



**Mathai v Wathoko & another (Environment and Land Miscellaneous Application  
3 of 2024) [2024] KEELC 6119 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6119 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2024**

**YM ANGIMA, J**

**SEPTEMBER 19, 2024**

**(FORMERLY NAIVASHA ELC MISC. APPL. NO. 4 OF 2024)**

**AND**

**(FORMERLY NAKURU MISC. APPL. NO. E009 OF 2023)**

**BETWEEN**

**SUSAN WAIRIMU MATHAI ..... APPLICANT**

**AND**

**PETER WAITARA WATHOKO ..... 1<sup>ST</sup> RESPONDENT**

**MARY WAMBUI WATHOKO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Applicant's Application**

1. Vide a notice of motion dated 27.07.2023 brought pursuant to Sections 152A, 152B, 152E and 152F of the *Land Act*, 2012 and Sections 3 and 3A of the *Civil Procedure Act* (Cap.21) the Applicant sought the following orders:
  - a. That the Honourable Court be pleased to issue orders of eviction of the Respondents from all that parcel of land known as Nyandarua/Kitiri/3118 (hereinafter the "suit property") and that vacant possession be delivered to the Applicant.
  - b. That the OCS Kinangop Police Station to ensure compliance with the orders of the court.
  - c. That costs of the application be provided for.
2. The application was supported by the supporting affidavit sworn by the Applicant on 27.07.2023 and the annexures thereto. The Applicant pleaded that she was the registered proprietor of Title No. Nyandarua/Kitiri/3118 (the suit property). It was her case that she was unable to access and to utilize



the same because the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had trespassed thereon whereby they were cultivating crops and grazing their livestock. It was her case that despite demand and issuance of a notice to vacate under Section 152E(2) of the *Land Act* the Respondents had failed to vacate the suit property thus rendering the application necessary.

### **B. Respondents' Response**

3. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 07.12.2023 in opposition to the application. He denied having trespassed upon the suit property and pleaded that he was only in occupation of his own parcel of land measuring 6 acres and that he did not even share a common boundary with the Applicant since there was a road separating their respective parcels. He sought to have a surveyor sent to the ground to establish the ground status and file a report in court in that regard.
4. It was his case that the Applicant, who was his sister, had fraudulently combined their late mother's land into the suit property without involving the rest of the family members hence precipitating the dispute. It was also his case that the suit property had been the subject of proceedings before the Land Disputes Tribunal (Tribunal), the magistrates' court at Nyahururu and the High Court at Nakuru.
5. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 06.12.2023 in opposition to the application. She similarly denied having trespassed into the suit property and pleaded that she was only in occupation of her own Title on Nyandarua/Kitiri/3120 measuring about 1.98 ha. She pleaded that she was not claiming any portion of the suit property since the Applicant was holding it on behalf of her household. It was her contention that if the Applicant contended that there was any encroachment on her land then she ought to file a boundary dispute for determination of boundaries. As a result, she prayed for dismissal of the application with costs.

### **C. Applicant's Rejoinder**

6. The Applicant filed a further affidavit sworn on 18.01.2024 in reply to the Respondents' replying affidavits. She denied that there was any boundary dispute between her and the Respondents and contended that the relevant boundaries were clearly defined on the ground. She stated that the additional acreage was allocated to her by her late mother during her lifetime hence the 1<sup>st</sup> Respondent had no reason to complain about it.
7. The Applicant further pleaded that the decision of the tribunal over the suit property and all consequential proceedings were quashed by the High Court in Nakuru High Court Misc. Application No. 90 of 2010 and annexed what she considered to be a copy of the quashing order dated 05.10.2010. However, a perusal of the order reveals that it was an order merely granting leave to the Applicant to apply for the judicial review order of certiorari.

### **D. Issues for Determination**

8. The court has considered the Applicant's notice of motion dated 27.07.2023, the replying affidavits in opposition thereto, the Applicant's further affidavit as well as the material on record. The court is of the view that the key issues for determination herein as the following:
  - a. Whether the Applicant is entitled to the eviction order sought.
  - b. Whether the Applicant is entitled to the consequential order sought.
  - c. Who shall bear costs of the application.



## **E. Analysis and Determination**

### **a. Whether the Applicant is entitled to the eviction order sought**

9. The court has considered the material and submissions on record. The Applicant submitted that she had adequately demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had trespassed upon the suit property of which she was the registered proprietor hence she was entitled to the eviction order sought. It was submitted that the relevant notices under Sections 152A, 152B, 152E and 152F of the Land Act were duly served but the Respondents had failed to voluntarily vacate the suit property.
10. The Respondents, on their part, disputed that they had trespassed upon the Applicant's property and contended that they were in occupation of their respective parcels of land only and that the Applicant's allegation of trespass had not been proved. They further submitted that the issues in dispute among the parties could only be effectively resolved through a formal hearing where evidence would be tendered and tested in the normal manner. They consequently urged the court to dismiss the application with costs.
11. The court readily agrees with the Respondents that the dispute among the parties is not suitable for resolution in a summary manner since it is not a simple and straightforward matter. This is not a case where the Applicant is the only title holder and the Respondents are merely occupying her property without any colour of right. It is evident from the material on record that the Applicant's allegation of trespass have been denied and there is no credible and independent evidence on record to demonstrate the alleged trespass. There is no report from a surveyor, land registrar or other expert to demonstrate the alleged trespass. The Respondents' answer to the Applicant's claim is that they are simply occupying and working on their own parcels. The court is thus of the opinion that the instant dispute can only be effectively and completely resolved through a hearing in a civil suit. As a result, the court is not satisfied that the Applicant is entitled to the eviction order without a trial.

### **b. Whether the Applicant is entitled to the consequential order sought**

12. It is evident from the application that the Applicant sought the consequential order for the purpose of enforcing the eviction order. Given that the court has declined to grant the eviction order, then it would not serve any purpose to direct the OCS Kinangop Police Station to ensure compliance with a non-existent order.

### **c. Who shall bear costs of the application**

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is aware that all the parties to the proceedings are close relatives. The court is thus of the view that the appropriate order to make is that each party shall bear his own costs.

## **F. Conclusion and Disposal Order**

14. The upshot of the foregoing is that the court finds no merit in the Applicant's application for an eviction order. As a result, the notice of motion dated 27.07.2023 is hereby dismissed in its entirety without prejudice to the right of the Applicant to file a civil suit for trial in the ordinary manner. Each party shall bear his own costs.

Orders accordingly.



**RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**In the presence of:**

Ms. Ondande for the Applicant

N/A for the Respondents

Court Assistant – Carol

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**Y. M. ANGIMA**

**JUDGE**

