



Case Number:	Environment and Land Case 349 of 2014
Date Delivered:	09 Nov 2021
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Ruling
Judge:	Dalmas Omondi Ohungo
Citation:	Timothy Shivaji Mwanje v Horry Akalo Ng'ang'a [2021] eKLR
Advocates:	Mr Mango for the Defendant/Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kakamega
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of motion allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCC No. 349 OF 2014**

**TIMOTHY SHIVAJI MWANJE.....PLAINTIFF**

**VERSUS**

**HORRY AKALO NG'ANG'A.....DEFENDANT**

**RULING**

1. This ruling is in respect of Notice of Motion dated 9<sup>th</sup> March 2021, filed by Ruth Musimbi Shivaji. She is seeking the following orders:

1. *THAT the applicant herein Ruth Musimbi Shivaji be allowed to substitute the plaintiff herein Timothy Shivaji Mwanje (Deceased) for the purpose of this application.*

2. *THAT the OCS Nangili Police Station be and is hereby ordered to provide police escort and security to the applicant or through her agents for the purpose of peace and order during the process of eviction of the defendant/respondent herein Horry Akalo Ng'ong'a his agents, employees or servants or any other person acting under his instructions in Kakamega/Soy/1059.*

2. The application is supported by an affidavit sworn by the applicant. She deposed that the plaintiff passed away on 12<sup>th</sup> December 2020 and that she obtained grant *ad litem* in respect of his estate. She added that the respondent has not vacated from the suit property despite judgment having been rendered.

3. The application came up for inter parte hearing on three occasions. On 14<sup>th</sup> October 2021 which was the last of those occasions, counsel for the defendant/respondent informed the court that he had neither filed a replying affidavit nor submissions. Counsel for the applicant protested the delay. The court decided to render a ruling based on the material on record as at that point.

4. I have noted that there is a replying affidavit by the respondent now on record. As is manifest from the court fees receipt, it was filed on 14<sup>th</sup> October 2021 at 9.28 am, obviously after the court had dealt with the matter. Since, as it will emerge later in this ruling, nothing turns on the affidavit, I have decided to consider it, in the interest of justice. He deposes therein that he filed an appeal against the judgment in the Court of Appeal together with an application for stay pending appeal. That the application is yet to be determined and that it is in the interest of justice that before he is evicted, he should be accorded time to have the application for stay determined by the Court of Appeal.

5. Earlier, the applicant filed submissions on 13<sup>th</sup> October 2021. She argued that since there may be resistance to the eviction, it is prudent to grant security by police. She urged the court to allow the application.

6. I have considered the application, the affidavits and the submissions. The record herein shows that judgment was delivered by N. A. Matheka J on 24<sup>th</sup> June 2020 as follows:

1. *The defendant, his servants, agents and relatives are to vacate the suit Land Parcel No. Kakamega/Soy/1059 within the next six (6) months from the date of this judgement and in default eviction order to issue.*

2. *Each party to bear its own costs.*

7. The respondent does not dispute that the plaintiff is deceased. From the material submitted by the applicant, I am satisfied that the plaintiff passed away on 12<sup>th</sup> December 2020 and that the applicant obtained grant *ad litem* in respect of his estate on 26<sup>th</sup>

February 2021 in Eldoret Magistrate's Court Succession Cause No. 52 of 2021. Since the proceedings herein are now at the execution stage, it is not strictly necessary to substitute the deceased plaintiff in view of the provisions of **Order 24 rule 10** of the **Civil Procedure Rules**. Nevertheless, I see no harm in granting the applicant her wish in that regard.

8. It is now almost one and a half years since the judgment. The respondent concedes that he is still in the suit premises. In view of order number 2 in the judgment, his eviction is overdue since there is no order staying execution of the judgment and decree. His application for stay pending appeal was dismissed through ruling delivered by N. A. Matheka J on 24<sup>th</sup> November 2020. Mere pendency of an application for stay before the Court of Appeal does not amount to a stay. I agree with the applicant that it is prudent to have police on site during the eviction to ensure security. I will grant prayer 2 of the application but with slight modification to ensure that it is strictly in line with order number 2 in the judgment.

9. In view of the foregoing discourse, I find merit in Notice of Motion dated 9<sup>th</sup> March 2021. I therefore make the following orders:

**a) The deceased plaintiff herein is hereby substituted with Ruth Musimbi Shivaji.**

**b) The OCS Nangili Police Station is hereby ordered to provide police escort and security to the applicant or through her agents for the purpose of peace and order during the process of eviction of the defendant/respondent herein Horry Akalo Ng'ang'a, his servants, agents and relatives from land parcel No. Kakamega/Soy/1059.**

**c) Each party to bear own costs of the application.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF NOVEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**NO APPEARANCE FOR THE PLAINTIFF/APPLICANT**

**MS NAFUYE HOLDING BRIEF FOR MR MANGO FOR THE DEFENDANT/RESPONDENT**

**COURT ASSISTANT: E. JUMA**



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