



REPUBLIC OF KENYA



Onyango v Mankone & another (Environment and Land Miscellaneous Application E7 of 2022) [2022] KEELC 13754 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E7 OF 2022
LA OMOLLO, J
OCTOBER 27, 2022**

BETWEEN

ELIZABETH AKOTH ONYANGO APPLICANT

AND

BENSON AYUKA MANKONE 1ST RESPONDENT

ABRAHAM BIRUNDU NYANGOTO 2ND RESPONDENT

RULING

Introduction

1. This ruling is in respect of the applicant's notice of motion application dated April 6, 2022 which is expressed to be brought under section 152 e of the [Land Act](#) 2012 and order 51 rule 1 of the [Civil Procedure Rules](#).
2. The application seeks the following orders:
 1. Spent
 2. That this honorable court be pleased to have the 1st respondent evicted from land parcel number Shawa/gicheha Block 5/948 (ex-margaret)
 3. That this honorable court be pleased to have the 2nd respondent evicted from land parcel number Shawa/Gicheha Block 5/949 (ex-margaret).
 4. That upon grant of prayer 2 and 3 above, the honorable court be pleased to order the applicant to appoint a court bailiff or auctioneer of her choice to evict the 1st and 2nd respondents from land parcel number Shawa/Gicheha Block 5/948 and land parcel number Shawa/Gicheha Block 5/949 respectively.



5. That this honorable court be pleased to order the Officer Commanding Police Division (OCPD) Rongai division to direct the nearest police station under his command to provide security during the eviction exercise.
6. That the costs of this application be borne by the respondent.
3. The application is based on the grounds on its face and supported by the affidavit sworn on April 6, 2022 by Elizabeth Akoth Onyango.

Factual Background.

4. This matter first came up in court on April 6, 2022 and the court directed that the application be served upon the respondents.
5. The matter then came up on April 26, 2022 and the respondents who appeared court had not filed their responses to the application. The application was rescheduled for hearing on May 12, 2022 to give time to the respondents to file their response.
6. On May 12, 2022, directions were given that the application would be canvassed by way of written submissions. The matter was rescheduled to June 29, 2022 to confirm filing of submissions.
7. On June 29, 2022 parties were given more time to file their submissions which were ready on July 13, 2022. The application was then reserved for ruling.

The Applicant's Contention.

8. The applicant contends that she is the registered proprietor of land parcel No Shawa/Gicheha Block 5/948 (ex-margaret) and Shawa/Gicheha Block 5/949 (ex-margaret) which she holds jointly with her daughters Stacy Wairimu Onyango, Elsie Achieng' Onyango and Ashley Anyango Onyango.
9. The applicant further contends that she is advised by her advocates on record which advise she believes to be true that being that her daughters and herself have a joint proprietary interest in the suit properties, she is entitled to represent them in the present application to advance their claim against the respondents as per order 1 rule 8 of the *Civil Procedure Rules*.
10. The applicant also contends that sometime in February 2019, the 1st respondent entered into land parcel No Shawa/Gicheha Block 5/948 (ex-margaret) and built a toilet on it and begun farming. She further states that later the same month, the 2nd respondent entered onto land parcel No. Shawa/Gicheha Block 5/949 (ex-margaret), fenced it and begun to cultivate.
11. It is the applicant's contention that the respondents acts of trespass onto the two parcels of land was done without the permission of the registered proprietors of the land.
12. The applicant contends that she asked the respondents to cease their acts of trespass on the suit properties but they refused to do so and that despite reporting the matter at the nearby Ex Margaret Police post, she was not assisted. She states that she subsequently instructed her advocates to issue a notice to vacate in respect of the two parcels of land upon the respondents as required by the *Land Act*.
13. The applicant also contends that the respondents as well as the Deputy County Commissioner of Rongai Division and the Officer Commanding the Rongai Police Division were served with the notices to vacate as stipulated under section 152e of the *Land Act*.



14. The applicant further contends that to the best of her knowledge, the respondents do not have any proprietary interests in the suit properties and that their acts amount to trespass and that they should be evicted.
15. It is the contention of the applicant that despite the respondents being served with the respective notices to vacate the suit land, they failed, neglected and/or refused to vacate prompting the instant application.
16. The applicant contends that upon service of the notices to vacate the suit lands neither of the two respondents has filed any suit in court claiming proprietary interest.
17. The applicant ends her deposition by stating that for the reasons set out in her supporting affidavit, the application is necessary, merited and that the orders sought should be granted.

The 1st Respondent's Response.

18. The 1st respondent filed a replying affidavit sworn on May 11, 2022.
19. He contends that the application is permeated with concealment of material facts and that the applicant is being economical with the truth.
20. He contends further that the application is incompetent, untenable in law and an abuse of the due process. That the applicant is attempting to circumvent the process commenced by her late husband one Stephen Emmanuel Onyango.
21. He also contends that the applicant is the wife to one Stephen Emmanuel Onyango now deceased who was the proprietor of land parcel No Shawa/Gicheha Block 5/948(Ex Margaret).
22. It is his contention that it is a well known and open fact that the said Stephen Emmanuel Onyango prior to his death sold to him a parcel of land including the subject matter of this application.
23. He contends that upon entering into the said agreement with the deceased, he took immediate possession of the said parcels of land and cleared payment for parcel 5/946 and settled there with the full knowledge of the applicant herein.
24. He further contends that when Stephen Emmanuel Onyango passed on, he approached the applicant herein who stated that she will deal with the succession process and thereafter get back to him.
25. He also contends that once he sent the applicant the balance of the purchase price, the applicant cleared the succession process.
26. It his contention that as at March, 2017, the title was still in the name of the deceased and in 2019 the applicant registered the death of Stephen Emmanuel Onyango on the title.
27. He contends that applicant tried to get him out of the land by refunding the balance which caused him to seek the intervention of the DCI offices in Nakuru and she promised to clear the succession and transfer the said parcel to him.
28. He further contends that the applicant pleaded with him not to object to any succession process as she promised that she would transfer the parcel to him to which he agreed.
29. He also contends that the applicant sent him a notice to vacate which through his advocates on record on February 9, 2022 responded to.



30. It is his contention that when he received the present application he was surprised at the turn of events and had to apply for a copy of records from the lands office which he is yet to receive.
31. He contends that the present application is the highest level of dishonesty on the part of the applicant as an administrator to the estate.
32. He further contends that he occupied the said land as a bonafide purchaser and with full knowledge and consent of the applicant being the legal representative to Stephen Emmanuel Onyango.
33. He also contends that based on the foregoing, the application is therefore frivolous, vexatious, fatally defective and a gross abuse of the court process.
34. It his contention that he has been advised by his advocates on record which advise he believes to be correct that the applicant cannot therefore seek to enforce such a right through a miscellaneous application.
35. He ends his deposition by stating that he is advised by his advocates on record that the present cause is not a suit and should be struck out with costs.

Applicant's Response To The 1st Defendant's Reply.

36. Upon service of the 1st respondent's replying affidavit, the applicant filed a supplementary affidavit sworn on May 20, 2022.
37. She contends that it is not disputed that she together with her daughters Stacy Wairimu Onyango, Elsie Achieng' Onyango and Ashley Onyango are owners land parcel numbers Shawa/Gicheha Block 5/948 (Ex-Margaret) and Shawa/Gicheha Block 5/949(Ex-Margaret).
38. She reiterates that sometime in February 2019, the 1st respondent entered into land parcel number Shawa/Gicheha Block 5/948 (Ex Margaret) and built a toilet on it and begun farming it.
39. She contends that she is not aware of the sale agreement made between her late husband and the 1st respondent over land parcel No Shawa/Gicheha Block 5/948 (Ex Margaret) because from the records she has, the 1st respondent bought land parcel No Shawa/Gicheha Block 5/946 and 947 which purchase price was paid into her late husband's bank account which he held at Barclays Bank.
40. She also contends that she doubts the veracity and authenticity of the sale agreements in respect to land parcel numbers Shawa/Gicheha Block 5/948 and 949 and that is the reason why she reversed an Mpesa transaction of Kshs 30,000/= sent to her by the 1st respondent purporting to be a payment of balance of the purchase price for land parcel number Shawa/Gicheha Block 5/948.
41. It is her contention that in 2018 she placed a caution on land parcel numbers Shawa/Gicheha Block 5/948 and 949 before proceeding with the succession proceedings with respect to her late husband's estate and the transmission and that there is no point the caution was challenged.
42. She contends that neither the 1st nor the 2nd respondent has filed any suit in any court asserting any rights against her late husband's estate over the suit properties and if they were genuine claims they would have already done so.
43. She reiterates that she is the registered owner of the suit properties together with her two daughters and that she is advised by her advocates on record that as per section 26 of the [Land Registration Act](#), the certificate of title issued by the registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject



- to the encumbrances, easements, restrictions and conditions contained or endorsed on the certificate of title.
44. She contends that she is further advised by her advocates on record that the title of that proprietor shall not be subject to challenge except on the grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 45. She further contends that as far as she is aware, the 1st and 2nd respondents have not filed any suit challenging the suit properties in any court of law on account of having acquired the same illegally, unprocedurally or through a corrupt scheme.
 46. She also contends that she is advised by her advocates on record that the claims made by the 1st respondent with regard to the alleged purchase, payment and refund of the balance of the purchase price and the further allegations of a promise for the transfer of land parcel number Shawa/Gicheha Block 5/948(Ex-Margaret) upon completion of the succession proceedings is immaterial to this application.
 47. It is her contention that those allegations should have been made in a suit filed by him upon service of the notice to vacate pursuant to section 152e of the Land Act which notice was to take effect three months from the date of the notice which was sufficient time to file a suit for any claim against her and her co-proprietors.
 48. She contends that neither the 1st respondent nor the 2nd respondent have challenged or disputed service of the notice to vacate issued against them pursuant to section 152 e of the Land Act on November 24, 2021.
 49. She further contends that the 1st respondent admits to receiving the notice to vacate dated November 24, 2021 and has annexed a letter allegedly written by her advocates on record indicating that he intends not to comply with the notice and expresses an intention to defend his proprietary rights.
 50. She also contends that the said letter is strange to her advocates and herself as it was never served upon them. That the letter is dated February 9, 2022 and yet she filed this application on April 6, 2022.
 51. She ends her deposition by stating that she is also advised by her advocates on record that in these proceedings, the court has to establish, whether the applicant is the registered proprietor of the suit properties, whether the notice to vacate was issued to the respondents pursuant to section 152 e of the Land Act as per the prescribed form and whether it was properly served. That the court should not consider any extrinsic matters given that when the eviction notice given under section 152E of the Land Act is served upon the alleged trespasser, it is incumbent upon the alleged trespasser to seek legal redress to avert eviction.
 52. She sought that the application be allowed as prayed.
 53. The 2nd defendant/ respondent did not file any response to the application.

Submissions.

54. The applicant filed her submissions dated May 20, 2022 and the 1st respondent filed his submissions dated June 28, 2022.
55. The applicant in her submissions singles out one issue for determination that is; whether the applicant is entitled to the orders sought.



56. The applicant relies on section 152A, 152B, 152E and 152F of the [Land Act](#) and section 26 of the [Land Registration Act](#) and submits that she is deserving of the orders sought as she is the proprietor of the suit properties together with her daughters and that the respondents have illegally accessed them.
57. The applicant further submits that in compliance with the [Land Act](#), the applicant issued an eviction notice that was served on the respondents who refused to vacate the suit properties which lead to the filing of the present application.
58. The applicant also submits that the respondents do not dispute service of the notice to vacate and neither did they apply to the court for relief against the notice as provided for in section 152F of the [Land Act](#).
59. The applicant submits that the claims by the respondent is in the nature of purchaser's interest does not confer any proprietary interest on them.
60. The applicant submits that she only needed to establish that she is the registered owner of the property and secondly that the notice to vacate was issued to the respondents pursuant to section 152E of the [Land Act](#) which she has already proved.
61. The applicant refers to the decisions in [Atik Mohamed Omar Atik & 3 others v Joseph Katana & another](#) [2019] eKLR, [Margaret Karwirwa Mwongera v Francis Kofi](#) [2019] eKLR and [Grace Wangari Mureithi v David Njoroge](#) [2021] eKLR.
62. She concludes her submissions by stating that the applicant has satisfied the conditions set out in section 152E of the [Land Act](#) and sought that her application be allowed as prayed.
63. The 1st respondent in his submissions identifies one issue for determination that is; whether a party can seek to enforce a right through a miscellaneous application.
64. The 1st respondent relies on order 3 rule 1, order 40 rule 1 of the [Civil Procedure Rules](#), sections 2 and 9 of the [Civil Procedure Act](#), the case of [Tatecob Housing and Co-op Sacco Limited v Qwetu Sacco Limited](#) [2021] eKLR and submitted that the court can only grant eviction orders upon hearing the case on merit.
65. He submitted further that he occupied the suit property as a bonafide purchaser for value and with the full knowledge of the applicant who is the legal representative of the estate of Stephen Emmanuel Onyango.
66. The 1st respondent submits that as per the sale agreement attached to his replying affidavit dated May 11, 2022, it is evident that he entered into a sale agreement with the applicant's late husband Stephen Emmanuel Onyango.
67. He further submits that one of the terms of the agreement was that upon full payment of the purchase price the vendor would hand over the title deed and transfer the land to him which the applicant refused to do.
68. He concluded his submissions by stating that the application is incompetent and should be dismissed with costs.

Analysis And Determination.

69. I have considered the application, supporting affidavit, replying affidavit, supplementary affidavit and the rival submissions filed by the parties.



70. Section 152B of the *Land Act* provides as follows:

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

71. Section 152E of the *Land Act* provides as follows:

- (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.

72. Section 152F of the *Land Act* provides as follows:

- (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.

73. In this matter the applicant is seeking for the eviction of the respondents from land parcel No's Shawa/Gicheha Block 5/948 and 949 (Ex-Margaret).

74. She stated that she is the registered owner of the suit properties and that the respondents have invaded her land without permission.

75. The applicant attached to her application two notices issued to the respondents dated November 24, 2021 requiring them to vacate land parcel numbers Shawa/Gicheha Block 5/948 and 949 (Ex-Margaret).

76. She annexed a copy of the title deed for land parcel No. Shawa/Gicheha Block 5/948(Ex-Margaret) which shows that she is the registered owner together with Stacey Wairimu Onyango, Elsie Aloo Achieng Onyango and Ashley Anyango Onyango which proves her ownership.

77. The 1st respondent in his replying affidavit stated that he purchased the suit property from the applicant's husband and occupied the property with her knowledge.



78. The 1st respondent does not challenge the service of the said notice upon him but only claims that he occupied the land with the knowledge of the applicant upon purchasing the same from the applicant's late husband Stephen Emmanuel Onyango.
79. The case of *Julius L Marten v Caleb Arap Rotich* [2021] eKLR, offers useful insights on the approach to be taken where the ownership of property is disputed and an application has been filed under sections 152C, 152D and 152E of the *Land Act*, 2012. He states;
15. From a reading of sections 152C, 152D and 152E of the *Land Act*, 2012 it is not clear how a party ought to approach the court for relief under section 152F. Is it by way of a formal suit and/or miscellaneous application as in the instant suit. Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession of for some time. Before such an order is given the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard. (emphasis is mine) section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. (Emphasis is mine) What is the situation where there is no dispute on ownership and the occupation is unlawful? What is the situation where there is disputed ownership of the property? In my view where the ownership is disputed the summary procedure that section 152F appears to contemplate would not be suitable and a formal suit would be advisable. (Emphasis is mine)
16. In the instant matter the defendant does not hold title to the suit property. The court in ELC No 18 of 2014 (Nakuru) did not declare him the owner of the suit property. The court's final orders in the judgment are that the plaintiff is not entitled to the reliefs sought in regard to the eviction of the defendant (now applicant) from the suit property. The defendant had not raised a counterclaim in the suit and no declaration of ownership was issued in his favour. There was no order capable of execution made in his favour. The applicant save for the sale agreement holds no title to the land...
80. In the case of *Julius L Marten* (supra) the learned judge grappled with the same questions as I am grappling now. How is the court to deal when presented with an application made under section 152F and the person against whom the notice was issued was served, acknowledges service but the person failed to approach the court for relief as provided in section 152F?
81. While it is evident that section 152F does not require that the application be served on the party against whom the orders of eviction are sought, the rules of natural justice provide that a party should not be condemned unheard. This was rightly observed by the learned judge in *Margaret Karwirwa Mwongera v Francis Kofi* [2019] eKLR
- “In as much as a reading of the provisions of section 152F would imply that such an application is heard ex-parte, I think it is good practice that the respondent be served so as to give him an opportunity to respond. I therefore directed that he be served and he was duly served. He filed nothing in response. He has therefore not given any reason, despite being given an opportunity to do so, as to why he should not be evicted.”
82. What then is the role of the court after ordering that the application be served and after hearing responses and submissions in support of and in opposition to the application? I do not for a moment think that such orders are of no useful consequence.



83. As rightly observed by the judge in the case of *John L Marten* (supra)- I quote again;
- “In my view where the ownership is disputed the summary procedure that section 152F appears to contemplate would not be suitable and a formal suit would be advisable.”
84. The 1st respondent in this matter stated that he is in occupation of the suit property as a bona fide purchaser after buying the suit property from the applicant’s deceased husband.
85. In support of his assertions, he attached to his replying affidavit a copy of the title deed for land parcel No Shawa/Gicheha Block 5/948(Ex Margaret) in the name of Stephen Emmanuel Onyango and a land sale agreement dated December 4, 2015 for the same property entered between him and Stephen Emmanuel Onyango.
86. The applicant on the other hand denies knowledge of such a purchase and prays that eviction orders be issued against the respondents.
87. The applicant is also seeking the eviction of the 2nd respondent from land parcel No Shawa/Gicheha Block 5/949 (Ex Margaret) which she alleges that the 2nd defendant/Respondent had illegally taken occupation of.
88. She also annexed a copy of the notice to vacate issued to the 2nd respondent dated November 24, 2021 and copied to the Deputy County Commissioner- Rongai sub county, the Officer Commanding Police Division Rongai Division, the Directorate of Criminal Investigations of Nakuru and Salgaa, the Officer Commanding Police Station Salgaa Police Station and the Officer in Charge of the Ex-Margaret Police Station.
89. An affidavit of service dated March 18, 2022 and sworn by Nashon O. Mboyah is also annexed and it indicates that all the relevant parties were served.

Disposition.

90. In view of the foregoing, I find that there is an ownership dispute as between the 1st defendant and the plaintiff in respect of the suit property. It is necessary that this dispute is resolved on its merits and not in the summary procedure contemplated under section 152 F of the Land Act. Parties are at liberty to file a suit.
91. Consequently, the application dated April 6, 2022 is dismissed with no order as to costs.
92. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF OCTOBER, 2022.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Mwallo the Applicant.

Mr. Kipngeno for Wambeyi for the Respondent

Court Assistant; Miss Monica Wanjohi

