



REPUBLIC OF KENYA



**Waweru v Githuri (Environment and Land Miscellaneous Application
E005 of 2025) [2025] KEELC 8413 (KLR) (2 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2025
JM ONYANGO, J
DECEMBER 2, 2025**

BETWEEN

HUMPHREY NJONJO WAWERU APPLICANT

AND

FREDRICK WAITHAKA GITHURI RESPONDENT

RULING

Introduction

1. The application dated 13th November 2025 concerns the Respondent's ongoing occupation of the parcel of land known as Title No. Kabete/Lower Kabete/1352 (hereinafter 'the suit land'), which the Applicant maintains is without permission or legal basis.
2. The Applicant seeks an order requiring the Respondent to vacate, and further requests the assistance of the Officer Commanding Station and the Area Chief to ensure orderly enforcement of the Court's decree. The matter of costs is also placed before the Court for determination.
3. The application is supported by the affidavit of Humphrey Njonjo Waweru sworn on even date.
4. The Respondent has challenged the application through a Notice of Preliminary Objection dated 19th November 2025, contending that the dispute is commercial in nature and therefore falls outside the jurisdiction of this Court.
5. The Notice of Preliminary Objection was supported by the affidavit of Fredrick Waithaka Githuri sworn on even date.
6. The Respondent argues that the application is frivolous and the remedies sought arise from a relationship that should properly be addressed in a commercial forum, rendering these proceedings misconceived.



7. The parties were directed to canvass the application by way of written submissions.

Issues

8. Having examined the application, the Notice of Preliminary Objection in response, the parties' written submissions and the relevant authorities, the following issues emerge for determination:
 - i. Whether this court has jurisdiction to hear and determine this application
 - ii. Whether the applicant is entitled to the eviction Order

Analysis and Determination

9. First, the Court must determine the jurisdictional issue in limine, since its mandate to entertain the matter must be established before any further inquiry can be made.
10. The question whether this Court is clothed with jurisdiction to entertain the application is not one of mere convenience, it goes to the root of the power to proceed.
11. Jurisdiction flows only from *the Constitution* or legislation enacted pursuant thereto. The *Environment and Land Court Act* (ELCA), enacted under Article 162(2)(b) of *the Constitution* of Kenya 2010, vests in Environment and Land Court (ELC Court) jurisdiction to hear "disputes relating to the use and occupation of, and title to, land."
12. It is settled principle that a court may only exercise jurisdiction expressly conferred by *the Constitution* or statute.
13. The Supreme Court in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and Others* [2012] eKLR underscored this point with unmistakable clarity, holding that:

"A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

It went on to state:

"Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."
14. Essentially, this affirms the long-standing position that a court cannot, through interpretation or convenience, assume authority not granted to it by law.
15. The Respondent's Preliminary Objection therefore properly requires the Court to determine, at the threshold, whether the dispute before it falls within the constitutional and statutory remit of this forum.
16. Where jurisdiction is absent, the Supreme Court has made it plain that the Court must down its tools, for jurisdiction is not a matter of judicial discretion but a prerequisite grounded in law.
17. In the instant application, the core dispute concerns occupation and right to possession of land. That falls squarely within the ambit of "use and occupation of land" as contemplated by Article 162(2)(b) and ELCA.



18. Accordingly, while the Respondent contends that the matter is commercial in nature, the statutory framework and judicial precedent leave no doubt that the dispute falls within the Court's lawful competence.
19. The question that follows is whether the Applicant is entitled, in the exercise of this Court's jurisdiction, to an order of eviction under a miscellaneous application, even outside the procedural regime of the Land Act.
20. Learned counsel for the Applicant submits that the circumstances of this case are of such a peculiar and compelling character as to justify the invocation of the Court's sui generis jurisdiction, permitting the grant of an eviction order outside the procedural strictures of the Land Act.
21. The submission rests on the premise that the Respondent occupies the suit property without consent or lawful authority, and that delay or multiplicity of proceedings would undermine the Applicant's possessory rights.
22. Learned counsel for the applicant urged this court to be guided by the decision in *In re Estate of the Late Joab Odero Odero (Deceased)* [2025] KEHC 6404 (KLR) where the court adopted the reasoning 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) which addressed the three provisions of the Land Act 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.”
23. The court in *In re Estate of the Late Joab Odero Odero (Deceased)* (supra) went on to state:

“...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.”
24. In paragraph 3 of their affidavit, the Applicant asserts that the Respondent is aware of the ruling delivered on 30th July 2001 by Alnashir Visram J (as he then was) in *Milimani HC Succession Cause No. 2322 of 1995*. The said ruling dismissed the Respondent's challenge of the will of Humphrey Edward Githuru Kamuyu (deceased).



25. The Applicant contends that the executrix, one Loise Margaret Waweru (deceased) passed away in 2021 before transmitting the suit land to the Applicant.
26. It is the Applicant's assertion that he was subsequently appointed as administrator (with will annexed) on 14th December 2023 and he later obtained the title over the suit property.
27. The Applicant asserts that the Respondent's continued, unlawful occupation of the suit land is preventing the lawful exercise of the Applicant's rights, including the sale and transfer of the property.
28. Applying the principles elucidated in *In re Estate of the Late Joab Odera Odera (Deceased)* (supra) to the instant application, it is apparent that the Respondent's continued occupation occurs in defiance of rights already recognised by law.
29. However, there is also the question of whether a miscellaneous application, rather than a formal suit, suffices to secure the relief sought.
30. Section 19 of the *Civil Procedure Act* provides that:

“Every suit shall be instituted in such manner as may be prescribed by rules.”
31. This establishes that the initiation of proceedings must conform to the formalities set out in the governing procedural framework.
32. In accordance, Order 3 Rule 1(1) of the Civil Procedure Rules stipulates that:

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”
33. This codifies the manner in which a party may properly invoke the Court's jurisdiction. These provisions underscore the principle that the commencement of legal proceedings is subject to orderly procedure, ensuring clarity, notice, and the proper framing of issues, while leaving room for the Court to recognise alternative modes of instituting proceedings where justified by exceptional circumstances.
34. Learned counsel for the Applicant submits that a miscellaneous application is the proper mode of moving this court in the present circumstances and placed reliance in the case of *Riro v Kahonge & 3 others* [2023] KEELC 16433 (KLR) where the court stated:

“A suit can only be commenced by way of a miscellaneous when all that a person wants is an order of court where the rights of the parties are not in contention, and where the discretion of the court is being sought or a procedural issue is sought to be endorsed.

...This is permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. Where there is a call to adjudicate on rights of parties, then it must be said that there is a “civil action” which must be commenced in the manner prescribed by the Rules, and not a miscellaneous application.”
35. Applying these principles to the present matter, it is evident that the rights of the parties in relation to the suit property are not in dispute; the Respondent does not claim ownership but merely occupies the land without consent.
36. The relief sought, namely, an order for eviction, the provision of security during execution by the Officer Commanding Station and the Area Chief, and the award of costs, falls squarely within the Court's discretion and does not necessitate the initiation of a full suit.



37. That said, I must ensure that such a procedural route is not being employed to circumvent statutory safeguards.
38. The Applicant must demonstrate, and indeed has demonstrated on the affidavit filed, that the Respondent's occupation is unconsented, that prior demands to vacate the premises have been made and refused, and that delay or multiplicity of proceedings would occasion real and tangible prejudice, including the obstruction of the Applicant's ability to sell or transfer the property.
39. These factors, read together with the reasoning in *In re Estate of the Late Joab Odero Odero (Deceased)* [2025] KEHC 6404 (KLR), establish that the exceptional circumstances of this case justify the exercise of the Court's sui generis jurisdiction to grant an eviction order.
40. The upshot of the foregoing is that the application is allowed with costs.
41. In the premises, and for the reasons articulated hereinabove I hereby Order as follows:
- i. The Respondent, Fredrick Waithaka Githuri be and is hereby ordered to vacate the property Title No. Kabete/Lower Kabete/1352 forthwith.
 - ii. The Officer Commanding Station (OCS) Lower Kabete Police Station, in conjunction with the Area Chief, shall provide such security and assistance as may be necessary to ensure the orderly and peaceful execution of this eviction.
 - iii. The Respondent shall bear the costs of this application

It is so Ordered.

DATED, SIGNED AND DELIVERED, AT THIKA THIS 2ND DAY OF DECEMBER 2025

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J. M. ONYANGO

JUDGE

In the presence of:

Mr Kiplagat for the Applicant

Mr Fredrick Waithaka Githuri - Respondent

Court Assistant: Hinga

