

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC MISC. APPLICATION NO. E055 OF 2024**

**JOHN SILA KINYAMASYO:.....APPLICANT**

**VERSUS**

**DOROTHY MWANIA:.....1<sup>ST</sup> RESPONDENT**

**MORIS MWANIA:.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application is dated 10<sup>th</sup> 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 as urgent and service be dispensed with in the first instance.
2. That the Honorable court be pleased to issue orders of eviction of the respondents from all that parcel of land known as MUPUTI/KIIMA-KIMWE/4149(hereinafter known as the suit property) and for vacant possession of the property to be delivered to the applicant.
3. That EASTERN KENYA AUCTIONEERS do effect and execute the above eviction orders.

4. 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 herein above and to ensure compliance with the said orders.
5. That the costs of this application be provided for.

It is premised on the annexed affidavit of John Sila Kinyamasyo and grounds that the applicant herein is the sole registered and absolute owner of all that parcel of land known as MUPUTI/KIIMA-KIMWE/4159 with a certificate of title to that effect. That the suit property is private property registered and held under freehold tenure. That the Applicant has 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 Applicant has 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 Applicant has 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 its 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 the Applicant has been unable to access the suit property because of the Respondents continued and unjustifiable trespass on the property. That the continued illegal and unjustified occupation of the suit property by the Respondents arbitrarily deprives the Applicants of their right to own and enjoy property that is guaranteed by the constitution. That it is necessary for this Honourable Court to issue the orders sought to evict the Respondents 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. That it is in the interest of justice that this application be allowed and the Respondents evicted from the suit property forthwith.

This court has considered the application and the submissions therein. The Applicant seeks eviction orders reasons being that he is the sole registered and absolute owner of all that parcel of land known as

MUPUTI/KIIMA-KIMWE/4159 with a certificate of title to that effect. That the suit property is private property registered and held under freehold tenure. That he has 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.

The Respondents submitted that on or about 4<sup>th</sup> February 2015, they purchased a portion of the suit land from one Sarah Nganga and took possession that she granted them vacant possession. That on the 15<sup>th</sup> August 2024 the Respondents were served with an eviction notice by the Applicant. That they are bonafide purchasers.

Be that as it may, 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 sclerosis 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.”*

In the instant case the Respondents have raised contentious issues which would have to go to full trial. 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 24<sup>TH</sup> DAY OF  
MARCH 2026.**

**N.A. MATHEKA**

**JUDGE**

**ORIGINAL**