

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC MISC APPLICATION NO. E002 OF 2025

**ALEX MUASYA MUNGUTI :::::::::::::::::::::::::::::::1ST
APPLICANT**

NZEKI MUNGUTI KENKA:::::::::::::::::::::::::::::2ND APPLICANT

VERSUS

FRANCIS SILA:::::::::::::::::::::::::::::1ST RESPONDENT

KIMANTHI NDAMBUKI:::::::::::::::::::::::::::::2ND RESPONDENT

RULING

The application is dated 20th December 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 an order of temporary injunction do issue restraining the defendant/respondent by himself and/or his agents and/or employees and/or servants and/or any other person claiming under him from entering, using, undertaking construction, farming, alienating and/or in any other manner interfering with the parcel of land known as

MUPUTVKIIMA-KIMWE/4161 or part thereof pending the hearing and determination of this application.

3. THAT the honourable court be pleased to issue orders of eviction of the respondents from all that parcel of land known as MUPUTI/K11MA-KIMWE/4161 (Hereinafter known as the suit property) and for vacant possession of the property to be delivered to the applicant.
4. THAT EASTERN KENYA AUCTIONEERS do effect and execute the above eviction orders.
5. THAT the Officer Commanding Station (O.C.S) Machakos Police Station together with their officers to provide escort and/or security during execution of the orders sought hereinabove and to ensure compliance with the said orders.
6. THAT the costs of this application be provided for.

It is premised on the following grounds that the applicants herein are the sole joint registered and absolute owner of all that parcel of land known as MUPUT1/K11MA-KIMWE/4161 with a certificate of title to that effect. That the suit property is private property registered and held under freehold tenure. That the applicants have been unable to take possession of the property due to the continued presence of the respondents in the property who are constructing permanent structures on the property. That the applicants have engaged the

respondents several times and the respondents have been summoned by the local authorities but the respondents have blatantly refused and/ or ignored to deliver vacant possession of the property to the applicants. That the applicants have served the respondents 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 Machakos Police Station and the Deputy County Commissioner Machakos County. That despite being served with the Eviction Notice, the respondents have not moved out of the property and neither have they moved the court to challenge the Eviction Notice or to suspend operation. That in the circumstances, the applicants' right to evict the respondents who are illegal occupiers of private land has crystallized and it is necessary that the instant application be allowed to pave way for the eviction process and supervision of the process by relevant authorities. That 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 honorable 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.

This court has considered the application and the submissions therein. The applicants seek eviction of the Respondents from all that parcel of land known as MUPUTI/K11MA-KIMWE/4161 and for vacant possession of the property to be delivered to the applicant. They have attached a title deed dated 20th November 2023 and marked AMM1 as proof of ownership. The said application seeks substantive reliefs over land in dispute which is eviction, injunction or determination of rights by way of a miscellaneous application without having instituted a substantive suit contrary to established legal principles and the Civil Procedure Act and Rules. Section 19 of the Civil Procedure Act states that every suit must be instituted in such manner as prescribed by the Civil Procedure Rules. Order 3 Rule 1 of the Civil Procedure Rules further provides that every suit shall be instituted by way of a plaint, unless otherwise provided. Order 37 Rule 8 of the Rules allow for originating summons in some limited statutory matters none of which are applicable here.

Consequently, 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.”

I concur with the Respondent's submissions that the Applicants have bypassed established legal procedures and that the application is an abuse of the court process. For these reasons I find this application is unmerited and an abuse of the court process. I consequently dismiss it with costs the Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF
FEBRUARY 2026.**

N.A. MATHEKA

JUDGE

ORIGINAL