



REPUBLIC OF KENYA



Malai & 4 others v Blue Horizon Properties Ltd & 3 others (Civil Suit 467 of 2011) [2025] KEELC 604 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEELC 604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 467 OF 2011
LL NAIKUNI, J
FEBRUARY 14, 2025**

BETWEEN

**MZURI MALAU MALAI 1ST PLAINTIFF
JUMAA KOMBE CHARO 2ND PLAINTIFF
PETER K KALAMA 3RD PLAINTIFF
JEFWA KAZUNGU KALUTE (Suing for his own and on behalf of Miritini Redeemed Gospel Church) 4TH PLAINTIFF
TRUSTEES OF REDEEMED GOSPEL CHURCHES INCORPORATED 5TH PLAINTIFF**

AND

**BLUE HORIZON PROPERTIES LTD 1ST DEFENDANT
MUNICIPAL COUNCIL OF MOMBASA 2ND DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 3RD DEFENDANT
NATIONAL LAND COMMISSION 4TH DEFENDANT**

RULING

I. Introduction

1. This Honourable Court was called upon to determine and render itself onto the Notice of Motion application dated 26th September, 2024 instituted by Mzuri Malau Malai, Jumaa Kombe Charo, Peter K. Kalama, Jefwa Kazungu Kalute (Suing for his own and on behalf of Miritini Redeemed Gospel Church) and Trustees of Redeemed Gospel Churches Incorporated the Plaintiffs herein brought under Article 25 and 50 (2) of the *Constitution* of Kenya, Section 3A and 163 (e) and 93 of the *Civil Procedure Act*, Cap. 21 Order 22 Rule 22 of the Civil Procedure Rules.



II. The Plaintiffs' case.

2. The Plaintiffs sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to recall, set aside and/or strike out the Warrants to Give Vacant Possession dated 21st January, 2024.
 - d. That costs of this application be provided for.
3. The application was based on the grounds, testimony and the averments founded on the 20 Paragraphed Supporting Affidavit of JEFWA KAZUNGU KALUTE, one of the Plaintiffs herein; sworn and dated the same day as the application. He deponed that:-
 - a. By a Judgment delivered on 5th October, 2023 the Honourable Court dismissed the suit instituted by the Plaintiffs.
 - b. There was no Counter - Claim filed by the Defendant in the suit.
 - c. In order (c) of that Judgment herein, this Honourable Court ordered that: -

“ Any persons occupying the suit land through illegal means and trespass to be legally evicted from the land within the next 90 days from the date of the delivery of the judgment pursuant to the provisions of Section 152 E of the Land Act No.6 of 2012.”
 - d. The provision of Section 152 E of the Land Act No.6 of 2012 provides thus: -

“ 152 with respect to private land the owner or the person in charge is of the
E(1) opinion that the person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person notice, of not less than three(3)months before the date of the intended eviction.”
 - e. The Notice anticipated under the provision of Section 152 E of the Land Act, No. 6 of 2012 supra, must conform to Section 152 E (2), and in particular must;
 - a. Be in writing in a national and official language
 - b. In case of a large group of persons, be published in at least two daily Newspapers of nationwide circulations 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 building the reaping of growing crops and any other matters as the case may require; and
 - d. Be served on the Deputy County Commissioner in charge of the region and the Officer Commanding the Police Division of the area
 - f. The plaintiffs had never served him with any notice as specified in section 152 E of the Act.



- g. The only notice that had ever been served upon him is the Notice to Give Vacant Possession dated 22nd January, 2024.
- h. The Notice to Give Vacant notice anticipated in section 152 E(1);
 - a. Is issued by the owner of the private land
 - b. The notice must comply with the provision of Section 152 E(1).c) Under Section 152 F any person served with the notice may apply to court for relief against the notice.
- i. Section 152 E of the Land Act can be opposed pursuant to Section 152 F of the same Act, and must be decided in a fair and public hearing as enshrined in Article 50(1) of the Constitution of Kenya 2010.
- j. In the instant case, the Defendant now intends to evict the Plaintiffs under the guise out in the Judgment. I hereto annex a copy of the Notice To Give Vacant Possession dated 22nd January, 2024 and marked the same as “JKK - 1”.
- k. By making a clear pronouncement that the eviction of the illegal occupants of the suit property would be effected pursuant to the provisions of section 152 E of the Land Act, No. 6 of 2012, this court was clear that the provisions of Section 152 E of the Land Act No. 6 of 2012 would be strictly complied with.
- l. It was therefore up to the Defendant to comply with the aforesaid section by issuing the statutory notice thereunder in order to effect the eviction within the time set out in the Judgment.
- m. The observance of the process as provided under the provision of Section 152 E (1) of the Land Act No. 6 of 2012 is important and vital since the parties could then deal with the terms and conditions specified under the provision of Section 152 E (2)(c) hence the requirement that the same be served on the Deputy County Commissioner in charge of the area as well as the officer commanding the police division of the area.
- n. The same could be resolved by the court under the provision of Section 152 F (2)(a)(b)(c) and (d), all of which must be the resultant of fair hearing carried out in public pursuant to Article 50(1) of the Constitution.
- o. In the instant case his right to fair trial under article 50(1) was threatened by the aforesaid notice.
- p. The Notice to Give Vacant Possession was in the circumstance null and void and the same should be struck out.
- q. It could not have been the intention or the direction of the court pursuant to the judgment dated 5th October, 2023 that the provisions in section 152 E requiring the service of a Notice to the occupants of the suit property, or the right to oppose the same by application to this court, or the right to a fair trial in order to resolve by application of the law, the disputes that may arise out of such objection be ignored or disregarded.
- r. Further to the foregoing, informed that Party and Party Bill of Costs is yet to be taxed thus making execution premature under section 94 of the Civil Procedure Act.



III. The Submissions

4. On 29th October, 2024 while all the parties were present in Court, they were directed to have the Notice of motion application dated 26th September, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not accessed the written submissions for consideration. Nonetheless, the Court proceeded to render its ruling on 14th February, 2025 on its own merit accordingly.

IV. Analysis and Determination

5. I have carefully read and considered the pleadings herein, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
6. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 26th September, 2024 is merited?
 - b. Who will bear the Costs of Notice of Motion applications dated 26th September, 2024.

Issue No. a). Whether the notice of Motion application dated 26th September, 2024 is merited

7. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being the issue of Legal eviction as opposed to (forceful/Illegal eviction) and whether this Court should strike out the warrants to give vacant possession issued on 21st January, 2024. The procedure for legal eviction has been well established in statutes and which will be elaborately deliberated herein below. to be Legally speaking, a permanent injunction fully determines the rights of the parties before the court and perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This was stated by the court the case of “Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib [2018] eKLR” where it was held inter alia as follows:-

“.....A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

8. Orders of vacant possession are a permanent injunction in nature. The Black’s Law dictionary definition of a permanent injunction is;

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“ A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such



act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action fit law”

9. The provision of Section 13 (7)(g) the [Environment and Land Court Act](#), No. 19 of 1911 provides that in exercise of its jurisdiction under the Act, the court shall have power to make any order and grant relief as the court deems fit and just, including- restitution. The provision of Section 152 E of the [Land Act](#), No. 6 of 2012 provides for eviction in Kenya. Section 152E of the Amended [Land Act](#) provides that:-

Eviction Notice to un lawful occupiers of private land

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve a notice, of not less than three months before the date of the intended eviction.
 - (2) The notice under 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 circulation 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, the reaping of 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.
10. The Plaintiffs aver that by a Judgment dated 5th October, 2023 the Honourable Court whereby it dismissed the Plaintiffs’ suit. From the record, there was no Counter - Claim filed by the Defendant in the suit. In order (c) of that Judgment herein, this Honourable Court ordered that:-
- “ Any persons occupying the suit land through illegal means and trespass to be legally evicted from the land within the next 90 days from the date of the delivery of the judgment pursuant to the provisions of section 152 E of the [Land Act](#) No.6 of 2012.”
11. Ideally, this is what is envisaged as legal eviction process. Indeed, the Plaintiffs averred that the provision of Section 152 E of the [Land Act](#) supra anticipates a notice which should be in writing in a national and official language, in case of a large group of persons, be published in at least two daily Newspapers of nationwide circulations and be displayed in not less than five strategic locations within the occupied land and specify any terms and conditions as to the removal of building the reaping of growing crops and any other matters as the case may require; and be served on the Deputy County Commissioner in charge of the region and the Officer Commanding the Police Division of the area.
12. Thus, the Plaintiffs contend that they were never served with any notice. The only notice that had ever been served upon him is the Notice to Give Vacant Possession dated 22nd January, 2024. The observance of the process as provided under the provision of Section 152 E(1) of the [Land Act](#) No. 6 of 2012 is important and vital since the parties can then deal with the terms and conditions specified under section 152 E(2)(c) hence the requirement that the same be served on the Deputy County Commissioner in charge of the area as well as the officer commanding the police division of the area.



Further to the foregoing, informed that Party and Party Bill of Costs is yet to be taxed thus making execution premature under section 94 of the Civil Procedure Act.

13. I have perused the court record. I reiterate that there was no Counter - Claim filed by the Defendants. They slept on their right which included filing for a Counter - Claim in this suit as provided for under the provision of Order 7 Rules 3 & 7 of the Civil Procedure Rules, 2010. The correct procedure in seeking for a legal eviction should be followed as per the provision of Section 152 E of the Land Act, No. 6 of 2012. In the case of “Margret Karwirwa Mwongera – Versus - Francis Kofi (2019) eKLR” a similar application was filed pursuant to section 152 E of the Land Act whereby Justice Sila Munyao held that an eviction notice had been served upon the Respondent. It will also be seen from section 152 E (d) that the eviction notice is supposed to be served upon the Deputy County Commissioner in charge of the area where the land is situated and also upon the OCPD of the area. That should be the procedure. However, as far as this matter is concerned, I hold that the Honourable Court has not seen any notice served as envisaged by Law having been properly served in line with section 152E. The Warrants to Give Vacant Possession dated 21st January, 2024 cannot be deemed to be the stated notice. For this reason the application must succeed.

Issue b). Who bears the costs of the notice of Motion application dated 26th September, 2024

14. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
15. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
16. In this case, this Honourable Court has reserved its discretion not to award the costs.

V. Conclusion & Disposition.

17. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the omnibus application, this court arrives at the following decision and makes the orders below:-
 - a. That the Notice of Motion application dated 26th September, 2024 by the Plaintiffs be and is hereby found to have merit and is hereby allowed.
 - b. That this Honourable Court be and is hereby pleased to recall, set aside and/or strike out the Warrants to Give Vacant Possession dated 21st January, 2024.
 - c. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 14TH DAY OF FEBRUARY 2025.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Kalekye, the Court Assistant.
- b. Mr. Wameyo Advocate for the Plaintiffs/Applicants.
- c. Mr. Omwenga Advocate for the Defendants.

HON JUSTICE L.L. NAIKUNI (ELC JUDGE)

