



REPUBLIC OF KENYA



S/O & 22 others v Kanyi & another (Environment & Land Case E065 of 2024) [2025] KEELC 5200 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E065 OF 2024**

LL NAIKUNI, J

JULY 4, 2025

BETWEEN

WINNIE NJERI KAGIRI (SUING FOR AND ON BEHALF OF THE ESTATE OF SAMUEL MBUGUA GITHERE S/O APPLICANT

AND

MARGARET MARINGA 1ST PLAINTIFF
HELLEN OMITI MACHORA 2ND PLAINTIFF
SAMUEL MUREITHI MUTUOTA 3RD PLAINTIFF
PADDY KAMAU NG'ANG'A 4TH PLAINTIFF
ELIZABETH NJUGUINI WANYOIKE 5TH PLAINTIFF
MARY WANGECI ALI 6TH PLAINTIFF
NABILA KHAN 7TH PLAINTIFF
DENNIS MULILA 8TH PLAINTIFF
JANE WERU 9TH PLAINTIFF
PHILOMENA WAMBUI 10TH PLAINTIFF
CAROLINE OMITI 11TH PLAINTIFF
MIRRIAM NJENGA 12TH PLAINTIFF
JOSEPH NJENGA 13TH PLAINTIFF
PATRICK WAGURA NDUNG'U 14TH PLAINTIFF
LUCKY SAMUEL MULWA 15TH PLAINTIFF
KENNETH MWIRIGI 16TH PLAINTIFF



JULIA K SAMSON 17TH PLAINTIFF
KIMBLEY ASASO 18TH PLAINTIFF
RUKIA ABDULREHMAN MZEE 19TH PLAINTIFF
JULIA MUMBI NJENGA 20TH PLAINTIFF
CORNELIUS KIPLAGAT 21ST PLAINTIFF
ABDI MOHAMED DAHIR 22ND PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT
MURINGI FARM COMPANY LIMITED SIDIAN BANK 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court was called to make a determination of the Notice of Motion application dated 24th July, 2024. It was by Meena B. Patel, the 1st Defendant/Applicant herein under the provisions of Order 51 Rule 1, Order 45 Rule 2(1), Order 10 Rule 11 of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A, 63(e) and 80 (a), (b) of the Civil Procedure Act Cap. 21, the Laws of Kenya and any other enabling provisions of the law.
2. Despite of service of the Application, it never elicited any responses. Ideally, then the application was uncontroverted nor opposed. Nonetheless, the Honourable court will still proceed to make the determination on its own merit accordingly.

II. The 1st Defendant/Applicant case

3. The 1st Defendant/Applicant sought for the following orders: -
 - a. Spent.
 - b. That the Honourable Court be pleased to vary, Review and set aside the orders issued ex – parte on 15th July, 2024 and to vacate the same as they have automatically lapsed for failure to effect service upon the 1st Defendant/ Applicant within the requisite mandatory period of 3 days from the date of issue
 - c. That the Honourable Court to be pleased to issue an order directing the OCS Nyali Police Station to effect the removal of all the security guards deployed to the suit property and the people who were in illegal occupation of the suit property CR NO. 37967 and to order the Applicant/ 1st Defendant to immediately occupy the same pending hearing and determination of this suit.
 - d. That the Honourable Court be pleased to order the power of attorney exhibited in this matter dated 5th June, 2024 annexed to the supporting affidavit sworn by the Applicant to be investigated by the DCI Mombasa together with all other documents being used by the Plaintiff to claim ownership of Plot No. CR 37967.



- e. That the Honourable Court be pleased to order the invasion of the suit property by the Plaintiff and her agents, employees and servants to be unlawful.
 - f. That Costs of this Application be provided for.
4. The application by the Applicant was premised on the grounds, the testimonial facts on the face of the application and further supported by the 16 Paragraphed annexed affidavit of Meena B. Patel the 1st Defendant herein. The Deponent averred that:
- a. The Deponent came across a court order from the DCI's officer in Mombasa on 22nd July, 2024 as there was a report made at the Nyali Police regarding the same disputed land No. CR 37967 where statements had been recorded. Annexed in the affidavit and marked as 'MBP - 1', the orders marked as 'MBP - 2' the statements and "MBP - 3" which were self - explanatory.
 - b. The Deponent occupied Plot No. CR 37967 after a lawful transfer to the Deponent on 13th September, 2024, the Deponent therefore annexed the lease title marked as 'MBP - 4' and the transfer marked as 'MBP - 5' which were self-explanatory.
 - c. On 9th January, 2023, she placed a restriction to the suit property after learning that several people including the Plaintiff were sending brokers to view the property where the Deponent later learnt that they had made a report at Nyali Police Station with fictitious ownership documents of the Deponent's land. Annexed and marked as 'MBP - 6' and a search marked as "MBP - 7" respectively.
 - d. The Deponent had been paying the County Government of Mombasa Land Rates payments from the inception of acquiring the land to date. Annexed in the affidavit the rate payments marked as "MBP - 8", "MBP - 9", "MBP - 10" and "MBP - 12" respectively.
 - e. The Deponent also received a letter from the Law firm of Messrs. Omondi Waweru and Co Advocates dated 4th October, 2004 confirming that the Deponent was the bona fide owner of the suit land. Annexed in the affidavit was the letter marked as "MBP - 13".
 - f. The Plaintiff had indeed forged documents purporting to be the owner of the Deponent's property among other people who had since recorded statements at the DCI office. Annexed in the affidavit were some of the statements made marked as "MBP - 14".
 - g. Among the documents which were in the Deponent's possession was a letter dated 17th January, 1990 written by S.M. Githere for loss of title deeds (100) in number in Kajiado Ngong and Nakuru not Mombasa. Annexed in the affidavit marked as "MBP - 15".
 - h. According to the Deponent he had also found a Power of Attorney which was not attested whose format was unlawful and illegal and not registered where the Plaintiff's name was appearing in it. Annexed and marked as "MBP - 16" which was under investigation.
 - i. In the Deponent also had in possession a grant which was questionable for someone who died on 7th February, 1997 and a grant issued to the Plaintiff as the sole beneficiary issued at Kiambu on 12th April, 2022. Annexed in the affidavit is the grant marked MBP 17 and a purported list of parcels of land by a court order given on 20th February, 2023 without the names of the owners marked as "MBP - 18" and where the land in dispute No. 3239 CR 37967/5 was not among the list.
 - j. All these documents exhibited in this affidavit belonging to the Plaintiff were under scrutiny by the DCI offices in Mombasa.



- k. It will be for the interest of justice that all parties should be heard and a ruling be made as the Plaintiff had no prima facie case with probability of success where the status quo orders should be provided to the Deponent.
- l. The Orders issued ex parte should vacate to exist or should be set aside as the Plaintiff was not the owner of the land in dispute, in - fact people who had been put in the land were brokers and they should be ordered removed by the orders from this Court.
- m. Ex - Parte orders should be served within three days from the date of issue and failure to which they lapse. Annexed in the affidavit similar orders issued by the trial Court on 17th October, 2022 marked as “MBP – 19” which was self-explanatory and some photos of the suit property marked as “MBP – 20”.
- n. The Deponent therefore believed that this Court will provide justice to them.

III. Submissions

- 5. On 17th December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24th July, 2024 be disposed of by way of written submissions. Pursuant to that, the Honourable Court was only able to access the ones by the 1st Defendant/ Applicant. Eventually, the Honourable Court delivered on 4th July, 2025 accordingly.

A. The Written Submissions by the 1st Defendant/Applicant

- 6. The 1st Defendant/Applicant in her individual capacity filed her written submissions dated 15th October, 2024 where the Applicant submitted that the 1st Defendant sought the afore – stated orders. The Applicant submitted that her application was not defended by the Plaintiff in default to file her replying affidavit though served through the email of her advocate on record. The Plaintiff to date had not served him with the suit papers, she came to know about this suit when she made a visit at the DCIO’s office headquarters Mombasa to record her statements following her report made at the Nyali Police Station vide OB No. 44/24/06/2024.
- 7. The Applicant reiterated the contents of her supporting affidavit from paragraph 1 to 16 and she relied on the same. The Plaintiff had also forged a power of attorney and other documents in this matter which she also needed it to be investigated. Since his application was not defended she therefore prayed for it to be granted as prayed.

IV. Analysis and Determination

- 8. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following issues for determination.
 - a. Whether the 1st Defendant/Applicant has made out a case for the varying, reviewing and setting aside of ex part injunctive orders issued on 15th July, 2024 and to vacate the same as they have automatically lapsed for failure to effect service upon the 1st Defendant/ Applicant within the requisite mandatory period of 3 days from the date of issue.
 - b. Whether the prayers numbers 3, 4 and 5 in the Notice of Motion application dated 24th July, 2024 can be issued in the interim.



- c. Who will bear the Costs of Notice of Motion application 24th July, 2024.

Issue No. a). Whether the 1st Defendant/Applicant has made out a case for the varying, reviewing and setting aside of ex part injunctive orders issued on 15th July, 2024 and to vacate the same as they have automatically lapsed for failure to effect service upon the 1st Defendant/Applicant within the requisite mandatory period of 3 days from the date of issue.

9. Under this sub – title, the main issue here is whether the Court can vary, review and set aside its orders of the 15th July, 2024 which were issued in the interim. It is evident that the 1st Defendant/Applicant is currently in possession of the suit property on which she has cultivated some wheat. It is also evident from the material on record that she was the one in possession at the time the Plaintiffs/ Respondents' application for interim orders was determined.
10. Thus, the Honourable Court is of the opinion that a party who is already in possession of disputed property cannot effectively be restrained from entering, using or occupying the land. However, such person can be restrained from developing, transferring, leasing, charging, letting, assigning or dealing with the land in an adverse manner pending the hearing and determination of the ownership dispute. It is apparent from the application that the 1st Defendant/Applicant's fear is that she might be evicted from the suit property before the hearing and determination of the pending suit. Hence, this Court is satisfied that the 1st Defendant/Applicant has made out a case for review or variation of the interim injunction made on 15th July, 2024 to allow her continued possession pending the hearing and determination of the suit.
11. The court is, however, not inclined to replace the interim injunction entirely with a status quo order as suggested by the 1st Defendant/Applicant. The court shall simply vary the interim injunction in order to preserve the suit property and allow the 1st Defendant/Applicant to maintain possession. She shall, however, not be at liberty to construct any structures or undertake permanent developments thereon.
12. The upshot of forgoing is that Prayer number 2 of the Notice of Motion application dated 24th July, 2024 is found to have merit and is herein allowed.

Issue No. b). Whether the prayers numbers 3, 4 and 5 in the Notice of Motion application dated 24th July, 2024 can be issued in the interim.

13. Under this sub – title we shall examine whether the 3rd, 4th and 5th Prayer in the Notice of Motion application dated 24th July, 2024 can be issued in the interim without subjecting the evidence on record to a hearing. I have noted that the 1st Defendant has filed with the Court documents to show that she is in current possession of the suit property and that's she occupied Plot No. CR 37967 after a lawful transfer to the Applicant on 13th September, 2024. On 9th January, 2023, she placed a restriction to the suit property after learning that several people including the Plaintiff were sending brokers to view the property where the Applicant later learnt that they had made a report at Nyali Police Station with fictitious ownership documents of the Applicant's land.
14. The Applicant had been paying the county government of Mombasa Land Rates payments from the inception of acquiring the land to date. In this regard, I find prayer 3 can be granted in the interim which prayer I grant herein.
15. On prayer for on the investigation of the Power of Attorney by the DCI, in this case, the Plaintiffs are seeking the determination of the Honourable Court on the ownership of the suit property. The



1st Defendant has denied any knowledge of the alleged ownership by the Plaintiffs. The 1st Defendant now prays for an order directing the investigation of the Power of Attorney by the DCI.

16. The provision of Section 107, 108 and 109 of the Evidence Act, Cap. 80 deals with the burden of proof in any case, and it is clear that the same lies with the party who desires any court to give judgment as to any legal right or liability, and it is for that party to show that the fact which he alleges his case depends upon exist. This is known as the legal burden. In the Halsbury's Law of England 4th edition, volume 17 at paragraph 13 and 14 it is stated:

“The legal burden is the burden of proof which remains constant throughout a trial, it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action, thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegations, the burden lies upon the party for whom substantious of that particular allegation is an essential of his case. There may therefore be separate burden in a case with separate issues.”

17. As the issues herein are highly contested, the legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. It is therefore upto each party to this case to adduce evidence in support of their respective cases. In our legal system, which is adversarial, the court performs the role of an umpire, it does not have an inquisitorial function. It is therefore my view that the court should not descend into the arena of conflict by looking for evidence for parties in respect of contested issues. That ought to be left to the parties themselves. While appreciating that the jurisdiction of the court is unlimited as what and when orders may be issued, the court must exercise caution especially when the orders sought may end up being an intrusion of another individual's constitutionally guaranteed rights and freedoms. That would be a violation of an individual's right to bodily integrity and privacy. However, if the orders sought are eminently needed to establish the truth and reach a just conclusion in the matter absent of any other form of evidence, the party seeking the courts assistance must lay a firm legal and factual, foundation for his/ her application to be granted. In the instant case however, I am not persuaded that the 1st Defendant has laid a firm and factual basis to warrant the issuance of the orders sought.
18. My view is that besides what I have stated hereinabove, the 1st defendant also has the liberty of ascertaining the correct factual position from the said directorate which is an agency mandated by law to carry out investigations without necessarily an order from the court. Therefore prayer 4 fails.
19. Prayer 5 is a permanent order which can only be issued after evidence has been adduced and not on the interim as the 1st Defendant has not adduced any evidence to grant the same in the interim. Being that land matters are very sensitive is will be safe to determine such a prayer in finality after parties are heard by the Court and the Court has the pleasure of examining evidence from all the parties. Therefore prayer 5 also fails.
20. In the end the Notice of Motion application dated 24th July, 2024 is allowed partially with respect to strictly prayers numbers 2 and 3.

Issue No. c). Who will bear the Costs of Notice of Motion application 24th July, 2024.

21. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow



the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

22. I have well stated in previous precedence and most especially in “*Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased)* [2022] eKLR”, that:-

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

23. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court not to award any costs.

V. Conclusion and Disposition

24. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and the balance of convenience. Clearly, the 1st Defendant/Applicant has a case against the Plaintiffs/Respondents.
25. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 24th July, 2024 be and is hereby found to be partially merited and the same is allowed with respect to prayers No. 2 and 3 without costs.
 - b. That an order do and is hereby issued varying, reviewing and setting aside the orders issued ex – parte on 15th July, 2024 by this Honourable Court and to vacate the same as they have automatically lapsed for failure to effect service upon the 1st Defendant/Applicant within the requisite mandatory period of 3 days from the date of issue.
 - c. That an order do and is hereby issued directing the OCS Nyali Police Station to effect the removal of all the security guards deployed to the suit property and the people who were in illegal occupation of the suit property CR NO. 37967 and to order the 1st Defendant/Applicant to immediately occupy the same pending hearing and determination of this suit.



- d. That for expediency sake, there be a mention of the matter on 24th July, 2025 before Justice Hon. Olola or any other Judge sitting at the ELC Mombasa for further directions.
- e. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF JULY 2025.

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HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiffs.
- c. No appearance for the 1st Defendant.

