



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 140 OF 2011

IN THE MATTER OF THE ESTATE OF MUNGANIA

M'MWONGERA (DECEASED)

M'NKANATA

M'MWONGERA.....

.....PETITIONER

VERSUS

JACOB

KINYURU

M'MUNGANIA.....OBJECTOR

RULING

1. For determination is the Notice of Motion dated 21/12/2023 seeking that:

1. Spent

2. This honourable court be pleased to order the eviction of the objector/respondent, his agents, servants, assigns and/or family member or anyone else in occupation of the Applicant's land being L.P

No. Abothuguchi/Katheri/5827 in execution of the grant and the OCS Githongo police station to provide security and be authorized to supervise the eviction. ALTERNATIVELY, the objector be ordered to vacate by themselves within the next 45 days.

3. This honourable court be pleased to lift/remove inhibitions/restrictions/cautions placed over parcel no. ABOTHUGUCHI/KATHERI/5827.
 4. Costs of this application be borne by the objector/respondent.
2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by M’Nkanata M’Mwongera, the applicant herein, on even date. He averred that after the issuance of the grant in 2016, he went ahead to subdivide the land, but the objector has refused to vacate the land so that the grant can be fully effectuated. He discovered that the objector has placed caution upon the land, and it is in the interest of justice that the application is allowed.
3. The objector herein swore a replying affidavit on 20/2/2024 in opposition to the application. He averred that

they have lived on the suit land their entire life, it's where they were brought up and live with their families to date. His father, the deceased herein bought the suit land from Stepheno M'Mukindia, and the deceased herein had settled his 2 sons in their respective parcels of land. He has placed a caution on the land to prevent the petitioner from selling it and rendering him destitute, and prayed for the dismissal of the application.

4. The petitioner swore a further affidavit on 6/3/2024 in support of the application. He averred that the objector should settle on his half share, but not the entire land.
5. The objector filed a Notice of Preliminary Objection dated 20/2/2024 on the grounds that;
 1. The Honourable Court lacks jurisdiction to hear and determine this application.
 2. The same should be dismissed with costs to the Objector.
6. The application and the Preliminary Objection were canvassed by way of written submissions, which were duly filed.

7. The petitioner contended that the objector had converted the land into his own by erecting some semi-permanent old house and farming.
8. The objector contended that the jurisdiction to order eviction is vested in the Environment and Land Court. He contended that the essence of the caution is to prevent registration of dispositions in the suit land which may obliterate his interest in the land, and cited **Kiptuya Ngerech Too v Peri Wangui Macharia & another (2018) eKLR.**

Determination

9. Having considered the application, the response, the Preliminary Objection, and the submissions on record, the issue for determination is whether there is merit in the application and the Preliminary Objection.
10. What constitutes a Preliminary Objection has been defined in the *locus classicus* case of **Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696** as follows; ***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all***

the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. According to the objector, this court lacks the requisite jurisdiction to hear and determine the application for eviction, because that is a preserve of the Environment and Land Court.
12. The Probate and Administration Court has inherent jurisdiction under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to make the necessary orders to prevent abuse of the court process and for the ends of justice to be met. Those orders include but are not limited to eviction orders for the protection and preservation of the estate.
13. In ***re Estate of the Late Joab Odero alias Joab Odero Odero (Deceased) (Succession Cause 227 of 1993) [2022] KEHC 14167 (KLR) (24 October 2022) (Ruling)***, the court (J. Kamau J) espoused thus; ***“His actions amounted to intermeddling with the deceased’s estate as his continued occupation in***

the property hindered the 1st and 2nd Administratrixes from exercising the powers bestowed on them by Section 82 (b) (ii) of the Law of Succession Act...38. This court was therefore persuaded that the 2nd Administratrix had demonstrated that the Respondent was unlawfully in occupation of the subject property contrary to the Laws of Succession and was hindering the administration of the deceased's estate as was consented by the beneficiaries of the deceased's estate which was given the legal effect by the issuance of the Rectified Certificate of Confirmation of Grant.”

14. The provisions of Sections 152C, D and E of the Land Act were extensively addressed by the court (A. Nyukuri J) in **Pasha Enterprises Ltd v Kenya Farmers Association & another; County Government of Machakos (Interested Party) (Environment & Land Case 130 of 2015) [2023] KEELC 22131 (KLR) (6 December 2023) (Ruling)** as follows: **“Therefore, the import of the provisions of the Land Act above is that where a**

person is in unlawful occupation of another's land and where the owner wishes to take vacant possession without filing suit, they must comply with procedures for eviction as per the Land Act by among other matters, issuing a 90 day notice to the person said to be in an unlawful occupation, so that the latter can have the opportunity to seek redress from court if they dispute the eviction. On whether a party who has a judgment requiring vacant possession from the opposing party and in default, eviction orders to issue, like in the instant case should comply with Land Act, my view is that the provisions of the Land Act cited by the applicant do not apply. This is because a judgment declares the parties rights and requiring a decree holder granted vacant possession to comply with the above provisions of the Land Act is akin to placing impotence on the judgment. In this case, the applicant has since January 2019 been made aware that they need to grant the plaintiff vacant possession, yet they have refused to comply. I

therefore hold and find that the decree holder is not under duty to comply with sections 152B, 152 E and 152 F of Land Act as the court has already pronounced itself on the matter and issued eviction orders, hence the said provisions do not apply in the circumstances herein.”

15. Comparatively, in ***re Estate of the Late Joab Odero Odero (Deceased) (Succession Cause 227 of 1993) [2025] KEHC 6404 (KLR) (17 March 2025) (Ruling)***, the court (J. Omido J) expounded that; ***“...The procedures under the above provisions of the Land Act relate to situations where an owner of land or the person in charge thereof seeks to evict unlawful occupiers of the land in question without first filing suit. The procedures do not relate to situations where the rights of the parties have been determined through court orders or decrees.”***
16. Suffice to state, the objector and his siblings are lawful beneficiaries equally entitled to the estate property as the petitioner.

17. Had the petitioner established that the objector was indeed in unlawful occupation of the estate property, I would not have hesitated to grant the orders sought.
18. Invariably, the subdivision of the estate property ought, as far as practicable, to correspond with the prevailing occupation on the ground, to ensure that no beneficiary is unnecessarily disrupted and/or displaced.
19. The upshot from the foregoing is that the Preliminary Objection dated 20/2/2024 was improperly raised, and it is hereby struck out. On the same breadth, the application dated 21/12/2023 is in want of merit and it is accordingly dismissed.
20. Parties to bear own costs of the Applications.

DATED AND DELIVERED AT MERU THIS 4TH NOVEMBER, 2025

S.M. GITHINJI

JUDGE

APPEARANCES:-

Mrs. Otieno for the Objector.

Ms. Gatwiri Miriti holding brief for Mr. Kimathi for the Petitioner.

