



**Kwinga & 4 others v Chai & another (Miscellaneous Application
2 of 2024) [2024] KEELC 5994 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 2 OF 2024
EK MAKORI, J
SEPTEMBER 19, 2024**

BETWEEN

**ESTHER NGUNYA KWINGA 1ST APPLICANT
JOHN KAVILA MUTUNE KWINGA 2ND APPLICANT
NANCY WAENI MUTUNE KWINGA 3RD APPLICANT
JANE NDAISI KWINGA 4TH APPLICANT
MICHAEL WAMBUA MUTUNE KWINGA 5TH APPLICANT**

AND

**HAMID CHAI 1ST RESPONDENT
ADEN ABDIKADIR (BISHARALI HARDWARE) 2ND RESPONDENT**

RULING

1. Notice of Motion dated 15th January 2024 brought under Section 152A, 152B, 152E, 152F, and 152G of the [Land Law \(Amendment\) Act, 2016](#) seeks the following orders:
 - a. The Court be pleased to issue an order of eviction of the Respondents, their servants, employees, agents, or any other person acting under their instructions or interest from all that land parcel known as Plot Number 12889/79 and Plot No. 12889/77 Kilifi (“the suit property”) and for vacant possession of the property to be delivered to the Applicants.
 - b. The Court directed the Officer in Charge of Station (OCS) Kilifi Police Station to provide security during the eviction.
 - c. Costs of this application be in the cause.



2. The Application is supported by the Affidavit sworn by John Kavila Mutune Kwinga on 15 January 2024, in which he asserts that the said land parcels—Plot Numbers 12889/79 and 12889/77 Kilifi—were transmitted to them through succession proceedings after the demise of their father, who was previously the registered owner thereof.
3. The Applicants have annexed copies of the title deed to their Application as proof of ownership of the suit property. They contend that the Respondents and or their agents have unlawfully and without any colour of right trespassed onto the suit property and caused destruction and loss, which actions include but are not limited to:
 - i. Forceful and unlawful entry on the suit property;
 - ii. Erecting permanent structures on the suit property and carrying on business thereon.
4. The Applicants state that as a result of the Respondents' continued unlawful trespass, they instructed the firm of Ms. Tonia Mwanja & Associates Advocates to serve the Respondents herein and all the relevant bodies with an Eviction Notice pursuant to Sections 152A, 152B, 152E, 152G, 152F and 152G of the Land Law (Amendment) Act, 2016.
5. Consequently, on 29th May 2023, the firm of Ms. Tonia Mwanja & Associates Advocates instructed a process server to serve the Respondents herein with the Eviction Notices as well as the Officer Commanding Kilifi Police Station and the Deputy County Commissioner, Kilifi North Sub County.
6. The Applicants argued that despite the expired notice of eviction given to the Respondents, they did not vacate the suit property, and their continued occupation has denied the Applicants their right to occupation and use of the property.
7. The Applicants reiterate that the said actions of the Respondents have denied them peaceful and quiet enjoyment of the suit property. Yet, the Respondents have no legal rights to enter, occupy, remain on, utilize, or interfere with the suit property.
8. In opposing the application, the Respondents filed a Replying Affidavit sworn by the 1st Respondent, Hamid Chai, on 2nd February 2024, stating that they have been living on the suit land since 6th May 2009, when they purchased the land from the family of Moses Mwaro, and are genuine purchasers for value. They have built structures, including shops where they carry on business. They claim they never received any eviction notice. They further argue that the land in dispute differs from what is disclosed in the application; besides, it will be challenging to pick and evict them from other occupants of the densely populated Mavueni Market built back to back. A survey will be necessary under the circumstances.
9. The Respondents further state that they will be entitled to plead adverse possession since they have lived and occupied the portion for over 12 years. A civil suit will be pertinent to resolve the ownership issue.
10. The primary issue I frame for this Court's determination is whether this Court can issue an eviction based on the material and evidence placed before me and who should bear the costs of the current proceedings.
11. The Applicants, in their submissions by Ms. Mwanja, learned counsel, believe that Section 152E of the Land Law (Amendment) Act, 2016, has been achieved to warrant eviction since all necessary steps have been followed.



12. They also believe that they have demonstrated ownership of the suit properties by producing title deeds for both portions—Plot Number 12889/79 and Plot No. 12889/77 Kilifi—under Section 26 (1) of the [Land Registration Act](#) - that the registration of a person and certificate of the title held by such a person as a proprietor of the property is conclusive proof that such person is the owner of the property. In addition to that, Section 116 of the [Evidence Act](#) states that: -when the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. The Respondents filed a Replying Affidavit but did not supply any documentation to support the claim of ownership to the Court. Pictures of the land developments do not amount to proof of ownership.
13. On the contrary, in their submission, through learned counsel Ms. Garama, the Respondents aver that ownership of the suit properties will be core in this matter and that this is not one of the most straightforward cases to order for eviction in the manner proposed by the applicant without first deciding on the question of ownership. In that respect, the decision in [Francis Mwisyo v Bernard Maitya Ntbenge & 2 others](#) [2022] eKLR is cited – providing the circumstances under which a Court can order an eviction.
14. In their submissions, the applicants elaborately placed the yardstick on what to fulfill under Section 152 E of the [Land Law Amendment Act](#), 2016 before an eviction is achieved:
- i. If, with respect to private land the owner or the person in charge is of the opinion that person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 - ii. The notice under section subsection (1) shall-
 - (a) be in writing and in a national and official language,
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide and be displayed in not less than five strategic locations within the occupied land.
 - (c) specify any terms and conditions as to the removal of buildings, reaping of the growing crops and any other matters as the case may require; and
 - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.
15. In [Kenya Assemblies of God Trustees & another v Obuya & 5 others](#) (Environment & Land Case E086 of 2023) [2024] KEELC 4368 (KLR) (23 May 2024) (Judgment), Mugo J. had an occasion of discussing how eviction should be carried in Kenya:
- “Section 152 (E) & (G) of the [Land Laws \(Amendment\) Act](#) No. 28 of 2016 clearly provides that the notice to vacate must be issued not less than three months before the intended date of eviction. Therefore, whether the Defendants are occupying public land or private land, they are still entitled to three (3) months’ notice.
18. Regulation 65 of [Legal Notice 280 of 2017](#) (Land Regulations) provides as follows:
- 65 Upon establishing that a particular parcel of private land is unlawfully occupied, the owner of the land shall issue a notice in Form LA 57 set out in the Third Schedule to the unlawful occupiers to vacate the land.



19. This part of the Act was enacted after the observation by Mumbi J (as she then was) in the case of *Mitu-Bell Welfare Society -v- Attorney General & 2 others* [2013] eKLR that

“... This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Articles 2(5) and (6) of the *Constitution* make the general rules of international law and any treaty or convention that Kenya has ratified part of the law of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by the United Nations Office of the High Commissioner for Human Rights in General Comment No. 7.”

20. The UN guidelines requires appropriate procedural protection and due process as essential aspects of all human rights and, especially in relation to a matter such as forced evictions which directly invoke a large number of rights recognized in the two International Covenants on Human Rights. The procedural protections which should be applied in relation to forced evictions include:

- a. an opportunity for genuine consultation with those affected;
- b. adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- c. information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- d. especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- e. all persons carrying out the eviction to be properly identified;
- f. evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- g. provision of legal remedies; and
- h. provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”

16. The steps set by the law seem to have been fulfilled by the Applicants. But then again, the Respondents have raised the question that they are purchasers for value and have occupied the portion they have built since 2009. Even if that cannot add to anything, they have had the suit property for over 12 years and plead adverse possession as a defence. They further allege the portions in contention are different and will require a surveyor to spell out who owns what.



17. The question of ownership of the suit property under discussion here seems unresolved and as correctly submitted by the Respondent citing the decision in *Francis Mwisyo v Bernard Maitya Nthenge & 2 others* [2022] eKLR, where on the same question Murigi J. held:

“In so finding, I am guided by the case of *Tatecob Housing and Co-op Sacco Ltd v. Qwetu Sacco Ltd* (2021) eKLR, where the court held that;

“Without much ado, I will agree with the position of the respondent “that the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and If successful, that an order of eviction would issue.”

18. Before eviction ensues, a trial on ownership has to be conducted in a proper suit, not a Miscellaneous Application. That is why the Motion Application dated 15th January 2024 stands dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 19TH DAY OF SEPTEMBER 2024

E.K. MAKORI

JUDGE

In the presence of:

Ms. Garama, for the Respondent

Happy: Court Assistant

In the absence of:

Ms. Mwanja for the Applicant

