



Ochwa (Suing as administrator ad litem for the Estate of Mishael Ochwa Ojwang' alias Michael Ochwa Ojwang - Deceased) v Board of Management Minyenya Primary School & 6 others (Environment & Land Case 350 of 2017) [2023] KEELC 860 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 350 OF 2017
MN KULLOW, J
FEBRUARY 8, 2023**

BETWEEN

PATRICK OKOTH OCHWA (SUING AS ADMINISTRATOR AD LITEM FOR THE ESTATE OF MISHAEL OCHWA OJWANG' ALIAS MICHAEL OCHWA OJWANG - DECEASED) PLAINTIFF

AND

**BOARD OF MANAGEMENT MINYENYA PRIMARY SCHOOL 1ST
DEFENDANT**

**BOARD OF MANAGEMENT MINYENYA MIXED SECONDARY
SCHOOL 2ND DEFENDANT**

MINISTRY OF EDUCATION 3RD DEFENDANT

MIGORI COUNTY GOVERNMENT 4TH DEFENDANT

REGISTAR OF LAND 5TH DEFENDANT

DIRECTOR OF SURVEY 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. The Plaintiff/ Applicant herein filed a Chamber Summons dated 4th October, 2022, seeking the following orders: -
 - a. Spent.



- b. That the 1st and 2nd Defendants, their representatives, agents, servants and/or employees or whosoever acting on their behalf be evicted from Land Reference Number Kamagambo/ Kamwango/ 597 forthwith.
 - c. That the Honourable Court be pleased to order the Deputy County Commissioner and Sub-County Police Commander Rongo Sub-County to give security to the Plaintiff, auctioneer and/or court bailiff while executing the warrants of eviction.
 - d. That the costs of this Application be provided for.
2. The Application is premised on the 5 grounds on its face and on the Supporting Affidavit by Lenin Owuor Awino, an Advocate having conduct of the matter on behalf of the Plaintiff/ Applicant sworn on even date and a Supplementary Affidavit sworn on 16/12/2022.
 3. He contends that judgment was entered against the 1st and 2nd Defendants on the 17/09/2019; wherein the 1st and 2nd Defendants were directed to pull down any structures from the suit parcel and in default they would be forcefully evicted upon the expiry of the statutory notices. However, despite being served with the requisite eviction notices to vacate the suit land within 90 days; they have failed, neglected and refused to give vacant possession and they continue to be in occupation in clear breach and violation of the court judgment.
 4. It is his claim that despite judgment having been entered in favor of the Applicant, the 1st and 2nd defendants have refused to vacate the suit land and are still in actual occupation and use of the said land hence the need for warrants of eviction as sought in the instant Application. He further claims that as a result of the Defendants continued illegal and unlawful occupation, not only has his plans to develop the suit property have been hampered but the same also amounts to a violation of his proprietary rights.
 5. He is apprehensive that the Defendants shall continue to occupy the suit land and/or destroy the same and thus urged the court to grant the orders sought in the interest of justice.
 6. The Application was opposed, the 1st and 2nd Respondents filed a Replying Affidavit sworn by one Pamela A. Omindi on the 28.11.2022. She avers that the 2nd Respondent is a public secondary school; which is established, owned and operated by the government, under the supervision of the 3rd Respondent. Thus, being a public school, all the movable and immovable properties are acquired and owned by the government of Kenya for the benefit of the school.
 7. She further stated that pursuant to the County Surveyor's visit of the suit property on the 01/12/2017; it was established that the 1st and 2nd Defendants have encroached into a portion of the suit parcel measuring approx. 4 Acres and she confirmed that they have constructed permanent buildings that are currently being utilized by the 2nd Respondent's school as dormitories, teachers' quarters and ablution block.
 8. It is her contention that they have been actively engaging various government departments with a view of commencing the process of compulsory acquisition, she annexed various letters diversely dated in support of the said averments.
 9. Consequently, she urged the court to exercise its discretion in favor of the 1st and 2nd Respondents in accordance with the terms of section 152F (2) (b), (c) and (d) of the Land Act, in view of the public interest involved.
 10. The Application was canvassed by way of written submissions. However, I have noted that only the 1st and 2nd Respondents filed their submissions together with authorities which I have read and taken into account in arriving at my decision. Be that as it may, I will proceed to render my ruling as hereunder;



11. The sole issue for determination before me is whether the Chamber Summons Application dated 4th October, 2022 is merited.
12. The Applicant herein contends that judgment having been issued in the matter in his favor; the 1st and 2nd Defendants/ Respondents were/ are duty bound to vacate the said suit parcel as per the terms of such judgment and decree within the requisite statutory period issued. It is his claim that the 1st and 2nd Respondents have failed, neglected and refused to vacate the subject land in blatant breach and violation of the terms of the judgment and decree issued on the 17/09/2019 and their continued occupation thereon is detrimental to him and his development plans hence the instant Application to forcefully evict him. He annexed copies of the various notices duly served upon the Respondents to that effect.
13. The Respondent on the other hand urged the court to exercise its discretion in accordance with the provisions of section 152F of the *Land Act*, by suspending the 90days period of the eviction notice, pending the conclusion of the compulsory acquisition process. Even though she admitted that the 2nd Respondent had indeed encroached into a portion of the suit land; It is her contention that given the public interest involved, they are in the process of commencing the compulsory acquisition of the encroached portion with a view of acquiring the same and compensating the Applicant accordingly. She maintained that the 2nd Respondent being a public secondary school governed by the provisions of section 43(1) (a) of the *Basic Education Act*; all its movable and immovable assets are acquired and wholly owned by the government of Kenya for the benefit of the school. Thus by ordering for their eviction, they stand to suffer irreparable loss and damage.
14. I have looked at the Application, the response thereto and the submissions in totality. It is not in dispute that the 2nd Respondent, which is a public secondary school is still in occupation of a portion of the suit land measuring 4Acres. It is also not in dispute that there are permanent structures on the suit land, which the Respondents contend that are being used as dormitories, teachers' quarters and ablution block. I have considered the explanation tendered and the evidence adduced by the Respondents and I am persuaded with the same. Further, it is evident from the various letters annexed to the Replying Affidavit from the Ministry of Education and the various government departments; that they are in the process of commencing the compulsory acquisition of the said portion of the suit land. I have also taken into account that the 2nd Respondent is a Public Secondary School that has been in existence for more than 10 years and the effect that an order of eviction may occasion to the students undertaking their studies and their access to basic education as enshrined in Article 53 (1) (b) and 55 of the *Constitution*.
15. In the interest of justice, I am inclined to invoke section 152F (2) (c) of the *Land Act* and suspend the strict timelines outlined in the said Notices within which to comply. This is for purposes of giving the Respondents an opportunity to conclude the compulsory acquisition process. Section 152F provides as follows: -

“ 152F. Application to Court for relief.

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;
- (d) order for compensation."

16. I will therefore proceed to suspend the Eviction Notice for the reason that the 2nd Respondent is a public secondary school and the permanent structures on the portion in dispute are for the benefit of by both the students and staff of the 2nd Respondent. Further, I do acknowledge that there is an ongoing compulsory acquisition process which is yet to be concluded. This court takes judicial notice of the long bureaucratic process involved in the compulsory acquisition hence the need to suspend the said Notice for a definite period to allow its conclusion.
17. However, I do also note that the decree in question was issued in 2019 and there being no appeal lodged against the same; the Applicant has an undeniable right to enjoy the fruits of the judgment issued in his favor. I will therefore proceed to exercise my discretion in favor of the Respondent but with strict conditions as to timelines to ensure the expeditious conclusion of the process and the matter herein.

Conclusion

18. The upshot of the foregoing analysis is that the Plaintiff/ Applicant's Chamber Summons Application dated 4th October, 2022 is partially merited. I will proceed to issue the following orders: -
- I. The Notice of Eviction issued by the Applicant be and is hereby Suspended for a period of 120 days from the date of this ruling, to enable the Respondents to conclude the process of compulsory acquisition.
 - II. In default, the Notice so suspended is reinstated automatically and eviction to issue.
 - III. Further to Order (II) above, the Deputy County Commissioner and Sub-County Police Commander Rongo Sub-County are hereby ordered to give security to the Plaintiff, auctioneer and/or court bailiff during the execution process of the warrants of eviction.
 - IV. Each party to bear their own costs of the Application.
- It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Awino & Mr. Ochwa for the Plaintiff/ Applicant

Ms. Opiyo for the Respondent

Court Assistant - Tom Maurice/Victor

