



**Aden v Nyali Intergrated Academy (Environment & Land Case  
202 of 2018) [2022] KEELC 14481 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14481 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 202 OF 2018  
LL NAIKUNI, J  
OCTOBER 18, 2022**

**BETWEEN**

**ABDARAHMAN ADEN ..... PLAINTIFF**

**AND**

**NYALI INTERGRATED ACADEMY ..... DEFENDANT**

**RULING**

**I. Preliminaries**

1. The application before this Honorable Court for hearing and determination is the Notice of Motion application dated June 16, 2022 by the Plaintiff/Applicant. It is brought under a Certificate of urgency. The application is premised under the provisions of Sections 1A, 1B, 2 and 3A of the [Civil Procedure Act](#), Cap 21.

**II. The Plaintiff/Applicant's case**

2. The Applicant seeks for the following orders that:-
  - a. Spent.
  - b. That leave be granted to the Law firm of Messrs "Wangila and Wangila Advocates" to get police assistance from the Officer In Charge of the (OCS) Nyali Police Station during and when executing the ruling of this court delivered on November 6, 2019 and Judgment of the Court of Appeal delivered on June 10, 2022 on LR 9288 Sec 1MN and LR 9289 Sec 1MN (CR 27062 and CR 27063) herein referred to as Nyali Integrated Academy in Nyali occupied by the Respondent herein for purposes of removal of the above named person who is illegally occupying the parcel of land and give vacant possession to the Applicant.
  - c. That the costs of this Application be borne by the Respondent.



3. The application by the Applicant is premised on the grounds, facts, testimony and averment of the 13 Paragraphed Supporting Affidavit of Abdurahman Aden sworn and dated June 16, 2022 and four (4) annexures Marked as “AA-1 to 4” annexed herein. The application is premised on the grounds below that: -
  - a. The Respondent filed a suit against the Applicant in the Civil case ELC (Mombasa) No 202 of 2018 where the Learned Judge held that the lease stipulated that the tenancy was for a period of a term of ten (10) years. It also referred to the provision of Clause No 6 of the Tenancy agreement which provided that the tenant may carry out alterations to the premises subject to the consent of the landlord which the Respondent failed to observe since he made substantive alterations to the premises without the consent of the Applicant.
  - b. The Applicant had followed the laid down procedure in the tenancy agreement by serving all the required notices to the Respondent. Therefore, the Learned Judge found the Respondent to have been duly served with the notices and by virtue of the tenancy agreement having been terminated by lapse of time, the Respondent was obligated to vacate the premises and give vacant possession to the Applicant as a matter of procedure.
  - c. The Respondent being dissatisfied with the decision of this ELC Court Judge C Yano, they moved to the Court of Appeal on the grounds that the judge erred in law and facts which he highlighted in his appeal.
  - d. On June 10, 2022, through a three Judge bench, the Court of Appeal at Mombasa in Civil Appeal No 36 of 2020, delivered its Judgment. It dismissed the appeal on the basis that it lacked merit and that there was no reason to disturb the decision of the Superior Court in ELC 202 of 2018.
  - e. The Respondent was still occupying the parcel of land known as LR 9288 Sec1MN and LR 9289 Sec 1MN (CR 27062 and 27063) herein referred to as Nyali Integrated Academy in Nyali and they continued to interfere with the same by conducting business in the premises which has been regarded as acts of trespass in view of the prevailing order of ELC No 202 of 2018. Copy attached.
  - f. The said continued stay infringed, violated and denied the Applicant’s constitutional right to enjoy the fruits of his judgment, his constitutional right to enjoyment of his property.
  - g. It was in the interest of justice that they should be accorded the necessary security during the eviction exercise to maintain law and order.
4. The Applicant in his supporting affidavit averred that he was the Landlord in this matter and fully conversant with the facts of the case. He stated that he was the registered owner of the said parcel of land known as LR 9288 Sec 1 MN and LR 9289 Sec 1 MN (CR 27062 and 27063) herein referred to as Nyali Integrated Academy in Nyali. He annexed a true copy of the Certificate of Lease title marked as “MN – 1”.
5. He deposed that he entered into a tenancy agreement with the Respondent for a Lease period of ten (10) years which provided that upon expiry of the ten years and/or where the tenant/ Respondent was in breach of any covenant, the landlord would have the legal mandate of terminating the tenancy agreement after serving the required notices. He averred that it was after the lapse of ten (10) years and the Respondent refused to vacate the premises and deliver vacant possession as agreed that he decided to file a suit against the Respondent in ELC (Mombasa) No 202 of 2018.



6. He deposed that he was aware that Judgment herein was delivered on July 6, 2019 in favour of the Plaintiff/Applicant against the Defendant/Respondent herein. He stated that not being satisfied with the said Judgement, they preferred an appeal at the Court of Appeal. However, but the appeal was dismissed on June 10, 2022 with costs.
7. He informed Court that the Respondent was still occupying the parcel of land known as Land Reference Numbers 9288 Sec 1 MN and Land Reference Numbers 9289 Sec 1MN (CR 27062 and CR 27063) (hereinafter referred to as “The Nyali Integrated Academy”) in Nyali, the County of Mombasa. They continued to interfere with the same by conducting business in the premises which is regarded as trespass. They were in an outstanding rent arrears for a sum of Kenya Shillings Seven Million (Kshs 7,000,000/-) and his continued stay in the premises which was unlawful and wrongful. Thus, if an order to have the police assistance was not granted, the Applicant would be subjected to substantial loss caused by the Respondent since the Respondent had refused to vacate the said premises.
8. He deposed that he had approached the office of the Commanding Station Nyali Police Station in a bid to get enforcement and/or assistance for purpose of removing the Respondent. While there, he was advised by the OCS in order to formalize the request to obtain a Court order of this Honourable Court directly them to provide them assistance. He prayed for the court to grant him orders that the Officer Commanding Station, Nyali Police Station to assist by providing security during the execution of the above-mentioned orders.

### **III. The Respondents Case**

9. On June 27, 2022, the Respondent filed 10 Paragraphed Replying Affidavit sworn and dated June 27, 2022 by Mohamed Nur Abdullahi and 1 annexure Marked as “MNA 1 annexed hereto. He deposed from the onset that the Defendant/Respondent was a school with more than three (300) school going students from the Nursery to Secondary level in Form 4. He produced hereto the Class Registers for the children Marked as “MNA -1”. He confirmed that the Defendant/Respondent was an examination centre for the year, 2022 National Examinations. He averred that the basic right for the children’s education shall be affected as the Intended Eviction would take place in the middle of a school academic term. The Children’s right to education could be disrupted unnecessarily and the court should reject the request. The use of the police to evict school going children should never be encouraged by the court as the same may lead to loss of innocent lives since this was a civil action and the Respondent was ready and willing to peacefully vacate the premises at the end of the 2022 Academic year without necessary have to use police force.
10. He deposed that in light of the fact that the Defendant was a school as it could be seen from the filed application, it was necessary that the Defendant be allowed to leave the suit premises at the end of the Academic year 2022. He stated that he was aware that the Defendant had invested almost a sum of Kenya Shillings Sixty Million (Kshs 60,000,000/-) on the suit premises in terms of constructed structure on it which the Plaintiff/Applicant could easily recover any outstanding rent arrears by offsetting the same from the value of those structure. To support that fact, he attached a copy of the Bill of Quantity founded on pages 23 to 63 of the Replying Affidavit showing the value of those structures put up by the Defendant. He urged for the application to be dismissed with Costs.

### **IV. Submissions.**

11. On June 28, 2022 both the Learned Counsels – Mr Wangila Advocate for the Plaintiff/Applicant and Mr Omwenga Advocate for the Defendant/Respondent were accorded some brief opportunity to present their oral submission before this Honorable Court. Thereafter, Court offered to render its Ruling on notice.



### **A. The Oral Submission by the Plaintiff/Applicant.**

12. Mr Wangila Advocate of the Law firm of Messrs. Wangila & Wangila Company Advocates. in his submission stated that he was relying on the 13 Paragraphed averments of the Supporting Affidavit of Abdarahman Aden of the Notice of Motion application dated June 16, 2022 brought under the provision of Sections 1, 1A, 3, 3A of the Civil Procedure Act, Cap 21. In particular, the Counsel stated that the Applicant was seeking for prayers Numbers 2.

The Counsel stated that they were only urging for the safety of the people who would be procuring the execution the Decree of this honorable Court. He indicated that the Applicant did not want to the school children to continue being in an illegal premises. He informed Court that the Applicant had an order dismissing the appeal from the Court of Appeal order. He argued that through this application, it's a replica of the Court being asked to sit on appeal of its own Decree.

13. He indicated that they had already offered to vacate the premises with the police. He insisted that the matter before Court should not be on the validity of the Decree or otherwise. The Decree had never been set aside or vacated or appealed against.

They were using the Decree on an illegality. Undoubtedly, they were in rent arrears. There was no logic at all to state that the accrued and outstanding rent owned would be derived from the value and proceeds of the old structures built by the Respondent. His contention was that the Respondent was a trespasser and who in law had no legal right whatsoever. He had not come to court no clean hands. The only issue before the court was whether the police would be used to cause the eviction of the Applicant anytime.

In conclusion, the Counsel opined that the Respondent who was an old and sickly person need to be let to enjoy the fruits of his Judgement. He urged Court to dismiss the application.

### **B. The Oral Submission by the Defendant/Respondent.**

14. Mr Omwenga Advocate for the Defendant/Respondent from the Law firm of Messrs Mogaka, Omwenga & Mabeya Company Advocates submitted that in the premises there was school with 300 children attending classes. He referred Court to the provisions of Article 53 (1) (b) of the Constitution of Kenya where it stipulates that every child had a right to free and compulsory education. He urged Court not to let the right be taken away by the eviction order being sought by the Applicant which he indicated the school was in the middle of the school term. He informed Court that the institution was a registered centre of the national examination. To buttress his point, he cited the decision of "Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others - Versus - Kenya Railways Staff Retirement benefits Scheme" and the United Nations Convention on Human Right which spelled out the guidelines and conditions upon which eviction in such circumstances should take place. Certainly, he argued that the intended eviction being sought should not take place in the middle of the school term.

15. The Counsel further contended that the police should not be used in a Civil matter where there had not been any resistance caused by the Respondent at all. He cited the famous case on evictions from premises of "Kamau Muchuba - Versus - Ripples" where Justice Hancox hen stated that it was illegal to use the police in such cases. He held that the police should not be used at all particularly where the school children were involved. He opined that the application was pre - mature as the the Applicant had failed to first and foremost invoke the provision of Section 94 of the Civil Procedure Act, Cap 21. They ought to have sought for leave where they wanted to cause eviction of a Court Decree. He averred that was founded in the decision of Civil Appeal No 83 of 1986 "Bamburi - Versus Ali, CA"



which made this as a very serious observation. This order for eviction cannot be granted through an informal manner. The Honorable Court ought to be moved formally through filing of an application. This had not happened as yet. For these reasons the Counsel urged this Honorable Court to dismiss the application with costs.

## V. Analysis and Determination

16. I have carefully read and considered the pleadings herein and the relevant provisions of the Constitution and Statutes made by the by the Learned Counsels. This Court wishes to address itself on only two (2) issues in this ruling. These are:-
- a. Whether the Notice of Motion application dated June 16, 2022 by the Plaintiff/Applicant and the reliefs sought thereof should be granted.
  - b. Who will bear the Costs of the Application.

### Issue No a). Whether the notice of motion application dated June 16, 2022 by the plaintiff/applicant and the reliefs sought thereof should be granted

17. From the evidence adduced through filed affidavits, clearly shows that this court is only required to execute the Judgement and decree of this Court which was granted in favour of the Plaintiff/Applicants. The Court wishes to point out that its now well established that Court orders are never given in vain nor an abstract formality. They are sacrosanct. They are real and living tissues. And like any other tissues it has to be fed and watered. They breathe and require oxygen supplied in them throughout. Without it they would die. They are guarded jealously. They are there to be obeyed. Should anyone have a different view, there are legal avenues to either seek for them to be varied, set aside, reviewed or appeal against. But certainly not to disobey them. These statements are not mere metaphorical. It has been the practice of this Court to ensure that all court orders have to be implemented so that the Decree Holder may enjoy the fruits of his labour.
18. As it were, the provisions the Land Laws (Amendment) Act, No 3 of 2016 which came into operation by virtue of the Presidential Assent on August 31, 2016, brought forth radical changes to the eviction regime. One of the novel features of the Act was the introduction of a procedure that governs evictions of persons deemed to be unlawfully occupying public, community and private land.
19. I also find that the Judgement Debtor has been very uncooperative throughout the trial of this case. In the light of the cases I have referred to above and the affidavit evidence, I find that the Applicants are entitled to the orders that they are seeking from this court in terms of their prayers in the notice of motion.
20. The case of “Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others - Versus - Kenya Railways Staff Retirement benefits Scheme” The Court adopted the General Comment No 7 of the UN Commission on Human Rights and stated:-

“State Parties are obligated to use all appropriate means to protect the rights recognized in ICSECR and it recognizes that forced evictions ar prima facie violations of the right to adequate housing, and that States should be strictly prohibited in all case, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the General Comment No. 7 also elaborates an appropriate procedural protection and due process to be in place to ensure that human rights are not violated in connection with forced evictions.” The term “Forced Eviction” was defined in the context



of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines it as:-

“The permanent removal against their will of individuals, families and/or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection” .

The Court cited:- “The UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)” which have provided some guidelines to States on measures to adopt in order to ensure that development – based evictions, like the present one in this instant case, are not undertaken in contravention of the existing international human rights standards and violation of human rights. The Court held that:

“These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the rights to adequate housing for all those threatened with eviction, at all times. The Guidelines, inter alia, place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction, that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with the international human rights commitments .....the Guidelines also provided conditions to be undertaken during the evictions as follows: that there must be mandatory presence of Government officials or their representatives on site during the eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to election, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.....

21. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. I strongly hold that this must have been the rationale that informed and guided the Legislature in their wisdom to have caused the amendment into the Land Act, and inserted the provision of Section 152E of the [Land \(Amendment\) Act](#), which 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 the person a notice, of not less than three months before the date of the intended eviction. is in occupation of his or her land without
2. The notice under Sub - Section (1) shall:-



- a. In the case of a large group of persons, be published in at least two daily newspapers of national wide circulation and be displayed in not less than five strategic locations within the occupied land.
  - b. 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
  - c. Be served on the Deputy County Commissioner in Charge of the area as well as the officer Commanding the Police division of the area”.
22. Indeed, the Court fully concurs with the Learned Counsel for the Respondent based on the provision of Section 94 (1) of the *Civil Procedure Act*, Cap 21 that indeed a Court order is required before any eviction is effected. This position was upheld in the Court of Appeal case of “*Gusii Mwalimu Investment Co Limited & 2 Others Versus – Mwalimu Hotel Kisii Limited*, 1996 eKLR (Kisumu Court of Appeal) where the Court stated that:-
- “It is trite law that unless tenant consents or agrees to give up possession the land has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession”.
23. In the instant case, the Applicant though had a Decree from this Court was still to obtain the order for eviction. I have noted that it is now that the Applicant is seeking for the said reliefs - for an order directing the police to ensure peace and eviction order during the school vacation. It should be noted that this is a matter where a Judgment has been rendered and a decree issued. The only issue remaining is the enforcement of the decree which requires police supervision to ensure peace. There is no stay of execution in this matter. Therefore, it’s a case where the court could even give the order for the police to assist with the execution to ensure law and order.
24. It common ground that the Applicant has a Judgment having been delivered on July 6, 2019. Later on June 10, 2022, the Respondent who had preferred an appeal, the appeal was dismissed. Certainly, in the given circumstances, this Honorable Court perceives no justifiable reason nor good cause why, close to three (3) years todate down the line, the Applicant should continue being kept away from enjoying the fruits of his Judgment any longer.

**Issue No b Who will bear the costs of the application.**

25. The issue of costs is a discretion of the Court. Costs means an award that is granted to a party after the conclusion of any legal action, process or proceedings of any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 states that Costs follow the events. By events it means the result of the said legal action, process or proceedings of a litigation discourse.

In the instant case, the Plaintiff/Applicant has been successful in prosecuting its application and therefore, it goes without saying that costs should be borne by the Defendant/Respondent herein.

**Conclusion & Disposition**

26. The upshot of all this, on a preponderance of probability, I proceed to make the following Orders.
- a. That the notice of motion application dated June 16, 2022 has merit and is therefore allowed with costs.



- b. That an order be and is hereby granted to the Advocates of the Applicant to get police assistance from OCS, Nyali Police Station during and when executing the ruling of this court delivered on November 6, 2019 and Judgment of the Court of Appeal delivered on June 10, 2022 on LR 9288 Sec 1MN and LR 9289 Sec 1MN (CR 27062 and CR 27063) herein referred to as Nyali Integrated Academy in Nyali and give vacant possession to the Applicant.
- c. That eviction as ordered herein to be executed and/or enforced in a Humane manner and standards acceptable under any international Convention including the UN International Human Rights Convention Statutes and Section 152 E of the Land (Amendment) Act, No 3 of 2016 as follows:-
  - i. The eviction to be carried out during the day in a humane manner;
  - ii. During the 2<sup>nd</sup> and 4<sup>th</sup> week of January, 2023 being the school vacation as per the school annual calendar provided for by the Ministry of Education & Higher learning as and when the students will have been away from school.
  - iii. The Police officers assistance to be provide but they are caution not to be a specific number and to use any force or arms during the eviction process. They should not necessary be in the formal police uniform for avoidance of causing any intimidation or harassment.
- d. That an order be and is hereby made that there be a stay of execution of the Judgement of this Court delivered on November 6, 2019 and/or any other execution process for a period of Forty-Five (45) days from the date of this Ruling thereof.
- e. That the applicant shall have the costs of this application.

It is so ordered accordingly.

**RULING DELIVERED, SIGNED AT MOMBASA AND DATED THIS 18<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON. JUSTICE (MR.) L. L. NAIKUNI, JUDGE**

**ENVIROMNENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

- a. M/s. Yumnah & Mr. Omar the Court Assistants;
- b. No Appearance for the Applicant
- c. Mr. Omwenga Advocates for the Respondents

