



REPUBLIC OF KENYA



KENYA LAW
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Moenga v Okero (Petition E002 of 2023) [2023] KEHC 3298 (KLR) (30 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3298 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
PETITION E002 OF 2023
PN GICHOHI, J
MARCH 30, 2023
IN THE MATTER OF ARTICLES 3, 10, 19, 20, 21, 22, 24, 26, 27, 47, 48, 50,
159, 160
AND
IN THE MATTER OF USING SOLE REGISTERED PROPRIETOR TO
CONTRAVENE FUNDAMENTAL RIGHTS AND FREEDOMS
PROTECTED BY ARTICLE 40 AND 65 OF THE CONSTITUTION ON
ASSOCIATION AND PROTECTION OF PROPERTY
AND
IN THE MATTER OF BILL OF RIGHTS CHAPTER FOUR OF THE
CONSTITUTION
AND
PROTECTION OF THE RIGHTS TO A PROPERTY EITHER
INDIVIDUALLY OR IN ASSOCIATION WITH OTHERS TO ACQUIRE AND
OWN PROPERTY
BETWEEN
MERCILINE NYAMOITA MOENGA PETITIONER
AND
SIMON OTWORI OKERO RESPONDENT



RULING

1. Before this court is an application dated February 8, 2023 brought by way of a notice of motion under Section 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#). The Court was moved under a certificate of urgency.
2. The said application is purportedly labelled as a Constitutional Petition and the Applicant basically seeks that Land Parcels: - “plots Nos 5366, 4163, 6072 be amalgamated to one and be transferred to the petitioner”. The applicant also seeks injunctive orders. That application is supported by the affidavit sworn on February 7, 2023 by Merciline Nyamoita Moenga.
3. The application/petition is opposed by the Respondent Simon Otworu Okero who filed grounds of opposition dated February 21, 2023 through the firm of Kaburi Henry & Co Advocates. The grounds are that: -
 1. The application lacks merit and is otherwise an abuse of the process of court.
 2. The court lacks jurisdiction to hear and determine the application.
4. When the matter came for hearing, it transpired that the pleadings herein were filed by one Reverend Brethren Nemwel Momanyi who purported to file also a Memorandum of Appearance dated February 8, 2023.
5. The said Rev Brethren Nemwel Momanyi was present in court and so was the Applicant herein. When asked by the court who purported Peter Mogambi Nyamwenge named in the Memorandum of Appearance was, he told the court that he does not know him and that it was a typographical error. He was entering appearance for the Applicant herein. He further told the court that he was representing the Applicant in this case.
6. He however confirmed that he is not an Advocate. The Applicant addressed the court and stated that he wants the court to order the parcel of land where the second wife’s infant is buried be registered in the Applicant’s name.

Further she asks that the six plots she has mentioned in the pleadings be registered jointly with her and her husband Simon.
7. Mr Kaburi relied on the grounds of opposition and raised an oral preliminary objection that the pleadings are filed by an authorized person. He urged the court to dismiss the Application and the petition.

Determination

8. I have considered the pleadings before this court and have heard the parties. To start with there is no Constitutional Petition before this court as purported by the Applicant. It can only be an application. The application is purported to have been filed under Order 42 Rule 6 of the [Civil Procedure Rules](#) but that order refers to Appeals.
9. Though the application reflects as having been drawn and filed by Mercelline who is the Applicant herein, it is admitted that it is Rev Brethren Nemwel who drew it for her. He is not an Advocate and cannot purport to pleadings on behalf of the Applicant or represent him in court in the circumstances.



10. On merit it is clear that the issue before court is on land. This court lacks jurisdiction to hear and determine the same.
11. Consequently, the objection by the Respondent is upheld. The application is not only incompetent, but also ought not have been filed before this court but before the Environment and Land Court.
The same is therefore struck out. However, due to the nature of the matter, each party is ordered to bear his own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF MARCH, 2023

PATRICIA GICHOHI

JUDGE

In the presence of:

Both parties present

Isindu, Court Assistant

