

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC MISC. APPLICATION NO. E050 OF 2024

MARY MWIKALI NZAU:.....1ST APPLICANT

**ELIZABETH NTHENYA MULWA:.....2ND
APPLICANT**

VERSUS

**SAMUEL NDAMBUKI
KISENGE:.....RESPONDENT**

RULING

The application is dated 18th November 2024 and is brought under Section 152A, 152B, 152E and 152F of the Land Act, Section 3A of the Civil Procedure Act seeking the following orders;

1. THAT this application be certified urgent and service be dispensed with in the first instance.
2. THAT the Honourable Court be pleased to issue orders of eviction of the Respondent from all that parcel of land known as MACHAKOS TOWN BLOCK 3/2027 (Hereinafter known as the suit property) and for vacant possession of the property to be delivered to the Applicants.
3. THAT EASTERN KENYA AUCTIONEERS do effect and execute the above eviction orders.
4. THAT the OCS Machakos Police Station does supervise the eviction.

5. THAT the costs of this application be in the suit.

It is premised on the annexed affidavit of ELIZABETH NTHENYA MULWA and grounds that the Applicants herein are the joint registered and absolute owners of all that parcel of land known as MACHAKOS TOWN BLOCK 3/2027 with a Certificate of Title to that effect. That the Applicants acquired the property by way of purchase from KATELEMBO ATHIANI MUPUTI FARMING & RANCHING COOPERATIVE SOCIETY LTD. That the suit property is private property registered and held under freehold tenure. That before the purchase, the Applicants did their due diligence including a site visit, identified the exact location of the property and found that it was vacant with nobody in occupation. That sometime in 2023, during a routine visit, the Applicants found that, the Respondent had entered into, and taken possession of the suit property and was carrying out farming activities. That the Applicants reported the trespass to the relevant authorities, however, the Respondent has blatantly refused and/or ignored to deliver vacant possession of the property to the Applicants. That the Applicants have served the Respondent with an Eviction Notice as envisaged under Section 152E of the Land Act. That the 90 days period envisaged by statute have now lapsed since service of the Eviction Notice. That the Eviction Notice has also been served upon the OCPD, the OCS and the Deputy County Commissioner. That despite being served with the Eviction Notice, the Respondent has not moved out of the property and neither

has he moved the court to challenge the Eviction Notice or to suspend its operation.

That the Applicants have been unable to access the suit property because of the Respondent's continued and unjustifiable trespass on the property. That the continued illegal and unjustified occupation of the suit property by the Respondent arbitrarily deprives the Applicants of their right to own and enjoy property that is guaranteed by the Constitution. That it is necessary for this Honourable Court to issue the orders sought to evict the Respondent as provided by the law and to forestall the continued deprivation of their rights. That the Applicants have followed the right procedure provided by law and it is therefore only just to issue the orders sought. That it is in the interest of justice that this application be allowed and the Respondent evicted from the suit property forthwith.

The Respondent in his replying affidavit stated that he is the beneficial owner of the suit property for over 50 years and that he has developed it. That there is a dispute over ownership of the same in ELC Petition No 76 of 2017 where he is among the Petitioners which is yet to be determined. That a temporary injunction has been issued against Katelembo Athiani Farming and Ranching Cooperative Society Limited against any dealings with the suit land.

This court has considered the application and the submissions therein. The applicant seek eviction against the Respondent from all that parcel of land known as MACHAKOS TOWN BLOCK 3/2027 and for vacant possession of

the property to be delivered to them. There have produced a title deed issued on 24th November 2023 and marked EMM1 as proof of ownership.

Be that as it may, Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. Granting the orders sought will indeed conclude this matter. This is the position that was adopted in *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others* (2016) eKLR wherein it was held;

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

In the case of *Nairobi West Hospital Limited vs Joseph Kariha & Another* (2018) eKLR it was held that;

“.....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating

summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out."

For these reasons I find this application is unmerited and an abuse of the court process. I consequently dismiss it with costs the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF NOVEMBER 2025.

N.A. MATHEKA
JUDGE