



**Kagembe v Kamwara (Environment & Land Miscellaneous Case  
E001 of 2023) [2023] KEELC 18958 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18958 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023**

**CK YANO, J**

**JULY 26, 2023**

**BETWEEN**

**MWIKAMBA KAGEMBE ..... APPLICANT**

**AND**

**GEOFFREY KIANIA KAMWARA ..... RESPONDENT**

**RULING**

1. Before me for consideration is the Notice of Preliminary Objection dated February 28, 2023 by the Respondent seeking for dismissal of the Applicant’s application dated January 30, 2023 on the following grounds:
  1. That the application dated January 30, 2023 is not a suit to qualify the issuance of the orders sought.
  2. That the Applicant did not plead any counter-claim for eviction of the Respondent from the suit land LR Tharaka/Chiakariga “A”/1485 in Chuka High Court ELC No E001 of 2021 and therefore the present application is an afterthought and devoid of merit and must fail.
  3. That this Honourable Court has rightly pronounced itself in ELC Misc Application No E014 of 2021 (copy of the Ruling attached) and held that a Misc Application is not a suit as defined under section 2 and 19 of the *Civil Procedure Act* as read with order 3 Rule 1 of the *Civil Procedure Rules* and therefore the Applicant’s application dated January 30, 2023 is incompetent, bad in law and fundamentally defective.
2. In their submissions dated May 19, 2023, the Advocates for the Respondent gave an introduction of the matter and stated that the Applicant herein in the Miscellaneous Application herein filed against the Respondent, the principal order sought is for eviction of the Respondent from the suit land LR Tharaka/Chiakariga/ “A”/1485. That the Judgment rendered in Chuka High Court ELC Case No E001 of 2021 and which the Applicant is relying on his application herein is clear and does not raise



any ambiguities that the Respondent was not evicted from the suit land. Counsel for the Respondent submitted that the application herein does not deserve to see the light of the day and is a candidate for dismissal for being gross abuse of court process. The Respondent's counsel relied on a decision made by this court in Chuka Misc Application No E014 of 2022 and submitted that the application dated January 30, 2023 is unmerited and ought to fall for being gross abuse of court process.

3. In opposing the Respondent's preliminary objection, the Applicant filed grounds of opposition dated March 16, 2023 on the following grounds:
  1. That the Respondent commenced ELC (OS) E001 of 2021 by way of originating summons, which could not have accommodated a counter claim expressly, but the applicant attached a true copy of the demand to vacate/eviction notice dated February 10, 2021 on p.35 of the trial bundle;
  2. That the Respondent had been served on February 10, 2021 with a notice to vacate LR No Tharaka/Chiakariga "A"/1485 by the February 28, 2021 failure to which orders of eviction would be sought.
  3. That it was upon being served with the said notice to vacate, that the respondent rushed to court and filed an OS for adverse possession on February 17, 2021.
  4. That the said OS was dismissed with costs and therefore ownership of LR No Tharaka/Chiakariga "A"/1485 is not in dispute as the land belongs to the applicant herein;
  5. That where ownership is not disputed (as in the instant case) and a notice had been issued to vacate, a miscellaneous application can be filed seeking orders of eviction.
  6. That there is a myriad of authorities in support of the above assertion some of which are as follows:-
    - a. [\*Margaret Karwirwa Mwangera v Francis Kofi\*](#) (2019) eKLR (*Mwangera v Francis Kofi* (2019)Eklr (Misc Application 6 of 2018-Elc-Nakuru (Hon Justice Munyao Sila);
    - b. [\*Julius L Marten v Caleb Arap Rotich\*](#) (2021)eKLR
  7. That the application before this Honourable court is proper and sound in law for all intent and purposes.
4. I have considered the preliminary objection raised, the grounds of opposition and the submissions filed. The issue before me for determination is whether the Application dated January 30, 2023 is incompetent, bad in law and fundamental defective and whether the preliminary objection should be upheld or not.
5. Vide the Application dated January 30, 2023, the Applicant is seeking an order of eviction against the Respondent from LR No Tharaka/Chiakariga "A"/1485. The application is brought pursuant to the provisions of sections 152A and 152B of the [\*Land Act\*](#) as well as section 1A, 1B and 3A of the [\*Civil Procedure Act\*](#) and Order 40 Rules 2, 3, & 4 and Order 51 Rule 1 of the [\*Civil Procedure Rules\*](#).
6. There is a common ground that the suit property is registered in the name of the Applicant. The Respondent is currently in occupation of the suit property although his claim for the property by adverse possession in Chuka ELC (OS) E001 of 2021 was dismissed by the court vide a judgment delivered on November 9, 2022. The Applicant has now moved this court for an order of eviction. On his part, the Respondent is of the view that the Application dated January 30, 2023 is not a suit to qualify the issuance of the orders sought.



7. Section 152E of the [Land Act](#) provides as follows:

“ 152E. Eviction Notice to unlawful occupiers of private land.

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) –
  - c) be served on the Deputy County Commissioner in charge of the area as well as the Officer Commanding the Police Division of the area.”

8. While I do not wish to go into the application herein at this stage so as not to preempt the trial, it is my considered view that as long as the Applicant has complied with the provisions of sections 152A to 152 H of the [Land Act](#), the Applicant would be entitled to make an application for eviction where he has demonstrated ownership of the suit land. This is more so because the said provisions do not expressly provide a different mode in which one should approach the court for an order of eviction. In addition, section 152F of the said Act provides for relief against a notice of eviction.

9. Whereas the Respondent has relied on the decision made by this court in ELC Misc Application No E014 of 2022, that decision, respectively, is distinguishable with the application herein in that the Miscellaneous Application was seeking *inter alia*, an order directing the District Surveyor Meru South to allocate land to the Applicant and for the District Land Registrar to issue a Title Deed to the Applicant. It is clear therefore that the dispute in Chuka Misc Application No E014 of 2022 was about ownership unlike in this case in which the issue of ownership of the suit property is not in contention.

10. In light of the above and without saying more, I find that the preliminary objection dated February 28, 2023 has no merit and I disallow it. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**C. K. YANO,**

**JUDGE.**

In the presence of:

Ms. Musyimi h/b for Kirimi for Respondent

N/A for Applicant

