



Kencent Holdings Limited & another v Matsese & 330 others & 2 others (Environment & Land Case 123 of 2009) [2025] KEELC 466 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEELC 466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 123 OF 2009
SM KIBUNJA, J
FEBRUARY 12, 2025**

BETWEEN

KENCENT HOLDINGS LIMITED 1ST PLAINTIFF

KENYA NATIONAL ASSURANCE COMPANY 2ND PLAINTIFF

AND

MATI CHARO MATSESE & 330 OTHERS 1ST DEFENDANT

HON ATTORNEY GENERAL 2ND DEFENDANT

**SECRETARY TO THE COUNTY GOVERNMENT OF
MOMBASA 3RD DEFENDANT**

RULING

[Notice Of Motion Dated 28th October 2024]

1. The Office of the County Attorney, County Government of Mombasa, moved the court through the notice of motion dated the 28th October 2024, that is brought under Articles 1(4), 40, 43, 47, 48, 50, 60, 64, 159, 174 and 176 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Order 40 Rule 4 & 7, Order 51 Rule 1, 10 & 12 of the Civil Procedure Rules 2010, seeking for the following orders:

1. “Spent.
2. That leave be granted to the Office of the County Attorney, Mombasa to come on record for the 3rd Defendant.
3. Spent.
4. Spent.



5. That after inter parties hearing this Honourable Court be pleased to set aside/ or review the orders dated 5th July 2023 and 14th November 2023.
6. That after inter parties hearing Honourable Court be pleased to set aside, review and/or vary the orders of 31st October 2019.
7. That after inter-parties hearing this Honourable Court allows the 3rd Defendant to intervene in favour of the 1st Defendants and any other party on the suit property Plan L.R. MN/397/1 Bamburi (kwa Bulu to purchase and protect their interest of first purchase over the suit property PLOT L.R. MN/397/1 Bamburi (kwa Bulu.
8. That and other relief the court may deem fit to grant.
9. That the costs of this Application be in the cause.”

The application is based on the nine (9) grounds marked (a) to (i) and supported by the affidavit of Jeizan Faruk, the County Secretary, County Government of Mombasa, sworn on the 28th October 2024, inter alia deposing that the firm of Mwangi Njenga & Co. Advocates has been on record for the 3rd defendant’s predecessor, and there is need to bring in the County Attorney in substitution; that he was aware that the 2nd plaintiff had put a notice in the Standard and the Nation Newspapers of 22nd October 2024, offering for sale 1,366 plots derived from PLOT L.R. MN/397/1 BAMBURI (KWA BULO); that the sale would displace the squatters, and their resettlement would be a challenge to National and County governments; that the Governor had written to the National Treasury on 17th March 2023 expressing the intention to purchase the suit property for the squatters; that on 12th May 2023 the Cabinet Secretary Treasury responded to the Governor’s letter with reservations and vide letter dated 19th June 2023, forwarded a legal opinion from the Attorney General over the proposal recommending the sale transactions to be concluded in compliance with the court orders and directions; that on 21st August 2024, the 3rd defendant wrote to the Cabinet Secretary National Treasury seeking to suspend the advertisement calling for bidders to purchase the parcels of land derived from the suit property PLOT L.R. MN/397/1 Bamburi; that the Cabinet Secretary National Treasury on 18th September 2024 responded that the sale should be undertaken and concluded in strict compliance with court orders of 31st October 2019, which can only be altered by the court; that the 3rd defendant then filed the instant application and seeks for the court to set aside, review or vary the orders as prayed for the interest of the squatters and any other person in occupation of the suit property; that the 3rd defendant has put in place legislation known as Mombasa Ardhi Regulations 2024, which enables it to purchase land, like in the instant case for resettlement of squatters.

2. The application is opposed by the 1st plaintiff, through the grounds of opposition and replying affidavit of Karanja Wanyoike, director, both dated 8th November 2024. It is the 1st plaintiff’s case inter alia that the application has no merit, is frivolous, and an abuse of the court process, meant to derail the rightful and legal owners of the subject property; that under Section 7 (c) of the Office of the County Attorney Act, the County Attorney is only mandated to represent the County Executive under the instruction of the County Government, but the County Executive of Mombasa is not a party; that the application was res judicata as it seeks similar orders to the 1st defendant’s application dated 15th March 2024 that was dismissed by the court on 1st July 2024; that the applicant has not satisfied the requirements in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, or laid out any legal ground to warrant the court to set aside, review and or vary the orders made on 31st



October 2019, 5th July 2023, and 14th November 2023; that there has been unexplained, inordinate and unreasonable delay in seeking the setting aside, reviewing or varying of orders that were granted on 31st October 2019, 5th July 2023 and 14th November 2023, as a period of more than one year has lapsed since the said orders were issued; that the ruling of 31st October 2019 was on a review application made under Order 45 of the Civil Procedure Rules, and that Rule 6 of the same order bars this court from considering an application seeking review of an Order made on a review application; that the application is against their right to property since it seeks to impose a discount on the sale of the suit property, which amounts to an illegality that cannot be supported by the court; that the 3rd defendant stands to suffer no prejudice or irreparable harm or damage as the notice of sale is open to everyone in compliance with this Honourable Court's Orders; that according to the court order dated 19th October 2019, the squatters received their letter of offer relating to their portions of the suit property, and those who were unable to purchase by cash were offered the opportunity to apply for a loan from financial institutions or Land Settlement Fund Board of Trustees; that after collecting their letters of offer, the squatters filed an application seeking to stay the implementation of the said letters and orders of 19th October 2019, which was granted by the court on 5th July 2023, and the 2nd plaintiff was ordered to file all the requisite reports in Court; that the suit was mentioned on 4th October 2023 and after confirming the reports had been filed, the matter was fixed for further directions on 14th November 2023, when the court vacated Orders C (I) and (11) issued on 5th July 2023, with no objection being raised by any of the defendants; The deponent confirmed that adverts were published on 8th March 2024, 21st May 2024 and 13th August 2024, inviting the bidders alongside the squatters who had failed to take up their letters of offer; that the squatters tried to stay the said process vide an application dated 15th March 2024, but they however failed to comply with orders of the court on the dispensation of their application and it was dismissed for want of prosecution; that the Notice of Sale advertised on 22nd October 2024, which the 3rd defendant seeks to stay is explicitly open to everyone and argued that the 3rd defendant, County Government of Mombasa, is at liberty to send in their bid for consideration, based on competitive bidding; that the suit property L.R Number MN/397/1 Bamburi (Kwa Bulu) has since been subdivided into 1,448 plots, and only 1,366 plots remain available, with portions of land occupied by public utilities like public schools and conservation area being allocated to, and titles issued to the Cabinet Secretary National Treasury and the County Government of Mombasa respectively; that the communication between the 3rd defendant and the Ministry of Treasury alongside the office of the Attorney General, is clear that the 3rd defendant was advised that the sale should be compliant with the court orders.

3. The 2nd plaintiff also opposed the application vide their grounds of opposition and replying affidavit of Tabitha Mwaniki, Acting Chief Executive Officer and Secretary to the Board, both dated 6th November 2024. It is 2nd plaintiff's case inter alia that the application is frivolous, vexatious, unmerited, fatally defective and an abuse of the court process; that the consent orders of 19th April 2019 and 31st October 2019 halted the eviction of squatters and granted them an opportunity to purchase the plots they occupied, and the 3rd defendant, was not a party to the said orders; that as none of the parties who recorded the consent orders has sought for their vacation, the application cannot be granted; that the 3rd defendant participated in the implementation of the orders of 19th April 2019 and 31st October 2019 in terms of Physical Planning, taking of census to determine the population of the areas, approving the subdivision plans, issuing certificate of leases, and advertising for the sale of the plots derived from the suit property does not validate, justify or create a basis to vacate the orders; that there is a valid judgment against the 1st defendant where they had been ordered to be evicted from the suit property before the consent orders of 31st October, 2019 were entered, when they were given an option to purchase the portion/share of the property where they occupied; that the 1st defendant are squatters in the suit



property with no title and cannot enjoy the protection envisaged under Articles 40, 43, 60 and 64 of *the Constitution*, as they were simply offered an opportunity to purchase the parcels they occupy and obtain ownership documents which opportunity they have failed to take advantage of; that the 3rd defendant should be looking out for the interests of both the registered owners and the squatters by encouraging the squatters to take up the offer and pay for the parcels they occupy; that the mother title was subdivided into 1448 plots but only 1366 plots remain, and are the plots that were advertised for sale by the 2nd Plaintiff on 22nd October 2024; that the 3rd defendant's proposal to discount of 50% of the total purchase price of the suit property would infringe on the provisions of Sections 682 as read with Sections 684 and 685 of the *Insolvency Act* 2015 which empowers the court to set aside a transaction that is undervalued which is undertaken by a Company which is expected to proceed to voluntary liquidation as is the case with the 2nd Plaintiff herein; that any order stopping the sale would greatly inconvenience those who are in the process of acquiring their respective plots, yet the 1st defendant are still in occupation of the plots they have failed to purchase; that the 3rd defendant's proposal on whether it seeks to finance the 1st defendant to purchase their plots or purchase the plots on their behalf, and further was lacking on specific timelines for implementation, and would delay and defeat the ends of justice as their request to the Cabinet Secretary National Treasury was rejected; that the 2nd plaintiff, as a parastatal owned by the state, cannot discount the purchase price by 50% as it has since planned to go into voluntary liquidation after the sale of the suit property and the court has no legal capacity to force the same for the benefit of the 1st defendant, who have resided on the suit property for over 20 years; that the 2nd plaintiff has invested substantial resources in the enumeration, physical planning, survey, valuation and processing of the leases and certificate of leases and it was only fair for them to continue with the sale to completion.

4. The 2nd defendant equally opposed the application with their seven (7) grounds of opposition dated the 27th November 2024, inter alia stating that the 3rd defendant was guilty of laches and seeks orders against third-party purchasers who were not party to the application, and therefore their application contravenes section 4 (3) and (4) of the Fair Administration Act; that the 3rd defendant has failed to demonstrate through evidence any acceptance of the offer issued by the plaintiffs that they wish to finance; that the court has no jurisdiction to force parties into a contract to purchase/sell the suit property and the 3rd defendant does not need a court order to purchase the suit property, but should instead simply participate in the bidding process and pay the purchase price for the individual plots.
5. The court issued directions on 11th November 2024 and 3rd December 2024 on filing and exchanging submissions. The learned counsel for the 3rd defendant/applicant, 2nd defendant/interested party, 2nd and 1st plaintiffs filed their submissions dated 2nd December 2024, 27th November 2024, 11th December 2024 and 16th December 2024 respectively, which the court has considered.
6. The issues for the court's determinations are as follows:
 - a. Whether the County Attorney can be granted leave to come on record for the 3rd defendant.
 - b. Whether the 3rd defendant has met the threshold for the court set aside or review the orders issued on 31st October 2019, 5th July 2023 and 14th November 2023.
 - c. Whether the 3rd defendant has made a reasonable case to be allowed to purchase LR MN/397/1 Bamburi (Kwa Bulu), for the 1st defendant and other squatters thereon.
 - d. Who pays the costs in the application?



7. The court has carefully considered the grounds on the application and grounds of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited, the record and come to the following findings:

a. That judgment in this suit was delivered on 12th October 2011, by Ojwang J, as he then was, and eviction orders issued. That an appeal, being number 54 of 2018, was filed before Mombasa Court of Appeal where a consent to pursue negotiations with a view of finding a solution in the matter was entered. The 2nd and 3rd defendants/interested parties were not parties initially, but were joined after judgement was delivered. Their joinder followed the orders of this court of 4th March 2014 directing the plaintiffs to serve the County Commissioner, Mombasa County, the Inspector General of Police and the Secretary to the County Government of Mombasa with the decree of the judgement for enforcement. The 3rd Defendant has therefore been a party ever since that joinder order.

b. Order 9 Rule 9 of the Civil Procedure Rules which provides for change of advocates after judgment states:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

a. upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

The County Secretary is an office established by Section 44 of the County Government Act 2012 as the head of the County Public Service and Secretary to the County Executive Committee. The Office of the County Attorney is an office established in the County Public Service by Section 5 of the Office of the County Attorney Act 2020. One of the main functions of the County Attorney is to be the principal legal adviser to the County Government, with the power to represent the County Government in any court proceedings. The County Attorney is also a member of the County Executive Committee, where the Secretary to the County Government also sits. In my view, it is not only proper but a just use of public resources for the County Attorney to not only represent the 3rd defendant in court, but to also offer legal advice where needed. Therefore prayer 2 for the County Attorney to come on record post judgement for the 3rd defendant/interested party has merit and is allowed.

c. The court has the power to review its orders within the framework of Section 80 of the [Civil Procedure Act](#), which provides that as follows:-

Any person who considers himself aggrieved -

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules sets out the grounds for review and they include:



- a. discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or
- b. on account of some mistake or error apparent on the face of the record, or
- c. for any other sufficient reason, without unreasonable delay.

The 3rd defendant has submitted that it seeks the court to review, set aside or vary the orders issued on 31st October 2019, 5th July 2023 and 14th November 2023. That it in particular, seeks to vary the orders issued on 31st October 2019 to include that the 3rd defendant can purchase the suit property on behalf of squatters unable to pay cash for the property, extension of the period of which the squatters may accept the letters of offer and for the stay of the sale of the suit property. The 3rd defendant submitted that the Ardhi Fund Regulations, which allow the 3rd defendant to intervene were not in existence during the pendency of the case and only came into force on 25th October 2024.

- d. The orders of 31st October 2019 are as follows:

1. Spent.
2. Spent.
3. That the government through the deputy county commissioner, Kisauni sub-county be and is hereby ordered to carry out an enumeration of all people settled on the suit property. the enumeration report to be submitted to court within 30 days from the date of the court order which report shall be the basis of further dealings with the land.
4. That the people identified in the enumeration through not included in the list of the defendants be enjoined into the suit as long as they continue occupying the land. any dispute over ownership of the individual plots be resolved during the enumeration.
5. That the county physical planner be ordered to plan the settlement in accordance with the law and give a report within 30 days from the date the enumeration report is submitted to the court.
6. That the county surveyor based on the report by the physical planner to survey the portions occupied by each squatter and carry out a subdivision of the property and report to court within a specified period of within 30 days from the date the physical planning report is submitted in court.
7. That upon receipt of the subdivision plan the county Valuer be ordered to carry out a valuation of each portion of land whether vacant or occupied which will determine the value of each plot and report to court within a period within 30 days from the date the survey report is submitted to court.
8. That the individual occupants of the plots be given an offer to buy the portions they occupy at the value set by the county valuer and any person who is unable to pay cash for the report be offered an opportunity to apply for a loan from any financial institution or the land and settlement fund board trustee within the specific period of 60 days from the date of the valuation report submitted in court. The letter of offer



should be accepted within 45 days and a report on the accepted offers to be submitted to court within 60 days.

9. That upon payment of the full purchase price or obtaining a loan from financial institutions or land settlement fund board of trustees the certificate be proceeded and be given to the individual buyers within a period of 60 days from the date of acceptance of offer.
 10. That the proceeds of sale after payment of all the costs of physical planning, survey, valuation and issuance of certificates of title be apportioned between Kencent holdings limited and Kenya national assurance company (2001) limited in accordance with their interest in the land which is a ratio of 20:80. 20% to Kencent holdings limited in accordance with their 20% deposit paid for the land and 80% to Kenya national assurance company (2001) limited representing the unpaid balance of the sale price.
 11. That all the processes of sale shall be carried out under the supervision of the court.
 12. That there be liberty to apply to the court by any of the parties.
- e. The orders of 5th July 2023 are as follows:
- a. The 1st defendants' application dated the February 17, 2022 has no merit is premature and is hereby struck out with each party bearing their own costs.
 - b. The 2nd plaintiff application dated the March 28, 2022 is also premature, without merit and is likewise struck out with each party bearing their own costs.
 - c. The 1st defendants' application dated the December 29, 2021 has merit and is allowed in the following terms;
 - i. That there should be no further dealing with the suit land and or the subdivisions thereof that is likely to affect its legal status, until the orders of October 31, 2019 are fully complied with. That for avoidance of doubts, the 2nd plaintiff is directed to file with the court all the reports as required in the orders of October 31, 2019 within thirty (30) days from the date of this ruling. The documents to be filed to include the following; The Enumeration Report, detailing the enumeration process that was conducted of the defendants/ squatters residing on the suit land. Detailed List of the squatters who are not among the defendants, and who are to be considered for joinder that were identified in the enumeration to be occupying the suit property. The Physical Planner's Report on the suit land. The Survey Report on the suit land. The Valuation Report on each of the plots surveyed on the suit land.
 - ii. That the letters of offer issued by the 2nd plaintiff over all the plots subdivided from the suit property to any of defendants/squatters residing therein are hereby suspended, and the sale thereof stayed until further orders of the court, for the plaintiffs' failure to comply with the orders issued by this court on October 31, 2019.
 - iii. Each party to bear their own costs in the three applications.
- f. The record confirms that the suit came up for mention on 14th November 2023, for directions on the documents filed by the 2nd plaintiff dated 2nd August 2023, in furtherance to the orders of court issued on 5th July 2023, that required the directions of 31st October 2019 to be



complied with. That upon the court noting that all parties had been served, and none had filed any objection, the court proceeded to certify the said documents filed to be in compliance with the orders issued on 31st October 2023, and order (c)(i) of 5th July 2023. The court then proceeded to review and vacate Order (c)(ii) of 5th July 2023 which suspended the letters of offer issued by the 2nd plaintiff and stayed the subsequent sale since the orders of 31st October 2019 had been complied with.

- g. The orders issued on 31st October 2019 were made pursuant to the 2nd plaintiff's application dated 5th October 2018, while the orders issued on 5th July 2023 were more of implementing in further detail the orders of 31st October 2019. The court having established that the 2nd plaintiff has complied with the orders of 5th July 2023 by filing the required documents on 2nd August 2024, and the orders of 31st July 2019 having been complied with fully, the question that arises to be answered is which orders does the 3rd defendant seeks to be stayed, set aside or varied? I find that question important because the court has already made a finding, as shown above, that all the orders issued on 5th July 2023 and 31st October 2019 have been complied with, and no objections had been raised. Upon confirming compliance, the court vacated the stay orders issued earlier, and there is no reasonable cause shown for the court to stay, set aside or review any of the orders as the advertised sale has been okayed by the court.
- h. Court orders are not granted in vain, but are meant to be implemented. The plaintiffs have already commenced the implementation of the court orders with the court having given its approval after disposing of all the pending challenges, and are in the process of completing the exercise. The 3rd defendant has been a party since the joinder years ago and was represented by counsel and one wonders why no objection was raised before the compliance certification on 14th November 2023 or soon thereafter or why it has not participated in the bidding process like other potential purchasers. That in view of the history of this dispute from the judgement to the appeal before the Court of Appeal, the agreement on how to settle the dispute post judgement, the consent orders of 19th April 2019 and 31st October 2019 and the various applications and rulings thereafter, I find what the 3rd defendant is essentially asking the court is to disregard or better still expunge from the court records the reports that were filed pursuant to the orders of 5th July 2023. That would not only be unfair, but also a waste of the court's time, considering that different government agencies like the Land Registrar, Surveyor, and Valuer have all been involved in visiting the suit property, preparing and filing their respective reports, which have all along been considered by the court. The 3rd defendant has failed to lay before the court any new evidence that they could not reasonably have obtained and availed to the court before to enable the court grant their quest which would really be reversing what has been done with the blessings of the court. In any case, to grant the 3rd defendant's prayers would amount to a great injustice to those potential purchasers, squatters and third parties who have already been successful in their bids and or have already paid for their plots and are not parties herein.
- i. On the question of whether the 3rd defendant should be allowed to purchase the suit property on behalf of the squatters, who shall be rendered homeless, the court has noted that the County Government of Mombasa, through its Governor wrote to the CS National Treasury and Economic Planning on 17th March 2023 on their intention to purchase the suit property on behalf of the squatters. The letter reads " The County Government of Mombasa as an interested party in the suit and the potential beneficiary of this settlement in land rates revenue as well as development control, has made arrangement with a financial institution to immediately raise 50% and requests 50% discount of the total purchase price on behalf



of the squatters.” On 12th May 2023, the CS wrote back to the Governor communicating his reservations on the proposal made as it does not help the 2nd plaintiff’s in meeting its financial obligation as a company under receivership and recommended full payment of the purchase price. The letter read “The County Government of Mombasa to raise the market value of the land and pay entire amount to the Kenya National Assurance Company (2001) to facilitate transfer of the asset to the County Government, The County Government will thereafter have the latitude to determine on how to proceed with the land being its asset; or The National Government to partner with the County Government of Mombasa on a fifty to fifty percent basis and raise the market value of the land to the Kenya National Assurance Company (2001) to facilitate the transfer of the land to squatters. This option will require the County Government of Mombasa to indulge the Ministry of lands to recommend to the National Government the most optimal manner to share the burden of buying the subject land.” The CS Treasury made the above proposal to the County Government on 12th May 2023, but no evidence has been adduced in court to show that the County Government of Mombasa responded to the proposals, or better still considered the proposals made. There 3rd defendant has not provided the court with any details about the financial institution that was to support or aid the County Government to raise 50% of the purchase price, or how far they have reached in the negotiations. The court is of the view that the proposal fronted by the CS Treasury was realistic, and if indeed, the County Government of Mombasa was committed in settling the squatters on the suit property, it would have pursued the same to its finality, without delay by engaged the plaintiffs accordingly. The application by the 3rd defendant to simply halt the sale of the suit property merely because there is now in place a legal instrument, Mombasa County Ardhi Fund Regulations, cannot be a sufficient ground to stop the implementation of the very clear court orders, and does not amount to a fair and just prayer under the circumstances.

- j. The sale of the suit property is long overdue and as argued by the plaintiffs, the subdivision was approved by the respective government offices of the National and County Government of Mombasa. There is nothing illegal about the sales and the County Government of Mombasa can still support the squatters purchase their respective plots on an individual basis using the Mombasa County Arthi Fund Regulations. There is no need to halt the whole process, a process which the 3rd defendant has been part of for over a decade when it was allowed to join the suit to ensure compliance in implementation as per court orders and directions. That other than prayer 2 for the County Attorney to come on record for the 3rd defendant, all the other prayers are without merit.
 - k. That pursuant to section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the 3rd defendant will meet the costs of the plaintiffs as it has failed in the primary and contentious prayers.
8. In view of the foregoing determinations on the 3rd defendant’s notice of motion dated the 28th October 2024, the court finds and orders as hereunder:
- a. That prayer 2 for the County Attorney to come on record for the 3rd defendant is allowed.
 - b. That all the other prayers are dismissed with costs to the plaintiffs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.



In The Presence Of:

Plaintiffs : Mr Waithaka For 1st Plaintiff

Mr. Omondi For 2nd Plaintiff

Defendants : Mr Tajbhai For 3rd Defendant/applicant

Shitemi- Court Assistant.

