Honourable Court in its ruling indeed noted that "these three hundred residents are however not named" which is testament to the uncontrolled invasion of different sets of squatters onto the applicant's property.
3. The applicant has been and remains the registered owner of the suit property land known as Subdivision Numbers 15782-16150 situate at Kiembeni area within Mombasa County, upon which the respondents has without any colour of right invaded upon, taken possession of, constructed semi-permanent structures and moved in with their families in total disregard to the applicant's right of ownership of land. This application has been brought in good faith seeking the court's intervention to assist him recover his land through a legal, orderly and court sanctioned manner. It is in the interests of justice that the application be allowed.
4. The Applicant stated that he is the registered owner of all that property known as Subdivisions Nos. 1578216150 situated at Kiembeni, Bamburi emanating from subdivision of MN / 11/271, 276, 277, 278 and 231. (Annexed and mark as AK-I a copy of the certificate of title numbers MN/11/271, 276, 277, 278 and 231). That his property has been invaded upon by squatters whose number is approximated to be four hundred or thereabouts. That the said squatters filed a suit in Mombasa ELC No. 9 of 2021 seeking the court to declare the owners of the suit property described as MN/11/271, 276, 277, 278 and 231.
5. That through his various affidavits, he explained to the court that the said properties as described do not exist because him, being the legally registered owner, had taken necessary steps towards consolidation of the said properties and further subdivided the resultant portions. That the court considered the case and delivered its ruling on 21st April 2021 dismissing the respondents' case and consequently vacating the injunctive orders issued in favour of the respondents (annexed and mark ak-2 a copy of the ruling delivered on 21st April 2022). That he served the same upon the Respondents' representative the Respondents having even prior instituted separate adverse possession suits against him which were subsequently dismissed annexed and marked AK-3 a copy of the court order issued on 21st April 2022 and copies of the order discharging injunctive orders in MSA ELC 205 of 2018 & 120 of 2018. That despite knowledge of the decisions of the court, the Respondents still remain on his property and have refused to vacate and/or demolish the illegal structures that have been put up on the said property.
6. This court has considered the application and the supporting affidavit. The Respondent did not enter appearance or defend the application. In the affidavit of service dated 25th August 2023 the process server on Ian M. Keari stated that he served *Mzee wa Mtaa* called *Mzee Rashidi* and asked him to pass the message. I find that service was improper. Be that as it may, the Applicant seeks an order that the OCS Bamburi Police station in conjunction with officer commanding Kiembeni Police Station do enforce compliance with the notice to vacate issued on 8th February 2023. The Applicant has attached a court ruling and order in ELC No 9 of 2021 *Safari Chiengo Nyambu & Others vs Alpesb Kanaksihn Khimji* striking out the Applicant's suit and vacating any interim orders therein. The Applicant has also attached a court order dated 29th March 2019 in ELC No. 205 of 2018 *Mkalla Charo & Others & Others vs Alpesb Kanaksihn Khimji* discharging interim orders. The Applicant states that there is an uncontrolled invasion of different sets of squatters onto the applicant's property who are over three



hundred. I see no order of eviction on record for me to order the police to enforce it. Secondly it would appear that unknown third parties are involved in this matter and court cannot issue orders against unknown people. The Applicant has combined two cases to obtain one order and this is irregular in any execution process. I also find that this application is an abuse of the court process as it should have been filed if at all in the mother file.

7. Courts have time and again taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted in *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others* (2016) eKLR where the court held that;

So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

8. Similarly in *Nairobi West Hospital Limited vs Joseph Kariha & Another* (2018)eKLR it was held that;

.....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the *Civil Procedure Rules* will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral sclorsis and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out.”

9. For the foregoing reasons, I find this application lacks merit and I dismiss it with no orders as to costs as it was undefended.

10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER, 2023.

N.A. MATHEKA

JUDGE

