



**Mochogwa v Ogeto & 2 others (Miscellaneous Application
E003 of 2023) [2023] KEELC 18061 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18061 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
MISCELLANEOUS APPLICATION E003 OF 2023**

JM KAMAU, J

JUNE 20, 2023

BETWEEN

MARY NYANCHAMA MOCHOGWA APPLICANT

AND

POLYCARP OGETO 1ST RESPONDENT

HENRY ABENGA 2ND RESPONDENT

PETERSON MIKA 3RD RESPONDENT

RULING

1. This Miscellaneous Application was filed under certificate of urgency on 16/02/2023 seeking two (2) substantive orders against the respondent for:
 1. An order that the respondents, their agents, employees and all persons claiming under them to be evicted from the parcel of land known as Title No. West Mugirango/bosamaro West/544.
 2. The Sub-County Police Commander in charge of Nyamira South Sub-County within Nyamira County do provide security to the Applicant and/or his agents during the process of evicting the Respondents, their agents, employees and all persons claiming under them for the parcel of land known as Title No. West Mugirango/bosamaro West/544.
2. The Grounds supporting the Application are that the respondents have been in unlawful occupation of the applicant's piece of land known as Title No. West Mugirango/bosamaro West/544, that three (3) months have lapsed since the Respondents were served with a Notice to vacate and that the Applicant fears that the Respondents may resist eviction. In the Supporting Affidavit, the Applicant claims to be the registered owner of the aforesaid suit land and that section 152E of the *Land Act*, No. 6 of 2012 and Regulations 65 of the *Land Regulations*, 2017 have been complied with by the Applicant.



3. The same was opposed by way of a relying affidavit sworn on 14/04/2023 where the 3rd respondent depones that he has been in occupation of a portion of West Mugirango/bosamaro West/544 measuring 0.159 Hectares which he purchased on 02/01/1976 from one Morubwa Siango at a consideration of Kshs. 2,500/= which land had been registered in the name of Siango Nyaata who is now deceased. He has lived thereon with his family and has made significant developments such as putting up permanent houses on the suit land and that his daughter in law who passed on in the year 2014 was buried there with no objection raised.

Without going further with this matter, Order 3 Rule 1 (1) of the Civil Procedure Rules provides that:

every suit shall be instituted by presenting a Plaintiff to the court, or in such other manner as may be prescribed.”

Other ways of presenting a suit in court are: -

Judicial Review. Originating Summons. Petition. Memorandum of Appeal. Originating Motion.

5. Notice of Motion is not one of them. In the Case of Fidelity Bank Limited vs John Joel Kanyali (2014) e KLR the court held as follows: -

A Notice of Motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in cap 21 and its Rules. Accordingly, there is no suit before court which suit can sustain the Notice of Motion.”

6. Similarly, there is no suit in court that is capable of ascertaining the rights of either party or how such rights have been trodden upon and this court cannot proceed with the matter as it is. Actually what is in court gives the impression that there has been a suit which was determined in the Applicant’s favour and now he is coming for execution. This is not the case. The amendments to the Land Act under the Land Laws (Amendment) Act (No. 28 of 2016) to the Land Act that gave rise to sections 152A to I (inclusive) did not give parties a short cut to evicting “undesirable” people from their properties. The proprietor must first prove through the normal way his proprietary rights before invoking section 152 of the Land Act, No. 6 of 2012. In the instant Motion, it is difficult to determine the rights of either party and the Applicant is undeserving of the prayers sought. The Motion as filed is an abuse of the process of the court and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF JUNE 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Applicant: Mr. Kavita

Respondents: Ms. Moguche holding brief for Mr. Ochoki

