



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. E010 OF 2025 (O.S.)

BETWEEN

JANE KANYUA KATHURIMA.....
.....APPLICANT

VERSUS

ALFRED ODHIAMBO OTIENO.....
DEFENDANT

AND

AFRICAN BANKING CORPORATION
LIMITED.....INTERESTED PARTY

JUDGMENT

1. The suit is instituted by an originating summons (OS) dated 18th March 2025, filed by the applicant, expressed to have been moved within the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 37 Rules (4), (19) and (20)** of the **Civil Procedure Rules (“CPR”)**, and any other enabling provisions of the law. The applicant has

raised the following questions for this court's determination:

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a) Whether the respondent, his agents and servants should be ordered to immediately vacate all that property known as Title Number Mavoko Town Block 3/2141, situated within Malaa Area off Kangundo Road.

b) Whether the court should issue a permanent order of injunction as against the respondent from interfering with the applicant's quiet possession over that all that property known as Title Number Mavoko Town Block 3/2141, situated within Malaa Area off Kangundo Road.

c) Whether the court should issue an order to the OCPD Athi River police station to assist in the eviction of the respondent from all that Title Number Mavoko Town Block 3/2141, situated within Malaa Area off Kangundo Road.

d) Whether the applicant should bear the costs of the summons.

2. The OS is based on the grounds listed on its face and the applicant's supporting affidavit, sworn on 6th February 2025. In summary, she avers that on 29th November 2023,

the applicant purchased the property known as **TITLE NUMBER MAVOKO TOWN BLOCK 3/2141 (“suit property”)** from an auction conducted by **Igare Auctioneers** for the interested party (**“IP”**).

3. The title documents have been transferred to the applicant, who is now the registered owner. Despite being aware of the sale and transfer, the respondent has refused to vacate the suit property. An eviction notice was served, requesting the defendant to vacate by January 2025, but the respondent has declined.
4. The applicant asserts that the respondent’s continued occupation amounts to trespass and is causing substantial prejudice. She seeks court orders for her peaceful possession of the suit property. In support of her assertions, she availed to the court the certificate and memorandum of sale, a copy of the certificate of title for the suit property, and a notice to vacate.
5. Upon service, the respondent, through his replying affidavit of 14/10/2025, swore, among others, that the current suit is premature and an abuse of the court process because there is an existing and active case being **Machakos HCCOMM E007 of 2022 (“High Court case”)** concerning the legality of a charge over the suit property and the alleged auction. Though the applicant claims to have purchased the suit property at auction, the validity of this sale is

challenged in the ongoing case, which prevents the current court from hearing related proceedings.

6. The respondent states that he has fulfilled his loan obligations to the IP, and that the alleged sale to the applicant was marred by illegality and irregularity. The respondent denies accusations of trespass and maintains that he remains the lawful owner of the property, asserting that any eviction notice is premature until ownership is resolved in court. He contends that the current application is an attempt to bypass the ongoing legal proceedings and requests that the court stay the current case until the earlier suit is determined, to avoid conflicting decisions. The respondent further argues that the application is incompetent and seeks its dismissal with costs.
7. When counsel for the applicant and respondent appeared before this court on 24th September 2025, the court directed them to file written submissions within specified timelines. However, at the time of preparing this ruling, none have been filed, and if they are subsequently filed, this court will consider them as having been filed out of time. Accordingly, having given careful thought to the motion, its grounds, affidavits, and annexures, the singular issue for determination is **whether the applicant is entitled to vacant possession.**

8. Thus, and regarding the law, **Order 37** of the **Civil Procedure Rules (“CPR”)** defines the legal framework governing originating summonses, which pertain to a specific category of cases that are straightforward, simple, uncontested, and it also restricts participation to a particular category of litigants.

9. By instituting the OS, the applicant has invoked the provisions of **Order 37 Rule 4** of **CPR**, which provides thus:

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“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.”

10. Accordingly, and having considered the certificate of sale, memorandum of sale, and title deed, the applicant

acquired the subject property through a public auction, and the property is duly registered in her name. Consequently, it follows that she has the legal capacity to initiate proceedings in this court and to seek vacant possession of the property, as provided by this provision of the law. The facts she has also sworn to are uncontested. Therefore, this court finds that the OS is properly before it.

11. To this court's mind and on review of the respondent's replying affidavit, it is evident that the contested factual issues pertain solely to the respondent and the interested party, and do not involve the applicant.

12. Furthermore, pursuant to **Section 99 of the Land Act**, the applicant, whose conduct in good faith and whose integrity in the purchase of the subject property have not been questioned, is safeguarded against adverse claims, as referenced in the reply concerning the validity of the alleged sale, the subsequent transfer to her, the creation of an additional charge, and the settlement of the loan. The relevant **Subsections** therein specifically stipulate that:

“99. Protection of purchaser

(1)This section applies to—

(a)a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on

the part of the chargee, of which that person has actual or constructive notice.”

13. In situations such as this, where the suit property has been transferred to another party who purchased it in good faith without evidence of constructive notice of the IP's alleged fraud, misrepresentation, or misconduct, the sole remedy available to the chargor, who is the respondent in this matter, against the IP is a claim for damages and not a claim over the suit property. This position is enunciated specifically in **Section 99 (4)** of the **Land Act**, which states:

“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

14. These provisos have been the subject of determination in various court decisions, and this court aligns itself with their findings.

In **Mbuthia v Jimba Credit Finance Corporation & another**[1988] eKLR, **Masime Ag JA** stated thus:-

“In this regard I respectfully agree with Platt and Apaloo JJ.A. that the effect of the long line of English authorities and decisions of this Court in

respect of mortgages under the Indian Transfer of Property Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale."

The principles laid out in **Mbuthia (Supra)** were well summarised in **Kamulu Academy Limited & another v British American Insurance (K) Limited & 2 others [2018] KEHC 2525 (KLR)** as follows: -

In the case of Mbuthia Vs Jimba Credit Finance Corporation and another [1986-1989] 1 EA 340 (CAK) considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second respondent. The Court of Appeal held:-

"A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee's exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.

The Court will not grant to a mortgagor tampering the moneys due under the mortgage, an injunction restraining the

mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of this power of sale unless it is proved that the mortgagee entered into the contract in bad faith.

The transaction which is the subject of the dispute was entered into in February 1982 and is therefore governed not only by the Registered Land Act itself, but also by the common law and equity under section 72(1) of that Act, the equity of redemption subsisted in the mortgagor until the leasehold premises was sold. It was then extinguished and the Act provides that "a chargee shall be deemed to have been sold when a bid has been accepted at the auction sale."

This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act."

In **Kamuri v Awino (Environment & Land Case E002 of 2023) [2024] KEELC 304 (KLR) (30 January 2024) (Judgment)**, when faced with similar circumstances, the court in allowing the OS stated:-

“From the foregoing, the Respondent in this matter has no cause of action against the Applicant. His claim, if any, is for damages against the bank that sold the suit property to the Applicant in exercise of its statutory power of sale. The Respondent has indeed led a case against the bank which he has severally referred to in his response to the O.S. That case High Court is materially and substantially different from this matter.”

15. Of significance to this case is that the respondent asserts that he was the registered owner of the suit property and that this matter was *sub judice*. Given the gravity of these assertions, which formed the basis of his defence, it was anticipated that he would substantiate his claims by providing an official search of the suit property that would contradict the applicant’s claim on registration status, as well as present the pleadings and rulings (if any) from the High Court case to demonstrate that the matter in question is also directly and substantially in issue in the other lawsuit or proceedings involving the same parties, or parties under whom they or any of them claim, operating under the same

title, and that such an action is pending either in the same court or in a court with jurisdiction, as contemplated by **Section 6** of the **CPR**, which he did not. Suffice it to say, the extract of the *CTS* extract was insufficient to demonstrate that this suit is *sub judice*.

16. Consequently, guided by statutory provisions and judicial precedents, this court finds that the OS is merited. It also finds and holds that the applicant is entitled to vacant possession of the suit property, having acquired it lawfully through a public auction. Since it is trite law that costs follow the event, it awards costs to the applicant and grants the following final disposal orders: -

a) A permanent order of injunction is hereby issued against the respondent, his workers, agents, family, servants and/ or anyone claiming from him from interfering with the applicant's quiet possession over all that property known as Title Number Mavoko Town Block 3/2141, situated within Malaa Area off Kangundo Road.

b) The respondent, is hereby directed to grant vacant possession of the property known as Title Number Mavoko Town Block 3/2141, situated within Malaa Area off Kangundo Road,

to the applicant herein, within the next 90 days from the date of this judgment, failing which the applicant will be at liberty to evict the respondent from the said property without any further reference to this court and with the assistance of the police and court bailiff.

c) Costs of the suit are awarded to the applicant.

Judgment accordingly.

Delivered and Dated at Machakos this 27th day of January, 2026.

**HON. A. Y. KOROSS
JUDGE
27.01.2026**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr. Wetunga for Plaintiff.

Mrs. Kavita Defendant.