



Stringsfile Limited v Kamotho & 9 others (Environment and Land Miscellaneous Application E040 of 2022) [2023] KEELC 15741 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E040 OF 2022
LA OMOLLO, J
FEBRUARY 23, 2023**

BETWEEN

STRINGSFILEL LIMITED APPLICANT

AND

SAMUEL NJOGU KAMOTHO 1ST RESPONDENT

STEPHEN NJOROGE MUNGAI 2ND RESPONDENT

JOHN MUNGAI GITAIGIA 3RD RESPONDENT

DANIEL MACHARIA KIHARA 4TH RESPONDENT

BIDAN MWANGI 5TH RESPONDENT

NAOMI WANGECHI 6TH RESPONDENT

JOSEPH MABARIA 7TH RESPONDENT

VIRGINIA WAITHIRA 8TH RESPONDENT

JOHN MUNGAI 9TH RESPONDENT

ZAKAYO WAWERI 10TH RESPONDENT

RULING

1. This ruling is in respect of the applicant's notice of motion application dated October 6, 2022 which is expressed to be brought under section 1A, 1B, 3A and 63E of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, section 15A, 152B, 152E and 152G of the *Land Act* and all other enabling provisions of the law.
2. The application seeks the following orders:



- a. Spent
 - b. Spent
 - c. That pending the hearing of this application, this Honourable court be pleased to issue eviction orders against the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with that parcel of land known as Naivasha Municipality Block5/386
 - d. That this honourable court be pleased to order the Ward Commander Naivasha police station and the Naivasha sub-County Police Commander to enforce the eviction orders and provide security during the eviction of the Respondents.
 - e. That the costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on October 6, 2022 by one Shella Bano Sheik, a director of the applicant.

FACTUAL BACKGROUND.

4. The matter first came up in court on October 6, 2022 and the court stated that it was not persuaded as to the urgency of the application and directed that the same be served upon the Respondents and further directed that the application would be heard inter partes on November 8, 2022.
5. On November 8, 2022, the applicant informed the court that the Respondents had been served but had not filed any responses to the application. Counsel further informed court that he had filed an affidavit of service sworn on October 14, 2022 as evidence of service upon the Respondents.
6. The court being satisfied that service had been effected on the respondents, issued directions that the application would be heard by way of written submissions and gave a date for mention to confirm filing of submissions by the Applicant.
7. On November 8, 2022 the applicant confirmed that it had filed its submissions. The matter was then reserved for ruling.

The Applicant's Contention.

8. The applicant contends that on April 30, 2020 this court vide ELC No. 89 of 2019 ; Samuel Njogu Kamotho & 43 others vs Kenya African National Union (KANU) ordered the respondents herein, who were plaintiffs/applicants in the previous suit, to vacate and give vacant possession of the suit property to KANU Party and in default eviction orders to issue. A copy of this ruling is annexed to the supporting affidavit.
9. The applicant contends that on account of the orders in ELC No. 89 of 2019, the respondents were evicted after which KANU sold the suit property to the applicants herein. A certificate of lease in the name of the applicant, issued on November 23, 2021 is annexed to the supporting affidavit.
10. The applicant contends that after purchase, it took vacant possession but some of the respondents have since invaded the property again as a result of which it is facing frustration and cannot enjoy the suit property.



11. The applicant contends that the actions of the respondent are in complete defiance of the orders of the court and that the respondents occupation of the suit property is illegal and has made it impossible for it to enjoy and develop the suit parcel.
12. As stated in the foregoing paragraphs, the respondents did not file any response to this application despite service of the application upon them.

Submissions.

13. The Applicant filed her submissions on November 16, 2022.
14. In its submissions, the Applicant gives a background of the application and identifies the following issues for determination:
 - a. Whether eviction orders should issue against the Respondents in respect of Naivasha Municipality Block5/386 and the Ward Commander Naivasha police station and the Naivasha sub-County Police Commander ensure compliance.
 - b. Whether the respondents are in contempt of court.
 - c. Who should bear the costs of this application.
15. On the first issue for determination, the applicant submits that no stay was issued in respect of the court order in- ELC No. 89 of 2019 Samuel Njogu Kamotho & 43 others Vs Kenya African National Union. It submits that orders to vacate and give vacant possession on or before March 30, 2021 are still in force and that the respondents occupation is therefore illegal and eviction orders are necessary.
16. The applicant further submits that the respondents do not hold title to the suit property adding that their claims over the suit property were dismissed in the aforementioned suit and that the court allowed the defendant's (KANU) counterclaim. It submits that the orders in the counter claim were that the plaintiffs (Respondents herein) issue the defendant (KANU) vacant possession of the suit property.
17. The applicant has cited the decisions in *Lucy Ghati vs Alex Wambura John & another* (2010) eKLR and *Josphat Kurai Gathoni vs James Maina Njoroge & 3 others* (2019) eKLR in support of its prayers for eviction orders.
18. On the second limb of the first issue for determination, the applicant submits that they seek assistance of the Ward Commander Naivasha Police Station and the Naivasha Sub-County Police Commander to oversee the eviction for the reasons that evictees very often resist eviction that may result in violence and breach of peace.
19. On the second issue the applicant defines contempt and submits that the respondents have disobeyed the court order and are therefore in contempt. It relies on the decision in *Teachers Service Commission-vs- Kenya National Union of teachers & 2 others* (2013) eKLR and *African Management Communication International Limited vs Joseph Mathenge Mugo & another* (2013) eKLR
20. On the issue of costs, the Applicant relies on the provisions of section 27 of the *Civil Procedure Act*. It also relied on the decisions in *Levben Products vs Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) AT 227 which speaks to discretion of the court in granting costs and that discretion must be exercised judiciously. The applicant also relies on the decision in *Cecilia Karuru Ngayu vs Barclays Bank of Kenya Limited & another* (2016) eKLR which speaks to the fact that a successful party is entitled to costs and that the court has no discretion to take away this right unless there has been misconduct, omission or neglect or oppressive and vexatious conduct on the part of a party. The applicant ends by praying that costs are granted in its favour.



21. In my view, the twin issues for determination by this court are:
 - a. Whether eviction orders from Naivasha Municipality Block5/386 should issue against the Respondents
 - b. Who shall bear the costs of this application?

Analysis And Determination.

22. I have considered the Application, Supporting Affidavit and annexures filed in this matter.
23. The applicant relies on section 152A, 152B, 152E and 152G of the Land Act.
24. Section 152 A of the Land Act provides as follows

A person shall not unlawfully occupy private, community or public land.
25. Section 152B of the Land Act provides as follows:

An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.
26. Section 152E of the Land Act provides for the procedure to be followed before eviction. It is as follows:
 - (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 on that person 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.
27. Section 152F of the Land Act provides as follows:
 - (1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to court for relief against the notice.
 - (2) The court, after considering the matters set out in sections 152C, 152D and 152E may-
 - (a) confirm the notice and order the person to vacate;
 - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - (c) suspend the operation of the notice for any period which the court shall determine;



or

(d) order for compensation.

28. Section 152G make provision for mandatory procedures during eviction.
29. The applicant has annexed a certificate of lease to the suit property and as such the fact of ownership by it as a pre-condition for seeking orders of eviction has been complied with. However, the Applicant has not attached evidence of having strictly complied with the provisions of the law pursuant to which it brings this application and seeks orders of eviction.
30. The process for eviction is initiated by the issuance of an eviction notice. Section 152E of the Land Act makes provision for issuance of eviction notice to unlawful occupiers of Private Land. It provides for service and duration of notice to the unlawful occupier, contents of notice and service of the notice upon Deputy Commissioners incharge of the area and the Officer Commanding the Police Division of the area. It is evident that the Applicant herein has not complied with these provisions.
31. Further, the fulcrum of this application, as presented by the Applicant, is the court orders issued in ELC 89 OF 2019. On perusal of the ruling annexed to the affidavit in support of the application, I have discovered that the application was filed by the 1st Respondent herein and 43 others (whose names are not disclosed) for the grant of orders of temporary injunction against Kenya African National Union. The court dismissed the application stating that the applicants therein (1st Respondent herein and 43 others) failed to establish a prima facie case; a precondition for grant of orders of temporary injunction.
32. There is no evidence of the final determination in ELC No. 89 of 2019 and I am unable to find that Kenya African National Union was granted orders to vacate and grant vacant possession against the 1st respondents herein & the 43 others. I am, also, unable to find that the Applicant herein was a party to the said suit and therefore a beneficiary of the purported orders to vacate the suit parcel.

DISPOSITION.

33. The Applicant has not followed the strict and elaborate provisions pertaining to issuance of notice to unlawful occupiers as set out in section 152E. The Applicant has also failed to:
 - a. Attach evidence of the purported orders to vacate issued in ELC No. 89 of 2019.
 - b. Attach evidence that the other Respondents (apart from the 1st Respondent) were parties to the said suit and that orders to vacate were issued against them.
 - c. Attach evidence that the applicant is a party in and/or beneficiary of orders granted in ELC No. 89 of 2019.
34. In view of the foregoing, I find that the proposed eviction is not in compliance with the Land Act. Consequently, the application dated October 6, 2022 is dismissed with no order as to costs.
35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23TH DAY OF FEBRUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -



Mr. Otieno for Orege for Applicant
No appearance for Respondents.
Court Assistant; Miss Monica Wanjohi.

