



**Kamia & another v Ziro & 4 others; Mguta (Respondent) (Environment and Land Case 280 of 2015 & 70A of 2022 (Consolidated))
[2025] KEELC 8617 (KLR) (10 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 280 OF 2015 & 70A OF 2022 (CONSOLIDATED)
SM KIBUNJA, J
DECEMBER 10, 2025**

BETWEEN

JOHN MUTHINI KAMIA APPLICANT

AND

MWARIDZO JUMA ZIRO DEFENDANT

AND

NASSORO OMAR MGUTA RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 70A OF 2022

BETWEEN

NASSORO OMAR MGUTA RESPONDENT

AND

JOHN MUTHINI KAMIA 1ST APPLICANT

ALI SALIM MWAKUFWAIRWA 2ND APPLICANT

RULIA SALIM MWAKUFWAIRWA 3RD APPLICANT

KWALE LAND REGISTRAR 4TH APPLICANT

*(NOTICES OF MOTION DATED 13TH APRIL 2025 & 28TH APRIL 2025
AND NOTICE OF PRELIMINARY OBJECTION DATED 4TH JUNE 2025)*



RULING

1. The 1st to 3rd defendants in Mombasa ELCC NO. 70A of 2022 moved the court through the notice of motion dated 13th April 2025 seeking for:
 - a. An order directing the plaintiff by himself and or his agent to surrender the original title deed for Kwale/Diani/Beach/1579; and
 - b. Costs to be provided.

The application is based on the nine (9) grounds on its face, and supported by the affidavit of Ali Salim Mwakufwairwa, 2nd defendant, sworn on the 13th April 2025 in which he deposed inter alia that his sister who is the 3rd defendant sold a quarter acre of land from the suit property to the plaintiff through sale agreements of 14th April 2006 and 12th December 2006; that they gave the plaintiff the original title deed on or about 2006 to carve out his portion and return the title deed for the remainder back to them; that the plaintiff has declined to return the title deed to them and they want to sell other portions therefrom; that as the plaintiff's claim was dismissed vide the court's judgement and decree of 27th February 2025 issued, he should be ordered to return the title deed.

2. The plaintiff in Mombasa ELCC No. 280 of 2015, who is the 1st defendant in Mombasa ELCC No. 70A of 2022, filed the notice of motion dated 28th April 2025 seeking for orders inter alia that:
 - a. The court bailiff be directed to put the plaintiff into possession of Kwale/Diani Beach/1576 forthwith.
 - b. The OCS Diani Beach Police Station to provide security during the enforcement of the court's decree issued on 13th November 2024.

The application is based on the seven (7) grounds on its face and is supported by the affidavit of John Muthini Kamia, the plaintiff, sworn on the 28th April 2025, in which he deposed inter alia that the court delivered its judgement on 13th November 2024 and directed the defendant to vacate from the suit property in thirty (30) days; that over four months had passed and the defendant had not vacated, though no appeal had been filed, and hence this application.

3. Nassoro Omar Mguta, who is the interested party in Mombasa ELCC No. 280 of 2015 and plaintiff in Mombasa ELCC No. 70A of 2022, filed the notice of preliminary objection dated 4th June 2025, raising six grounds that are summarized into two as shown herein below:
 - a. That the application dated 13th April 2025 is filed in the file that is not the lead file, contrary to the court directions that designated ELCC No. 280 of 2015 as the lead file for the purposes of hearing and determination of all matters relating to the subject matter herein.
 - b. That the filing of the application in the secondary file is irregular, an abuse of court process and makes it fatally defective and should be struck out.
4. The 1st to 3rd defendants in Mombasa ELCC No. 70A of 2022, who are the applicants in the notice of motion of dated 13th April 2025, filed a reply to the preliminary objection raising seven points summarised as herein below:
 - a. That the objection that the application was filed in a file not designated as the lead file is not a pure point of law, as ascertaining the lead file is a factual inquiry, which places the ground



outside the limits set in Mukisa Biscuits Manufacturing Company Limited versus West End Distributors (1969) EA.

- b. That the application is therefore not fatally defective, irregular or an abuse of the court process, but is validly before the court.
5. The learned counsel for the plaintiff in Mombasa ELCC No. 280 of 2015 and for the 1st to 3rd defendants in Mombasa ELCC NO. 70A of 2022, filed their submissions both dated the 28th August 2025, which the court has considered.
 6. The issues for the court's determinations on the two applications and preliminary objection are as follows:
 - a. Whether the preliminary objection raises any pure point of law, that can be canvassed with considering any evidence, and that if upheld, it would determine the application.
 - b. Whether the 1st to 3rd defendants in Mombasa ELCC No. 70A of 2022, have made out a reasonable case for plaintiff by himself and or his agent to be ordered to surrender the original title deed for Kwale/Diani/Beach/1579.
 - c. Whether the plaintiff in Mombasa ELCC No. 280 of 2015 has made a good case for the court bailiff to be directed to put him into possession of Kwale/Diani Beach/1576 forthwith, and for the OCS Diani Beach Police Station to provide security during the enforcement of the court's decree issued on 13th November 2024.
 - d. Who pays the costs?
 7. The court has carefully considered the grounds on the two applications, notice of preliminary objection, submissions by learned counsel, the record and come to the following conclusions:
 - a. Under Order 51 Rule 15 of the Civil Procedure Rules, a notice of preliminary objections is one of the documents a respondent to an application may file in response. That as there is no replying affidavit or grounds of opposition filed in response to the two applications, I will treat the notice of preliminary objection dated 4th June 2025 as the rejoinder to the application dated the 13th April 2025 as clearly stated thereon. Where a preliminary objection is filed, it is imperative that the court starts by making a determination on it before moving to the other issues, in case it determines the matter before it.
 - b. It is a fact that upon consolidation of the two suits, Mombasa ELCC No. 280 of 2015 became the lead file. It is in through the lead file that the proceedings took place, and all parties were, and still are, expected to file all their processes relating to the two consolidated suits for ease of reference and traceability. However, the filing of the application dated the 13th April 2025 through Mombasa ELCC No. 70 of 2022, instead of Mombasa ELCC No. 280 of 2015, lead file, does not make it defective, irregular or an abuse of the court process. The counsel for the parties are mapped in both suits and therefore are able to access any documents filed by the other, and there is no suggestion that any of the parties has been prejudiced by the action of filing the application in the file other than the lead file. The preliminary objection therefore has no merit and is rejected. Having rejected the preliminary objection, and the affidavit evidence in support of application dated 13th April 2025 being un rebutted, the prayer thereon is granted.
 - c. The parties are in agreement that the two suits, Mombasa ELCC Nos. 280 of 2015 & 70A of 2022, were consolidated for purposes of hearing and determination, and indeed, were decided though the judgement delivered on 13th November 2024. That as observed by the court at



paragraph 10(a) of the judgement, “both plaintiffs in ELC No. 280 of 2015 and 70A of 2022 are claiming ownership of Kwale/Diani Beach/1576, suit property.” That as can be seen at paragraph 11 of the judgement, the court made a finding for the plaintiff in ELCC No. 280 of 2015 and ordered as follows:

- a. “That the plaintiff in ELC No. 280 of 2015 has proved his case against the defendant and interested party. Judgement is therefore entered for the plaintiff and the following orders issued;
 - i. That the defendant and interested party do vacate from Kwale/Diani Beach/1576, and give vacant possession to the plaintiff in thirty (30) days, in default eviction and demolition order to issue, and to be executed at their costs.
 - ii. A permanent injunction be issued restraining the defendant and interested party by themselves/servants/agents from encroaching upon/trespassing/occupying the suit property and/or in any other manner interfering with the indefeasible rights of ownership of the plaintiff over the suit property No. Kwale/Diani Beach Block 1576, upon giving vacant possession or being evicted.
 - iii. The plaintiff is awarded costs in the suit.
- b. The plaintiff in ELC No. 70A of 2022 has failed to prove his claim against the defendants and the suit is dismissed with costs.”
- c. There is no doubt therefore that Mwaridzo Juma Ziro and Nassoro Omar Mguta, the defendant and interested party respectively, in Mombasa ELCC No. 280 of 2015 were ordered to vacate from Kwale/Diani Beach/1576, suit property, in thirty (30) days and give vacant possession to John Muthini Kamia, the plaintiff thereof, and they have not done so to date. That from the affidavit evidence presented herein, no appeal has been preferred on the judgement delivered on the 13th November 2025, and there being no reply filed in response to the motion dated 28th April 2025, the court will take it as unopposed, and allow it as prayed.
- d. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court orders otherwise. In this instance, it is the failure by the respondents to the applications to do what they were obligated to do that made it necessary for the applications to be filed. The as applicants have been successful in their respective applications, they are entitled to costs.

8. In view of the determinations set out above, the court finds the two applications to be meritorious and orders as follows:

- a. That the notice of preliminary objection dated the 4th June 2025 is without merit and is rejected.
- b. That the application dated 13th April 2025 has merit and is allowed in terms of prayer (a) with costs.
- c. That the application dated the 28th April 2028 has merit and is allowed in terms of prayers (b) & (c) with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.



S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicants : Mr Mutugi

Respondents : Mr. Mwanyama for Mr Mbwiza for Respondent

Kalekye-court Assistant.

