

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC CASE NO. E125 OF 2016

CAMULUS OSENO

OMUSUMBA.....1ST

PLAINTIFF/RESPONDENT

JUSTUS OMBIJI ONYANGO.....2ND

PLAINTIFF/RESPONDENT

VS

PATRICK BARASA

OJIAMBO.....1ST

DEFENDANT/APPLICANT

STEPHEN

OJIMBO.....2ND

DEFENDANT/APPLICANT

FRANCIS

OJIAMBO.....3RD

DEFENDANT/APPLICANT

DOUGLAS

JUMA.....4TH

DEFENDANT/APPLICANT

MOSES

OJIAMBO.....5TH

DEFENDANT/APPLICANT

RULING

1. Vide a judgment delivered on 25th March 2025, this Court differently constituted (Boaz N. Olao J.), dismissed the plaintiffs/respondents claim to entitlement of the parcel of

land known as L.R NO. SAMIA-WAKHUNGU/ODIADO/67 on account of having been in adverse possession thereof.

2. Following dismissal of the plaintiffs/respondents' suit, the defendants/applicants issued the plaintiffs/respondents with a 21 days notice requiring them to vacate the suit property failing which they would move to court for appropriate orders.
3. The plaintiffs/respondents did not heed the notice. Consequently, the defendants/applicants filed a Notice of Motion dated 8th October 2025, in which they seek the following orders:-
 - i) That following the judgment of this Honourable Court delivered on 25th March 2025 in this matter, this Honourable Court be pleased to issue an order compelling the respondents to vacate L.R NO. SAMIA-WAKHUNGU/ODIADO/67 and in default eviction orders against the plaintiffs/respondents to issue.
 - ii) That costs of the application be provided for.
4. The application is premised on the grounds that the plaintiffs/respondents filed the instant suit seeking adverse possession over the suit property which is registered in their name; that this honourable court through its judgment delivered on 25th March 2025 dismissed the plaintiffs/respondents claim for adverse possession over the suit property; that the defendants/applicants want the

respondents out of their land and it is in the interest of justice that the orders sought be granted.

5. The application is supported by the affidavit of defendants/applicants sworn on 8th October 2025 in which the grounds on the face of the application are reiterated. Annexed to the application is the judgment of this court delivered on 25th March 2025 and the eviction notice dated 22nd July 2025.
6. In reply and opposition to the application, the 1st plaintiff/respondent, Camulus Oseno Musumba, filed the replying affidavit he swore on 23rd February 2026. In the the affidavit he inter alia depones as follows:-

“
.....

4. That I participated in the proceedings that culminated in the said judgment; however, I was not fully aware of the nature, implications and legal consequences of the case as filed.

5. That my intention in approaching my Advocate on record was solely to assist me in execution and regularization of transfer processes relating to the suit property and not to institute a fresh claim.

6. That the suit land has been the subject of litigation since 2003 before the Funyula Land Disputes Tribunal, which Tribunal awarded me the suit property (Annexed hereto and marked

COM 1 are copies of the Tribunal Proceedings and Award);

7. That the decision of the said Tribunal was subsequently adopted as a judgment of the Senior Resident Magistrate's Court at Busia in Land Dispute Case No. 15 of 2003. (Annexed and marked COM-2) is a copy of the adoption proceedings).

8. That the applicants herein filed an application seeking stay of execution of the said judgment in Land Dispute Case No.15 of 2003, which application was dismissed by the Court. (Annexed and marked COM-3 is a copy of the ruling).

9. That following the dismissal of the stay application, I filed a Notice of Motion dated 23rd July 2007 seeking eviction of the applicants herein and an eviction order was issued on 24th January 2008 (Annexed and marked COM-4 is a copy of the order).

10. That I subsequently obtained an eviction order dated 1st April 2009, which was duly executed and the applicants were removed from the suit land (Annexed marked COM-5 is a copy of the eviction order).

11. That thereafter I moved the Land Registry to effect transfer of the suit property into my

name and the court verified the authenticity of the documents following which the transfer process was effected. (Annexed and marked COM-6 is a copy of the verification order and related documents).

12. That I lawfully occupy the suit property pursuant to valid court orders which were never appealed against, set aside or overturned.

13.....

19. That the issues surrounding ownership and occupation of the suit property have been substantively and conclusively determined by competent courts, rendering the present proceedings res judicata

20....

21....

22. That in the circumstances, it is only fair and just that this honourable Court considers the history of this matter and declines to grant the eviction orders sought in the Notice of Motion dated 8th October 2025.

23....”

7. In a rejoinder, the defendants/applicants filed a supplementary affidavit, sworn on 21st April 2026 in which they have deposed as follows:-

“.....
.....

3. We are the lawfully and rightful owners of land parcel numberattached and marked PSFDM-1 is a copy of the green card;

4. That all the issues raised by the 1st Respondent in his replying affidavit, dated 23rd February 2026 were conclusively dealt with by this Court in her judgment dated 25th March 2025;

5. That the said judgment of 25th March 2025 was never appealed against by the respondents to date.

6. That the 1st Respondent’s allegations of not instructing his advocate to file for adverse possession over the suit land is an afterthought which does not hold any basis.

7. That our humble prayer is that the respondent be directed to vacate the suit property as prayed in our notice of motion dated 8th October 2025 following the judgment of this Honourable Court.

8...”

8. The application was disposed of by way of written submissions.
9. In their submissions dated 21st April 2026, the applicants have framed two issues for the court's determination namely; whether or not an order compelling the respondents to vacate the suit property should be issued following the court's judgment of 25th March 2025 and who should bear the cost of the application.
10. Regarding those issues, the applicants have submitted/addressed the Court as follows:-

“Your ladyship there is a cogent proof vide the judgment of this court delivered on 25th March 2025 at paragraph 31 page 22 that the plaintiffs/respondents herein, their claim to the suit land on the basis that they have been in occupation and possession thereof peacefully and uninterrupted for a period of over 12 years and are entitled to be registered as proprietors of the same by way of adverse possession or on the basis of trust is misconceived and must be dismissed.

The court did not agree with the respondents that they are entitled to the suit land as they claimed. The decision of the court was never appealed against by the respondents and it still stands.

The applicants are the rightful and lawful registered owners of the suit land which owners have got a right to full enjoyment of their land and the execution of everyone else including the respondents.

The applicants have the full right to enjoy the suit property...as guaranteed under article 40 of the constitution of Kenya. This Honourable Court has got the discretion to issue the said orders prayed for by the applicants in their notice of motion dated 8th October 2025 to ensure that the ends of justice are met...

It is only just and fair that the respondents do vacate the suit land.

It is therefore our humble submission that this honourable court do find it fit to grant the orders prayed for by the applicants in their application dated 8th October 2025."

11. On who should bear the costs of the application, the applicants have made reference to **Section 27(1)** of the Civil Procedure Act and submitted that unless the Court otherwise orders costs for the event, that is to say are payable to the successful party, they urge this Honourable Court to grant them the costs of the application.
12. In his submissions dated 15th May 2026, the 1st respondent has framed 4 issues for the court's determination. These are:-

- i) Whether the applicants are entitled to eviction orders through the present application;
- ii) Whether eviction orders can issue in the absence of a counterclaim or substantive suit for vacant possession;
- iii) Whether the application meets the legal threshold for grant of eviction orders;
- iv) Who should bear the costs of the application.

13. Concerning those issues, the plaintiffs/respondents have submitted/addressed the Court as follows:-

“1. ...the application is incompetent and fatally defective.

The applicants seek substantive eviction orders through a mere notice of motion yet no counterclaim for eviction, vacant possession or trespass was ever pleaded or determined by this Honourable Court.

It is trite law that parties are bound by their pleadings and a court can only grant reliefs specifically pleaded and proved....

2. That dismissal of an adverse possession claim does not automatically translate to eviction.

That dismissal of the respondent’s claim for adverse possession did not amount to a

positive declaration that the applicants are automatically entitled to vacant possession or eviction

Eviction orders are drastic in nature and must strictly comply with sections 152A, 152B, 152E and 152F of the Land Act. In Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others and Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others. The courts emphasized compliance with due process and constitutional safeguards before evictions can issue.

3. That the application seeks final orders through an interlocutory process.

The orders sought are final in nature and would permanently remove the Respondents from the suit property without a substantive hearing on trespass and entitlement to possession.

The applicants ought to have filed a counterclaim or instituted a substantive suit for eviction. The present application violates article 50 of the Constitution on fair hearing.

4. That the application is an abuse of the Court process.

The applicants are attempting to obtain substantive proprietary reliefs through post-

judgment application despite never filing a counterclaim. In Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others, the Court described abuse of process as improper use of court procedure to achieve an outcome sanctioned by law.

5. That the applicants have not laid any legal basis for the orders sought.

The application does not cite proper statutory provisions for eviction nor demonstrate compliance with the Land Act. In Owners of Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd, the Court emphasized the necessity of proper legal foundation before invoking the jurisdiction of the court.

Conclusion

The applicants have improperly invited this Court to grant substantive eviction orders through an interlocutory application despite there being no counterclaim or substantive proceedings for vacant possession and eviction.

The respondents therefore pray that the Notice of Motion dated 8th October 2025 be dismissed with costs...”

14. I have read and considered the application by the defendants/applicants, the response thereto and the submissions filed by the parties. I find the sole issue for

the court's determination to be whether the applicants have made up a case for being granted the orders sought.

15. In that regard, a review of the application by the applicants shows that they seek eviction orders against the respondents based on a judgment of this court delivered on 25th March 2025. Through the said judgment, this court differently constituted, dismissed the respondents' claim to entitlement of the parcel of land known as L.R No. Samia/Wakhungu/Odiado/67 on account of having been in adverse possession thereof.
16. Although this court dismissed the respondents' claim for adverse possession, it is noteworthy that the court did not make any declarations or finding concerning the legality or otherwise of the respondents occupation of the suit property. It merely dismissed the respondents' claim to entitlement of the suit property by virtue of having been in adverse possession thereof.
17. Following delivery of the judgment, the defendants/applicants issued the respondents with an eviction notice requiring them to vacate the suit property within 21 days of service or receipt of the eviction notice.
18. I have reviewed the notice issued by the applicants vis-a vis the provisions of **Section 152 E** of the Land Act, 2012 and I do find the notice to have failed short of the requirements of an eviction notice required by law in that, it was for a period less than the period required in law. It was also not copied to the relevant government institution charged with the responsibility of overseeing evictions

under the Land Act, 2012. In that regard, see the said eviction notice and the provisions of **Section 152B** as read with **152E** of the Land Act, which are as follows:-

“152B. An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

152E(1) If, with respect to private land the owner or person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or person in charge may serve on that person a notice, of not less 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)...

(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

(c) be served on the deputy county commissioner in charge of the area as well as the officer commanding police division of the area.”

19. **Section 152F** provides for the rights and obligations of a person served with the notice contemplated under **Section 152E**. The section provides as follows:-

“152F.(1) Any person or persons served with a Notice in terms of sections 152C, 152D and 152E may apply to court for reliefs against the notice.

2. The Court, after considering the matters set out in section 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 a period which the court shall determine;

d. order for compensation.”

20. In view of the foregoing, I find the notice issued by the defendants/applicants to have been defective and incapable of forming the basis of the intended eviction proceedings.

21. From the affidavit evidence annexed to the replying affidavit sworn in reply to the defendants/applicants' notice of motion, I gather that there were previous suits in which the rights of the parties to the suit property were determined. The documents don't suggest that the respondents' use and occupation of the suit property is unlawful. In the absence of any evidence that the respondents' use and occupation of the suit property is unlawful, this court is unable to grant the orders sought.

22. There being no eviction order in the judgment of this court on which the orders sought can hinge, I agree with the respondents that the instant application cannot form the basis of the orders sought by the defendants/applicants.
23. The upshot of the foregoing is that I find the notice of motion dated 8th October 2025 to be lacking in merits and dismiss it with costs to the respondents.
24. Orders accordingly.

**Ruling dated, signed and delivered at
Nyahururu this 6th day of July, 2026 through
Microsoft Teams.**

**L. N. WAITHAKA
JUDGE**

In the presence of:-

Mr Shihemi holding brief for Ms. Achala for the
Applicants

Mr. Camulus 1st Respondent

No appearance for 2nd – 5th Respondents

Court Assistant: Bedan

ORIGINAL