

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**MISC APPLICATION NO. E056 OF 2025**

TIMOTHY                      KIMUTAI                      NG'ENY                      .....  
PLAINTIFF/RESPONDENT

VERSUS

STANLEY                      KABUU                      KIARIE.....1<sup>ST</sup>  
DEFENDANT/APPLICANT  
WILSON                      KIARIE                      KABUU.....2<sup>ND</sup>  
DEFENDANT/APPLICANT  
JAMES MBUGUA KABUU.....3<sup>RD</sup> DEFENDANT/APPLICANT

**RULING**

1. This ruling is in respect of the application dated 22<sup>nd</sup> July, 2025, by the Applicants seeking the following orders:

- a) *Spent.*
- b) *THAT the Honourable Court be pleased to issue orders of eviction against the Plaintiff/Respondent herein and all his agents or employees from the applicant's parcel of land known as NAKURU/OLENGURUONE/AMALO/183 and the Applicants be given vacant possession.*
- c) *THAT the applicants be at liberty to appoint any auctioneer to execute the eviction order.*
- d) *THAT the OCS Elburgon Police Station be authorized to provide security during the eviction exercise.*
- e) *THAT costs of this application be provided for.*

2. The application is supported by the annexed affidavit of Stanley Kabuu Kiarie the 1<sup>st</sup> Applicant, who deponed that together with his co-applicants

they are the owners of the suit property known as NAKURU/OLENGURUONE/AMALO/183. He also stated that, the Plaintiff/Respondent had instituted a suit against them which was dismissed and that no appeal had been preferred.

3. It was the Applicant's disposition that the Respondent was in occupation of the suit property, despite having been issued with an eviction notice and urged the court to allow the application as prayed.
4. The Plaintiff/respondent filed his replying affidavit sworn on 8<sup>th</sup> August, 2025, where he averred that as the occupant of the suit property, he has neither been served with the instant application nor any notice to vacate. He further deponed that the Applicants are barred by the doctrine of *res judicata* from re-opening the issues that had already been determined.

#### **APPLICANTS' SUBMISSIONS**

5. Counsel for the Applicants identified three issues for determination:
  - a) *Whether the Applicants have demonstrated an unassailable and infeasible right to ownership and exclusive possession of the suit property thereby rendering the Respondent's occupation patently unlawful?*
  - b) *Whether the Applicants have meticulously satisfied all mandatory statutory pre-conditions for the lawful eviction of an unlawful occupier as delineated under the Land Act No 6 of 2012?*

*c) Whether in light of the aforesaid, the Applicants are compellingly entitled to the orders sought as a just and equitable remedy for the violation of their constitutional rights?*

6. On the first issue, counsel submitted that the Applicants proprietorship constituted a judicial fact that was established through documentary evidence being the title deed that confirmed their absolute ownership and relied on Section 26(1) of the Land Registration Act and the case of **Anglican Church of Kenya V Jindwa (Environment and Land Case No. 128 of 2017) [2023] KEELC 22272 (KLR)**.
7. On the second issue, counsel submitted that the Applicants' conduct has been a model of strict compliance with the statutory framework under Section 15 of the Land Act and underscored their commitment to ensuring that the eviction process proceeds under judicial sanction in full respect of human dignity.
8. Counsel therefore urged the court to grant the orders as sought in the application with costs.

### **RESPONDENT'S SUBMISSIONS**

9. Counsel identified four issues for determination as follows:
  - a) Whether a Notice to Vacate was issued to the Respondent pursuant to Section 152 E of the Land Act as per the prescribed form.*

- b) Whether there was proper service of the Notice to vacate upon the Respondent.*
- c) Whether the Applicants are the registered proprietors of the suit property.*
- d) Whether a party can seek to enforce a right through a miscellaneous application.*

10. On the first issue, counsel cited Section 152B, 152E and 152F of the Land Act and submitted that there was no evidence to demonstrate that the Respondent was served with an eviction notice, and relied on Order 5 Rule 15 of the Civil Procedure Rules and the case of **Deplphis Bank Limited v Wheatland Motors & 2 others [2015] eKLR**.
11. On the third issue, counsel submitted that, it is not disputed that the Applicants do not hold a title to the property known as Title Number Nakuru/Olenguruone/Amalo/183, as the court in Nakuru ELC Case No.453 of 2016 did not declare them as the owners of the said property. The court's final orders in the judgment were that the Agreement between the Applicants and the Respondent was null and void and that Respondent was not entitled to the claim because it was time barred. The court further found that the Applicants had not raised a counterclaim in the suit and therefore no declaration of ownership was issued in their favour. The suit was dismissed with no order as to costs because in the Court's view the Applicants received money from the Respondent purporting to sell the property and are responsible for the Respondent taking possession of the property which was the subject of that suit.

12. Counsel relied on the case of **Julius L Marten Vs Caleb Arap Rotich [2021] eKLR**, where Mutungi J. stated that in his view where the ownership is disputed the summary procedure that Section 152F appears to contemplate would not be suitable and a formal suit would be advisable. Judge Mutungi further stated that any eviction order has far-reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession for some time and therefore such an order is given the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard.
13. On the final issue, as to whether the Applicants can enforce rights vide a miscellaneous application, counsel submitted that, there must be in existence a suit upon which the application can be hinged and that the Court can only grant such orders upon hearing the case on merit.
14. Counsel submitted that due to the seriousness of eviction orders, they must be anchored in a suit as per provisions of the Civil Procedure Rules and the Land Act, and relied on the case of **Tatecoh Housing and Co-op Sacco Limited v Qwetu Sacco Limited [2021] eKLR** and the case of **Eutyclus Muthui Vs Apollo Nteere M'ambutu & 2 others [2009] eKLR**. Counsel urged the court to dismiss the application with costs.

### **ANALYSIS AND DETERMINATION**

15. The issue for determination is whether a party can seek a substantive order to enforce a right through a Miscellaneous Application.
16. The Applicants' claim that the respondent filed a case in Nakuru ELC No. 453 of 2016, where a judgment was delivered on 19<sup>th</sup> September, 2023, and the suit was dismissed. The court was very specific in the Judgment that the Agreement between the Applicants and the Respondent was null and void and that Respondent was not entitled to the claim because it was time barred. Further that the Applicants had not raised a counterclaim in the suit and no declaration of ownership was issued in their favour, leading to the being dismissed with no order as to costs because in the Court's view the Applicants received money from the Respondent purporting to sell property and were responsible for the Respondent taking possession of the property which was the subject of that suit.
17. The case of **Julius L Marten Vs Caleb Arap Rotich (supra)**, is similar to this case where the court held as follows:

*“15. From a reading of sections 152C, 152D and 152E of the Land Act, 2012 it is not clear how a party ought to approach the court for relief under section 152F. Is it by way of a formal suit and/or miscellaneous application as in the instant suit? Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession of for some time. Before such an order is given the court must be satisfied on its merits*

*which means any person who stands to be affected by any order the court may make is entitled to be heard. Section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. What is the situation where there is no dispute on ownership and the occupation is unlawful? What is the situation where there is disputed ownership of the property? In my view where the ownership is disputed the summary procedure that section 152F appears to contemplate would not be suitable and a formal suit would be advisable. 16. In the instant matter the defendant does not hold title to the suit property. The court in ELC No.18 of 2014 (Nakuru) did not declare him the owner of the suit property. The court's final orders in the judgment are that the plaintiff is not entitled to the reliefs sought in regard to the eviction of the defendant (now applicant) from the suit property. The defendant had not raised a counterclaim in the suit and no declaration of ownership was issued in his favour. There was no order capable of execution made in his favour. The applicant save for the sale agreement holds no title to the land. He requires to have a declaration of ownership of the suit property and a decree for him to be entitled to an order of eviction against the respondent."*

18. I agree with Judge Mutungi's analysis of the above case on the issue of eviction and noting that there was a case that was filed in respect of the suit land where no declaratory orders were issued on the ownership of the

suit land. Are the Applicants registered owners of the suit land, if so, why did they not file execution proceedings in ELC CASE NO. 453 OF 2016.

19. I am further in agreement with Munyao J in the case of **Tatecoh Housing and Co-op Sacco Limited v Qwetu Sacco Limited (supra)**, where he held as follows:

*“Without much ado, I will agree with the position of the respondent, as raised in the preliminary objection and buttressed by Mr. Muthami in his submissions, that the applicant cannot seek the orders sought in its miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought in the motion are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of a case. What the applicant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon hearing of such suit, and if successful, that an order of eviction would issue.”*

20. I find that the Application lacks merit and is therefore dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF JANUARY 2026.**

**M. A. ODENY  
JUDGE**