



REPUBLIC OF KENYA



**Sabai & 4 others v District Land Adjudication & Settlement Office,
Trans- nzoia & 11 others (Environment & Land Case 107 of 2012)
[2022] KEELC 4874 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 107 OF 2012
FO NYAGAKA, J
SEPTEMBER 20, 2022**

BETWEEN

**FRED K. SABAI 1ST PLAINTIFF
RICHARD KIPSOI 2ND PLAINTIFF
DANIEL KAPKARA 3RD PLAINTIFF
DANIEL CHEMAKET 4TH PLAINTIFF
ELIUD SICHEI 5TH PLAINTIFF**

AND

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICE, TRANS-
NZOIA 1ST DEFENDANT
PETER CHEMASWET 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT
NATHAN JINDET NDIWA 4TH DEFENDANT
JAMES BOIYO BELLO 5TH DEFENDANT
ROBINSON CHESBOI 6TH DEFENDANT
BARNABA K. KITEYWO 7TH DEFENDANT
WILFRED M. CHEPROT 8TH DEFENDANT
JUMA WILLIAM CHEMOSIT 9TH DEFENDANT
PETER KIBARAK KIBET 10TH DEFENDANT
JOHN KAPKARA MASAI 11TH DEFENDANT**



RULING

1. The 3rd - 12th defendants' application dated March 19, 2020 and filed on that day invokes order 22, rules 80, 82, 83 & 7 of the Civil Procedure Rules. In it the applicants seek the following reliefs:
 - a. ...spent;
 - b. THAT the OCS Kitale police station be ordered to provide security to enforce the court decree dated February 13, 2019 and to proceed to evict all invaders or trespassers and/or the plaintiffs, their relatives, sympathizers, agents and/or whomever found in the subject parcel of land and remove all illegal structures erected in the suit premises;
 - c. That the respondents to pay costs of this application and eviction;
 - d. Any other order that the court may deem fit to grant.
2. In support of the application, the applicant listed several grounds on the body of the motion as well as going on to annex a supporting affidavit sworn on March 19, 2020 by the 3rd defendant. In summary, and for clarity purposes, the tail end of the history of the suit herein is that judgment was entered in favor of the 3rd - 12th defendants on January 30, 2013 (sic) (PC1). Resultantly, the defendants extracted a decree on February 13, 2019. It was annexed and marked PC2. Thereafter, on December 11, 2019 (sic) the plaintiffs filed an application for stay of execution. In a ruling, annexed and marked as PC3, delivered on December 11, 2019 in respect to this application, the court granted conditional stay of execution that would automatically lapse if the conditions precedent were not met by the plaintiffs. Ultimately, the plaintiffs failed to meet the conditions. The orders of stay of execution lapsed.
3. The defendants maintained that the plaintiffs have since continued to occupy the suit lands in breach of the decree yet the suit lands were lawfully declared as to belong to the defendants in the manner demystified in the court's judgment. The defendants contended further that the plaintiffs continued to deny the defendants possession thereof hence the present application. They intended to utilize the land for purposes of settlement, ploughing and planting.
4. In their joint replying affidavit filed on February 28, 2022 and sworn on their behalf by the 5th plaintiff, the plaintiffs deposed that the decree, having been issued on February 20, 2019, necessitated the defendants to abide by the provisions set out in order 22, rule 18 of the Civil Procedure Rules to wit since more than one (1) year had passed after the date of the decree, the defendants were supposed to issue a notice to the plaintiffs to show cause why the decree ought not to be executed against them. Such notice on alleged unlawful occupation on alleged private land use was truncated in section 152E of the Land Act. They deposed that the evictions were not carried out in accordance further, with the wordings of the provisions enshrined in sections 152F and 152G of the Land Act. Consequently, the present application was in violation of express mandatory provisions of the law.
5. They added that the eviction orders affected people who were not parties to the suit and thus injudicious. The plaintiffs made references to their application dated July 24, 2017 citing that it was for stay of execution which was opposed by the defendants' joint replying affidavit; both marked ES1 and ES2 respectively. Notably and regrettably, the annexures referred to were not attached to the affidavit. The applicants' argument was that the said application was pending hearing and determination. Since



it was first in time, they urged this court to determine it before the present application. They urged the court to find that the application lacked merit and be dismissed with costs.

6. Before I proceed further, I note that the application dated July 24, 2017 was not only filed by the applicants but it also sought a refund of cash bail and not for stay of execution. The application was opposed by replying affidavit of Peter Chemaswet filed on October 18, 2017. The application was allowed on November 1, 2017. Thus, the contention about its pendency is at best hot air and extremely unfounded. I discourage from and will continue to caution parties against misleading courts on any matter, however small, as borne out by the facts in this matter.
7. The defendants filed a Further affidavit on April 8, 2022. The same was sworn by Michael K Chemwok, advocate of the High Court of Kenya acting for the 3rd - 12th defendants. They reiterated the contents in their application and Affidavit. Additionally, they maintained that the application sought to evict the plaintiffs to this suit. The defendants instructed court bailiffs to evict the plaintiffs. For this assertion, they annexed the instruction letter dated February 3, 2020 to Ms Eshikoni Auctioneers that was marked MKC1. They were on February 20, 2020 advised by the said court bailiffs to move the court accordingly to facilitate security to enable successful eviction of the plaintiffs. That letter was annexed and marked MKC2.
8. While it was not disputed that the decree was issued on February 13, 2019, marked as annexture MKC3, on December 11, 2019 the court ruled on the plaintiffs' application dated March 12, 2019, which ruling was marked as annexture MKC4. The defendants maintained that execution could not issue during the pendency of the orders as stay of execution had been granted. It was after the lapse of the stay orders that occurred on January 25, 2020 that the defendants filed the present application. As a result, the issue of a one (1) year lapse did not apply. The defendants acted without any delay and it was in the interest of justice that the orders sought be granted.

SUBMISSIONS

9. The 3rd - 12th defendants filed their submissions on May 19, 2022. They submitted that the plaintiffs' reliance on the provisions of section 152e of the Land Act were misconceived as the framework under those provisions do not relate to evictions carried out in execution of court decrees. Furthermore, these were not the directions of the court in its judgment ordering the applicability of section 152e of the Land Act to enforce the present decree. They added that to necessitate the application of those provisions would be inimical to rules of justice as it would mean that they would face more hurdles in execution of their judgments. For this position, the defendants cited Mutbihi Investments Limited vs Andrew S Kyendo & 22 Others [2020] eKLR and Mary Wangui Karanja & Another vs Rhoda Wairimu Karanja & another [2021] eKLR.
10. This set of defendants urged this court to remain guided by the oxygen principle doctrine enshrined in sections 1A, 1B and 3B of the Civil Procedure Act that facilitate the administration of justice. It maintained that it remained mandatory for the plaintiffs to obey the court's orders.
11. The plaintiffs did not file submissions in response to the 3rd - 12th defendants' submissions. The 1st and 2nd defendants filed theirs on May 16, 2022. Their bone of contention was that the Officer Commanding Station (OCS) was incapable of executing the decree issued on February 13, 2019 as the said office lacked the authority to conduct evictions. They submitted that only the defendants, as successful litigants, or court bailiffs, were mandated to enforce the orders of the court and not the OCS, whose functions were only limited to provision of security under the guise of section 24 of the National Police Service Act. Otherwise such an order would be illegal and untenable. They cited several authorities in support of this argument. The 1st and 2nd defendants further submitted that the



application remained inchoate as they failed to demonstrate the difficulties in executing the decree first before seeking for the present reliefs. It was their considered view that the 3rd - 12th defendants ought to have first explored eviction proceedings through an application. The defendants noted that the application should not have sought or removal of illegal structures erected on the suit property as those orders were not sought in the primary suit. It was further their opinion that the application should only have remained limited to the parties to the proceedings and not sympathizers, intruders, trespassers or agents. For these reasons, they urged this court to dismiss the application.

12. Be that as it may, the 1st and 2nd defendants submitted that court should remain guided by the Constitution and statute law when making orders for eviction. They were emphatic that eviction from private land must accord with articles 2 (5) & (6), 43 and 47 of the *Constitution*, sections 152E and 152G of the *Land Laws (Amendment) Act*, the *UN General Comment* No 7 as well as Hon Justice Oscar Angote's recommendations in his paper 'Evictions in Kenya; Which way under the new Constitution and *Land Laws (Amendment) Act* 2016? (2018) *Journal of cmsd*, Vol 2 (2). They submitted that the defendants' intended eviction must be carried out within the ambit of the law.

Analysis and Disposition

13. I have considered the application and the rival parties' Affidavits. I have also scrutinized the submissions filed by rival parties as well as the relevant provisions of the law.
14. Before I proceed with analysis and determination of the application herein, I must make a commentary on the 1st and 2nd defendants' submissions. They have raised several grounds challenging the application in totality. They were, regrettably, filed without any prior pleadings presented before this court. I must continue to remind parties that submissions are not pleadings. A reminder on this point is drawn from the Court of Appeal case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where it held that, "Submissions cannot take the place of evidence...Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."
15. Therefore, submissions must remain to be so: a marketing strategy by parties to 'sell' their opinions and requests to court about the issues before the court. Ordinarily, they are intended to buttress, emphasize or clarify any factual issues and the law as raised in pleadings: they are some sort of embellishment. It goes without saying that any contentious issues raised in submissions will be disregarded in toto, and not have the benefit for consideration. I will thus disregard the 1st and 2nd defendant's submissions on that ground, in so far as they touch on factual issues. I will confine myself to the issues of law that they raise as no party should never be shut out of commenting on what the law is or ought to be.
16. The following issues are the ones which in my view will determine the application:

(1) Whether the application is marred with procedural lapses?

17. The plaintiffs have contended that the application was urged with indolence, having been filed more than one (1) year after the issuance of the decree. It was thus their contention that the applicants ought to have taken out notices to show cause first before filing the present application.
18. In my understanding of the plaintiffs' objection, the applicants are in breach of the provisions of order 22, rule 18 of the *Civil Procedure Rules*. It provides that where a decree is more than one (1) year old, and no steps have been taken to execute the same within that period, a decree holder must first, before execution, issue a notice to the judgment debtor to show cause why the decree should not be executed against him. Going by that analysis, it therefore was incumbent upon the applicants to take out notices to show cause after February 13, 2020.



19. In response to the allegations, the applicants contended that following the entry of judgment, the plaintiffs successfully obtained stay orders of execution of the decree on December 11, 2019. As a result, the issue of a one (1) year lapse did not apply.
20. An interpretation of the proviso to order 22, rule 18 of the *Civil Procedure Rules* reveals that time starts running from the date of the last order made after issuance of the decree when it was to be executed. The determining phrase reads that such the notice to show cause shall not be necessary if the application is made within one year from the last order “...made on any previous application for execution”. Such that if there were stay of execution orders made in favour of the judgment debtor, as in the instant suit, time would only start running after the last post judgment order against the decree has been made and not from the date of issue of the decree.
21. It cannot be gainsaid that after the court’s judgment entered on January 31, 2019, the plaintiffs orally prayed and were granted a forty-five (45) day stay of execution of the judgment. Thereafter, they filed an application for stay on March 13, 2019. The following day, that is on March 14, 2019, the plaintiffs were granted stay of execution pending inter partes hearing of the substantive application. The orders remained extended as long as the motion remained alive until December 11, 2019 when the court granted a substantive conditional stay of execution. The court directed the plaintiffs to deposit the sum of Kshs. 300,000.00 within forty-five (45) days from the date of the order as a condition for stay failing which the order automatically lapsed.
22. In my view, time only started running from January 26, 2020, after the forty-five (45) days lapsed. The application was filed on March 19, 2020. Thus, the court was moved within the statutory required period of time. In conclusion, I find that the application is properly filed bereft of any legal technicalities. In any event in and in line with sub-rule 2 of order 18, rule 22 of the *Civil Procedure Rules*, this court has discretion to dispense with the requirement for taking out notices to show cause if the issuance of such notices would cause unreasonable delay or remain inimical to the ends of justice, although that is not the sub-rule I have used to determine as unmeritorious the foregoing issue.

(2) Whether the applicants are in breach of sections 152E, 152F and 152G of the *Land Act*?

23. The plaintiffs averred that the application failed to comply with the provisions set out in sections 152E, 152F and 152G of the *Land Act*.
24. In summary section 152E (1) provides that “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”. Subsection 2 delineates the requirements for that notice. section 152F allows an aggrieved part to move the court for appropriate relief against the issuance of the notice envisaged under section 152E while section 152G outlines the mandatory procedures that should be adhered to during eviction.
25. In answering this question, I am guided by the authorities below as follows:
26. In *Muthithi Investments Limited v Andrew S Kyendo & 22 others* [2020] eKLR, the court held:

“Secondly, the applicant’s reliance on section 152E of the *Land Act* are misplaced because that framework does not relate to evictions carried out in execution of court decrees. Thirdly, there is no evidential material presented to the court to demonstrate that the decree holder has or is about to violate the eviction procedure spelt out in section 152E of the *Land Act* or any other section of the *Land Act*.”



27. In *Benjamin Kimeli Tanui v Omari Salim Nasib & another* [2020] eKLR, the court held:

“The order that this court granted in its judgment related to the Appellants who were to “be evicted in accordance with the law.” That law is found in section 152 E of the *Land Act*. The up - shot of the above is that having considered both applications by the appellants and the respondent, I make the following orders: -The respondent must comply with the provisions of section 152 E of the *Land Act* if he wishes to evict the Appellants.”

28. The court in *Mary Wangui Karanja & another v Rhoda Wairimu Karanja & another* [2021] eKLR had this to say:

“Where the court specifically provides in its final orders that the provisions of section 152 E of the *Land Act* should be complied with during eviction, then the said procedure has to be complied with. However, where the court directs that a party should give vacant possession of the suit without mentioning the applicability of section 152 E of the *Land Act*, it would be inimical to justice for a successful party to face extreme hurdles and difficulties in execution of the Judgment of the court by issuing notices provided for under section 152 E of the *Land Act*.”

29. I agree with the analysis of the courts in the foregoing paragraphs. sections 152E to 152G of the *Land Act* remain applicable to eviction on persons unlawfully occupying private land without a court order. In that regard, it is a mandatory requirement for the person seeking eviction to apply within the precincts of the law strictu sensu. However, my understanding of the provisions is that they remain inapplicable to court decrees unless the court has expressly directed mandatory compliance with those provisions of the law. court decrees are the end result of a process that both parties or a successful one for that matter becomes entitled to move the judgment debtor into compliance through lawful means. However, even when doing so, care should be taken to execute the decree of eviction in a humane manner. That notwithstanding, extending the olive branch of being humane should not be abused by the judgment debtor to the extent and manner of unreasonably impeding the court process and resisting eviction if it has to be carried out. The taking advantage of the humane procedures by parties should be abhorred in toto.

30. That said, the orders of the court issued on January 31, 2019 were that a mandatory injunction shall issue requiring the defendants to the counterclaim and their family members and anyone else claiming under them to vacate the said parcels of land mentioned in order (a) above and in default they be evicted at their own costs. I find that the applicants have not breached sections 152E to 152G of the *Land Act* and find that the application remains proper before this court.

(3) Whether the application is merited?

31. The applicants contend that the plaintiffs have remained in occupation of the suit premises in spite the judgment of the court delivered on January 31, 2019. The decree of the court and the orders subsequent thereto have not been set aside or challenged by way of an appeal and thus remain in force.

32. The plaintiffs, well aware of the court’s judgment, continue to illegally remain in occupation of the suit premises. Their actions or lack therefore prompted the applicants to engage the services of court bailiffs that is, Eshikoni Auctioneers, who advised them to move the court appropriately and seek orders for the provision of security in discharging their duties.

33. As stated above, the applicants are indeed entitled to eviction orders against the plaintiffs. Consequently, the application is and remains merited save to add that the same only applies to the



plaintiffs, their family members and anyone else claiming under them. Furthermore, execution of such decree shall only be effected by the court bailiff who is the designated officer to execute an eviction order. A police officer's role is limited to, as provided in section 24 of the [National Police Service Act](#), maintaining law and order including but not limited to the enforcement of all laws and regulations with which it is charged. In light of this, nothing stops a court bailiff from seeking the assistance of the police where it deems fit to do so in the provisions of security. This is anchored on rule 9 of the [Auctioneer Rules](#) of 1997.

34. Moreover, section 1B of the [Civil Procedure Act](#) empowers this court to execute its duty as stated therein, 3A gives this court "...inherent power...to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court". I believe that by the respondents opposing the application for orders of provision of security to officers lawfully executing the process of the court amounts to them doing nothing but calling on the court to join in their sheer abuse of its process. In the interest of justice, and in order not to issue orders in vain or orders that are superfluous, this court is empowered to craft the prayer sought to by the applicants to bring out the intent and meaning thereof for execution, as long as the court does not vary the content thereof. Consequently, I allow the application in the following terms:

- a. The court bailiff is permitted to and shall proceed to forthwith enforce the decree dated February 13, 2019 by way of eviction of the plaintiffs and their family members and anyone claiming under them from the parcels of land delineated in part (a) of the court's judgement dated January 31, 2019.
- b. The OCS Kitale police station shall provide security to the court bailiff, upon payment of the costs to be incurred, for enforcement the court decree dated February 13, 2019.
- c. The plaintiffs shall meet the costs of this application and those of the eviction.

35. orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF SEPTEMBER, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

