



Mbarak v Mwachibua & 32 others (Environment & Land Miscellaneous Case E052 of 2024) [2025] KEELC 1015 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E052 OF 2024**

**SM KIBUNJA, J
MARCH 5, 2025**

BETWEEN

ABBAS MOHAMED MBARAK APPLICANT

AND

JOEL MWACHIBUA & 32 OTHERS RESPONDENT

RULING

[Notice Of Motion Dated 4th July 2024]

1. The applicant has moved the court under sections 152A, 152B and 152E of the Land Laws (Amendment) Act, 2016, sections 1A, 1B, & 3A of *Civil Procedure Act* chapter 21 of Laws of Kenya and Order 51 of the Civil Procedure Rules, seeking for orders;
 - a. Spent.
 - b. That the Officer in charge of Kiembeni Police Station through Sub-County Commander be directed to provide assistance in the eviction of the trespassers, the Respondents herein, and the removal of encroachments on the Applicant's property.
 - c. That the Respondent be ordered to vacate the premises immediately and cease all further encroachment on the Applicant's property.

The application is supported by the fifteen (15) grounds on its face marked (1) to (15) and supported by the affidavit of Abbas Mohamed Mbarak, sworn on 4th July 2024, inter alia deposing that the late Mohamed Mbarak is the father of the applicant, and is the registered owner of L.R 313/II/MN, situated at Utange Mombasa; that upon the death of his father on 28th December 2002, the applicant obtained a grant of letters of admission on 27th February 2013, that was confirmed on 27th February 2014; that sometime around 12th August 2009, some unknown people fraudulently transferred and registered the title of the suit land to one Mohamed Hassan Mwarumba who acted as their agent; that



the National Land Commission had determined that the late Mohamed Mbarak and Kaim Abdalla are the rightful legal and beneficial owners of the suit property; that in ELCMISC No. 16 of 2017, the court determined that the letters of administration issued to the said Mohamed Hassan Mwarumba on 19th September 2013 were revoked, and further that the legal representatives of the late Mohamed Mbarak and Kaim Abdalla were the rightful owners of the suit property; that the court therefore upheld the determination by the National Land Commission; that the applicant arranged for a meeting with the respondents through the area chief, and offered a chance to resolve their dispute amicably; that the respondents have interfered with the suit property by trespassing and erecting permanent structures; that the applicant had issued eviction notices giving them 90 days to vacate the suit property; that despite the eviction notices, the respondents have refused to vacate and have failed to seek reliefs from this court under section 152 F (1) of the Land Laws (Amendment) Act 2016; that 2 years had passed since the ruling of the court in ELCMISC No. 16 of 2017 and no appeal has been preferred; that the continued trespass is a violation of applicant's constitutional rights and fundamental freedoms and amounts to intermeddling under section 45 of the Law of Succession Act.

2. The application is opposed by the respondents, through the replying affidavit of Hassan Mohamed, the 7th respondent, sworn on the 23rd July 2024, inter alia deposing that the orders prayed for cannot be sought in a miscellaneous application, but through a plaint as provided under Order 3 Rule 1 of the Civil Procedure Rules, and section 19 of the Civil Procedure Act; that the applicant has not adhered to the provisions of sections 152 (A) to 152 (H) of the Land Act; that they have been advised by their advocates that eviction orders can only be issued after a substantive suit has been filed, heard and determined, and relied on the case of Lynette Nasimiyu Wafula versus David Mwangi & 4 others (2022) eKLR; that ruling in ELCMISC No. 16 of 2017 did not uphold the decision of the National Land Commission, but focussed on leave to substitute the exparte applicant; that the applicant is before the court with unclean hands.
3. The applicant filed a further affidavit sworn by him on 23rd October 2024, inter alia reiterated his depositions in the supporting affidavit and added that some unknown people transferred title to the suit property to be in Mohamed Hassan Mwarumba 1/3 share, and Hezekiel Karal 2/3 share; that they took steps by protesting to the Land Registrar, and even wrote to the police; that sometime in 2011 the advocates who conducted the transfer on behalf of the said Mohamed and Hezekiel realized that they were misled and returned the titles; that in 2015 one Tawkeel Said Mohamed; a relative of the applicant requested the National Land Commission to mediate the dispute which they agreed and gave a determination on 3rd April 2017 in favour of the heirs of Kaim Abdalla Kaim, Saleh Bin Abdalla, Munira Binti Abdalla, Ngomeni Binti Abdalla and Mohamed Mbarak; that the late Mohamed Hassan Mwarumba was dissatisfied with the decision of the National Land Commission and sought judicial review against the decision, and filed ELCMISC No. 16 of 2017; that in the said suit the court held that Mr. Mohamed Hassan did not have locus to file Judicial Review proceedings and recognized the representatives of Mohamed Mbarak and Kaim Abdalla as the rightful owners of the suit property.
4. Pursuant to the directions issued on the 22nd July 2024 and 24th October 2024, the learned counsel for the applicant and the respondents filed their submissions on 23rd October 2024 and 17th January 2025 respectively, which the court has considered.
5. The issues for determinations by the court are as follows:
 - a. Whether the applicant ha properly moved the court.
 - b. Whether the applicant has met the threshold for the orders sought to be issued.
 - c. Who bears the costs?



6. The court has carefully considered the grounds on the application, the affidavit evidence tendered by both parties, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following findings:

- a. Order 4 Rule 1(1)(c) of the Civil Procedure Rules provides inter alia that “the plaint shall contain”....“the name, description and place of residence of the defendant, so far as can be ascertained.” The heading and body of the notice of motion through which this proceedings was commenced disclosed the name of only one respondent, Joel Mwachibua.” The other respondents are only referred to as “32 OTHERS.” The pleadings filed does not therefore disclose the names, descriptions and places of residence for the 32 other respondents. in respect of the 1st respondent, only his name is disclosed, but his description and place of residence is not particularized. The pleadings therefore contravenes Order 4 Rule 1(1)(c) of Civil Procedure Rules, and the court would be at liberty to strike it out with costs.
- b. The court has however seen the names of the other respondents on the eviction notice dated 1st October 2023, attached to the supporting affidavit and marked “AMM-5”. They will hereinafter be referred to as shown against their names:

Masumbuku Kazungu Randu 2Nd Respondent
Safari Mramba 3Rd Respondent
Kabibi Kirao 4Th Respondent
Lela Nassir Mohamed 5Th Respondent
Abert Ndune Mwamberi 6Th Respondent
Hassan Mohamed 7Th Respondent
Ali Khamis 8Th Respondent
Said Mohamed Omar 9Th Respondent
Wilson Ruwa 10Th Respondent
Dena Mwero Nyanje 11Th Respondent
Rehema Kirau 12Th Respondent
Johnson Mtana 13Th Respondent
Halima Ali 14Th Respondent
Aisha Ramadhan 15Th Respondent
Florence Kadzo 16Th Respondent
Mwanajuma Sirya 17Th Respondent
Kabibi Kirau 18Th Respondent
Anita Zena 19Th Respondent
Richard Randu 20Th Respondent
Kibwana Juma Abdalla 21St Respondent
Jilo Dowo Hiribae 22Nd Respondent



Islam Idha	23 Rd Respondent
Mama Islam	24 Th Respondent
Alex Kinyua	25 Th Respondent
Mwandaza Kafwani Mgute	26 Th Respondent
Pauline Mwendu Maundu	27 Th Respondent
Joseph Manjewakanjiriwe	28 Th Respondent
Khalifa Mohamed	29 Th Respondent
Martha Moyake Sindani	30 Th Respondent
Gladys Mbeyu Mwachiru	31 St Respondent
Saumu Ruwa Gona	32 Nd Respondent
George Aswani	33 Rd Respondent

c. This is a dispute between the applicant and the respondents and from the affidavit evidence presented, it is apparent the ownership of the parcel 313/11/MN, suit property, is in dispute. The applicant has attached to the supporting affidavit a certificate of postal search, showing ownership of the land as of 19th December 2023, was as follows:

- i. Kaim Abdalla Kaim – 1/3 share.
- ii. Saleh Bin Abdalla, Munira Binti Abdulla & Ngomeni Binti Abdulla – 1/3 share.
- iii. Mohamed Mbarak – 1/3 share.

The applicant has also attached a copy of certificate of confirmation of grant dated 27th February 2014 issued in Mombasa HC Succession Cause No. 518 of 2011 showing that Abbas Mohamed Mbarak, the applicant, is the legal representative of the estate of the late Mohamed Mbarak, whose interest in the suit property is 1/3 share. That the other owners of the suit property appear not to have been involved in the instant application, and no explanation has been tendered. From the contents of the National Land Commission decision dated 3rd April 2017, attached to the applicant’s further affidavit and marked “AMM-8” the other joint owners of the suit property are deceased. In the said decision, the Commission had determined as follows:

“That the County Surveyor moves to the ground together with the National Land Commission and heirs of Kaim Abdalla Kaim, Saleh Bin Abdalla, Munira Binti Abdalla and Ngomeni Binti Abdalla and Mohamed Mbarak and subdivide the entire parcel of land into three equal portions to be registered and owned through succession as divided shares among the heirs of each of the proprietors holding the title as registered owners of 1/3 undivided shares as provided for by the certificate of postal search of 21st October 2016 duly signed by the Registrar of Titles of Mombasa Land Registry.”

Even though there is no confirmation whether the Commission’s determination was effected, it is disconcerting that the applicant, whose interest must be taken to be over only undivided 1/3 share of the suit



property, did not ask the other legal representatives of the proprietors of the other two 1/3 shares to join him in the application.

- d. Registration as proprietors of a land confers one with rights and privileges over the same as set out under sections 24 and 25 of the [Land Registration Act](#) No. 3 of 2012. Without registration as proprietor, ones rights and privileges over the registered land are limited, in view of the above provisions of the law. Should the respondents be of the belief that they have legal or beneficial interests over the suit property or part of it, it is upon them to seek legal advice on how to actualise it. And should the applicant and or other legal representatives of the joint registered proprietors belief that the respondents are unlawfully on the suit property, they too should take legal advice on how to move the court for the desired orders. In the case of Lynette Nasimiyu Wafula versus David Mwangi & 4 others (2022) eKLR, cited by the respondents, the court was of the opinion that a normal suit should be filed to obtain eviction orders. As pointed out above, the National Land Commission has already involved in efforts to resolve the dispute on ownership as evinced in its decision of 3rd April 2017. It cannot be gainsaid, that the respondents were not part of that proceedings. It is worth noting that the suit property was and still is private land and not public land. I agree with the court's view in the case of Lynette Nasimiyu Wafula versus David Mwangi & 4 others [supra', especially in situations like the one before the court where the available facts shows ownership is disputed, and the applicant's entitlement to the suit property is only a 1/3 share.
- e. The applicant has submitted that he has followed the procedure in section 152 E of the [Land Act](#), and that he has also proved that service of the eviction notice upon the respondents was done, and the respondents have not disputed. In the case of Solome Naliaka Wabwile versus Alfred Okumu Musinaka [2022] KEELC 1200 (KLR) the court held:

“ 13. It must be remembered that under the [Land Act](#) 2012, the eviction of persons from private land can take either of the following routes:

1. By the land owner issuing a notice to the person in occupation of his land without consent to vacate within 3 months. Such notice is issued under section 152 E of the [Land Act](#). The person served with such a notice has a recourse under Section 152 F to apply to the Court for relief. The Court may confirm the notice and order the person to vacate or it may vary, alter, suspend or make additions to the notice as it deems equitable and just.
2. By the land owner filing a suit for the eviction of a person who is occupying his land without consent. The Court, after hearing both the land owner and the occupier of the land may issue an order for eviction of the person who is unlawfully occupying the land. That is the route that the defendant herein took by his Counter – Claim. Section 152 A of the [Land Act](#) provides that no person shall unlawfully occupy private, community or public land.

Whichever route the owner of the land takes in evicting persons who are unlawfully occupying his land, there are mandatory procedures provided under Section 152 G (a)



to (i) of the Land Act which must be adhered to during the eviction process. They include proper identification of those carrying out the eviction, presentation of the eviction order, respect of the dignity, right to life and security of those affected, presence of government officials etc. Those are the provisions that I had in mind in the Judgment delivered on 27th May 2020. And I believe those must be the provisions which the plaintiff has in mind when she seeks compliance with the law during the eviction process. As of now, however, no eviction has taken place and so it is premature for the plaintiff to allege that the defendant has conducted himself in an irregular or unlawful manner.”

- f. In the case of Julius L Marten v Caleb Arap Rotich [2021] KEELC 195 (KLR) the court held that:

“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. Section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. 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.”

It would appear that it is safe to follow the route of issuing and serving eviction notices before effecting evictions in clear instances where the question of ownership is not disputed. However, where ownership is disputed, and or in situations where it is apparent that those sought to be evicted are challenging the title, then a suit should be filed first to determine those questions before orders of eviction can be issued.

- g. In the case of Benson Wekesa Milimo v National Land Commission, Board of Management Sitatunga Secondary School & Christopher Khamwana [2021] KECA 970 (KLR), the Court of Appeal held that the National Land Commission violated Mr. Benson’s right to be heard, and issued certiorari and prohibition orders against the Commission’s decision to evict the him. Though the suit property in that case was public land, I am of the view that in the same spirit, it is in the interest of justice that the respondents should be heard first, as there is a question of ownership of the suit property. Should the applicant and or the other legal representatives of the joint proprietors of the suit property fail to initiate a suit, then the respondents may consider doing so pursuant to section 152 F of the Land Act. No costs were requested and therefore there shall be no order as to costs.
- h. Under section 27 of Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the events unless where the court for reasonable cause directs differently. As the dispute in this matter



is yet to be resolved, I am of the view that it will be fair and just for each party to bear their own costs.

7. From the foregoing conclusions, the court finds and orders as follows:

- a. That the notice of motion dated 4th July 2024 is for the reasons set out above rejected and struck out.
- b. That each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF MARCH 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicant : M/s Mukalenso for Wangila

Respondents : M/s Mubasu for Onyango

Shitemi – Court Assistant.

