**Kilimo v Malenya (Environment and Land Appeal 8 of 2022)**
**[2023] KEELC 19331 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEELC 19331 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND APPEAL 8 OF 2022**

**FO NYAGAKA, J**

**AUGUST 10, 2023**

**BETWEEN**

**JANE KILIMO ..... APPELLANT**

**AND**

**GRACE KHISA MALENYA ..... RESPONDENT**

***(Being an Appeal from the Ruling and the Order delivered by the Honourable S. Makila (Principal Magistrate) on 13{{^th}} April 2022 in Kitale Chief Magistrate Miscellaneous Civil Case No. E052 of 2021; Jane Kilimo -vs- Grace Khisa Malenya)***

**JUDGMENT**

## The Background

1. The background of the instant Appeal is that the Appellant brought the Miscellaneous Application by way of a Notice of Motion dated 24/11/2021. It was filed as Kitale CMC Misc. ELC Case No. 52 of 2021 It was brought under certificate of urgency on 02/12/2021. In it the Respondent sought a number of prayers. Besides the prayer for costs of the Application, they included, one that the honourable Court does confirm the eviction notice dated 02/08/2021 and order the Respondent to vacate and give vacant possession of land parcel number Trans-Nzoia Mito Mbili Settlement Scheme/96, and the Officer Commanding Station (OCS) Cherangany Police Station and/or the Deputy County Commissioner of Trans-Nzoia County ensures compliance.

2. The Application was brought under Sections 1A and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 152E and 152F(2) of the *Land Act*, 2012 and what was referred to as "all other enabling provisions of the law." It was based on six (6) grounds and supported by the Affidavit sworn by the Applicant, Jane Kilimo, on 24/11/2021. The Affidavit contained annextures numbered seven (7) though some contained more than a single one.

3. The Application was opposed by the Respondent therein, still the Respondent, one Grace Khisa Malenya, who swore a Replying Affidavit on 11/01/2022. It did not contain any annexture to it but had detailed challenges to the depositions and the documents relied on by the Applicant as proof of ownership of the land, as well as making a deposition that some persons such as one Bosco Wamachichi Bono to be called to Court for cross-examination. In addition, the Respondent filed grounds of opposition dated the same date.

4. Then the matter was disposed by way of written submissions. A determination of the Application by way of a Ruling delivered on 13/04/2022 was made. The Appellant then Applicant being dissatisfied with the finding of the trial court filed the instant appeal against the said ruling.

5. The Memorandum of Appeal contained six (6) grounds of appeal. These were that the learned trial magistrate erred in law and fact in:

    1. Failing to invoke and apply Sections 152E and 152F of the *Land Act*, 2012.

    2. Holding that the appellant ought to have filed a substantive suit whereas the *Land Act*, 2012 does not contemplate the same.

    3. Failing to consider the submissions and authorities supplied to her, hence neglecting the principle of stare decisis.

    4. Holding that the respondent's constitutional right to be heard could not be guaranteed in the present application whereas Section 152F of the *Land Act*, 2012 is explicit on the procedure used by any persons served with an eviction notice.

    5. Hoisting the Respondent's rights over the Appellant's.

    6. Totally misdirecting herself in delivering a ruling in favour of the Respondents by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant.

6. The Appellant prayed that the Ruling of 13/04/2022 be set aside; this Court issues an order of eviction against the respondent, her agents or assigns, or anybody acting under her directions; and she (Appellant) be awarded the costs of this appeal.

**Submissions**

7. The Appellant began her submissions by repeating the prayers which she sought in the Memorandum of Appeal, as stated above. She gave the background of the appeal which, in brief, was that she was the registered proprietor of that parcel of land known as Trans Nzoia/Mito Mbili Settlement Scheme/96. That she intended an eviction of the Respondent therefrom through an Eviction Notice dated 02/08/2021. That in an attempt to forestall eviction, the Respondent moved to court on 01/11/2021 vide an application dated the same day, in Kitale P& A 27/2010. The application was dismissed in limine for being an abuse of the court process but the Respondent did not vacate the appellant's property.

8. The appellant filed the application dated 24/11/2021 in respect of which the Ruling impugned was delivered. The Appellant invited the Court to consider both the facts and the law.

9. She stated that the facts were that the Respondent was initially the registered proprietor of the suit land by way of transmission over the Estate of Bosco Wamachichi Bono. By a determination in Kitale P&A 27/2010 the title was cancelled on account of fraud and a new one issued in the name of Bosco Wamachichi Bono. The latter transferred it to the appellant herein. Therefore, the Respondent's proprietary rights were distinguished (sic) when the court revoked the impugned Grant

of Letters of Administration and cancelled her title on 27/10/2020. She submitted that any claim on her proprietorship would thus be res judicata.

10. She gave a number of issues for determination in the present appeal. These were, what the application of Sections 152E and 152F of the *Land Act* 2012 was; whether the appellant ought to have filed a substantive suit; and whether the trial court neglected the principle of stare decisis in arriving at its decision.

11. After that she analyzed Sections 152E and 152F of the *Land Act* 2012. She submitted that two Sections brought forth radical changes to the eviction regime. One of these was the introduction of a procedure that governs eviction of persons deemed to be unlawfully occupying public, community and private land. She was of the view that now, once an Eviction Notice is given to persons served they may now be evicted in the absence of a formal Court order. She was of the view that for that reason there was no need for her to file a substantive suit. She relied on the case of Atik Mohamed Omar Atik & 3 Others v Joseph Katana & Another [2019] eKLR.

12. Again, she submitted that the Respondent's claim on ownership was already determined in Kitale P&A 27/2010 hence the trial court erred in holding that it was untenable, contrary to Order 19 Rule 2 of the Civil Procedure Rules, for cross-examination of Bosco Wamachichi Bono to be.

13. She submitted that litigation must come to an end hence such cross-examination would have elicited such answers such as to conclude the matter. She argued that all that is required of a lawful owner is to comply with Section 152E of the Act and it was incumbent on the person(s) contesting the eviction notice to move to court for relief against the Notice.

14. She stated that the first step in an eviction is for the lawful owner to serve a Notice of eviction so that the persons affected an opportunity to seek relief in Court. She argued that such a Notice had been issued and served on 02/08/2021 on all parties as required by law and the Respondent did not seek for relief as contemplated by Section 152F to the *Land Act*. She relied on the case of Margaret Karwirwa Mwongera v Francis Kofi [2019] eKLR where the Court granted a similar relief in a miscellaneous application. She also relied on the cases of James Mathuva Makewa v Nzavi Ngului [2021] eKLR and Lucy Ghati v Alex Wambura John & Another [2019] eKLR. She summed it that the Court was in error by ignoring the doctrine of stare decisis despite a myriad of case law to that effect. She prayed for the appeal to be allowed.

**Respondent's Written Submissions**

15. The Respondent began her submissions by summarizing the prayers in the Notice of Motion. This Court needs not to repeat them here. She stated that she filed a Replying Affidavit together with Grounds of Opposition and the matter proceed by way of written submissions. In the end the court dismissed the Application.

16. The Respondent gave only two issues for determination in the instant appeal. These were, whether the orders sought (in the application) could be granted through a miscellaneous application or through a substantive suit, and who should bear the costs of the appeal.

17. On whether orders sought can be sustained through a miscellaneous application or substantive suit, she submitted that the eviction orders sought in the motion dated 24/11/2021 could not be sustained through a miscellaneous application since that would deny the parties their day in court. She stated that it required be given in a substantive suit. She submitted that orders of eviction are so grievous that the parties ought to be given time to testify and give their evidence to enable the court to hear the case and arrive at a just conclusion of the issues in dispute.

18. She relied on the decision in Kitale High Court P&A 27 of 2010, revoking the Letters of Administration. She pointed that in the matter the court could not issue an eviction order against her. Instead the court directed the parties to pursue the prayer for vacant possession in the Environment and Land Court. She also relied on the case of Tatecoh Housing and Co-op Sacco Limited v Qwetu Sacco Limited [2021] eKLR which held that ordinarily orders of eviction are obtained after a full hearing of a case.

19. She then submitted that under Article 50 of *the Constitution* 2021 (sic) parties had the right to be heard hence the appeal should not be allowed.

20. Regarding the prayer for cross-examining Bosco Bono on his affidavit in support of the application she submitted that it was something untenable in a Miscellaneous Application. She submitted that the appeal had no merits and be dismissed with costs.

**Issues, Analysis and Determination**

21. This Court carefully considered the instant appeal. It also gave due regard to the law, the submissions by both parties, and the case law relied on.

22. This was a first appeal against the decision of the lower court, and as noted above, it resulted from the finding of the Court in an Application. In the trial court the Application proceeded by way of written submissions. It was a decision based on both the discretion and reasoning of the trial Court. Therefore, I am bound to consider whether that the trial magistrate exercised discretion properly, that is to say, whether the Court was judicious, and whether, if it was, the conclusion she arrived at was manifestly wrong.

23. I am alive to the fact that the duty of the Court as an appellate one of the first instance is to evaluate the evidence and arrive at its own conclusion. This was position was given by the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] e KLR., wherein the Court held that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

24. Similarly, the case of Peters v Sunday Post Ltd [1958] EA 424, as quoted in the case of Jackson Kaio Kivuva v Penina Wanjiru Muchene [2019] eKLR was of the same view when it held as follows:-

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

25. Additionally, in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] e KLR, the court held that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine

whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

26. But in the instant appeal, it is clear that the decision of the Court was not on the evidence of the parties but on a point of law which was about how the Applicant ought to have moved it in a bit to be granted the orders sought. I therefore weigh the arguments on the grounds of appeal as against the provisions of law on the issue of intended evictions as contended by the Appellant, and the exercise of the discretion and reasoning of the trial court.

27. I am also clearly aware that the role of this Court is not to substitute its discretion with that of the lower court but to consider whether it was not clearly erroneous as exercised. In so doing this Court must make its own independent finding and leave the discretion of the lower court intact if it was exercised based on the right principles, and reverse the decision only find if the reasoning was plainly wrong. But if evidence had been tendered by way of a trial, I should have given some allowances in my analysis given that I never heard or saw the witnesses.

28. It has been stated in Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006):

> "... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

29. Also, in Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR the Court of Appeal held that:

> "...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference."

30. Additionally, in Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere it must be clearly shown that the discretion was exercised injudiciously.

31. This point was put forth also in the case of Mbogo and Another v Shah [1968] EA 93 at 96) affirmed the as follows:

> "For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

32. Having laid the foundation for my duty in determining this appeal, I proceed to consider it based on a sequential consideration of certain grounds together as one since they revolve on the same issue. However, before doing so, as a preliminary point this Court finds that in the Applicant in the trial court, now Respondent, cited some irrelevant provisions of law. Although not fatal to his application, by virtue of Article 159(2)(d) of *the Constitution*, it was unnecessary to do so. The irrelevant provisions

he cited were Sections 1A and 3A of the *Civil Procedure Act* each of which has its place in the practice of law in civil matters.

33. This Court, while addressing the same issue in Erot v Al-Momin Foundation (Environment and Land Appeal 20 of 2022) [2023] KEELC 17557 (KLR) (25 May 2023) (Judgment) had this to say:-

> " 41. Besides, an Application under Section 152F of the *Land Act*, Act No. 6 of 2012 as amended in 2016 is supposed to be made by the person on whom a Notice to Vacate land has been issued by an owner. It is a summary procedure which can only be granted by the Court in the clearest of cases, being where there is no contest at all as to the ownership of the land in issue: only a question of why the person in unlawful occupation is not moving out of the land outstands. Such instances include where the Court has already pronounced itself in a suit as to who the owner of the land is and the matter is settled fully as such. Where there is a contest as to ownership of any kind, the person claiming to be the owner should file a suit and seek appropriate orders as to title before and then an eviction.
>
> 42. Again, the above-referenced provision of law is clear that only a person on whom the notice has been issued can apply to court for a relief against such a notice. It provides that "Any person or persons served with a notice in terms of Sections 152C,152D and 152E may apply to Court for relief against the notice." Plainly, it has no room for the person who is issuing a notice to proceed apply to Court for the reliefs "arising from" the notice. Thus, I respectively disagree with my colleagues in the two cases cited above that the Applicants correctly moved the court for the orders sought, without first resorting to a suit being filed for the eviction and being concluded in their favour. It is immaterial that the recipient of the notice to vacate moved the Court for the relief provided for or not since failure to do so does not confirm ownership of the land by the giver (of the notice). To give jurisprudence that supports that trajectory would defeat the purpose and history of the amendment of the Act, by introducing the Sections in issue, to provide for the manner of carrying out evictions. Further, the provisions were introduced into the law to give permission to the owner of the land to evict a trespasser. It means that once he issues the notice and it is not complied with, he should proceed to evict the trespasser while following the steps given in the law, without further recourse to court. Otherwise, for the owner to resort to a court process to confirm the vacation notice, without filing a suit, would defeat the logic and purpose of issuing the three months' notice! That is not what Parliament intended."

34. For that reason, and in line with the reasoning of the Court as above, it is clear that an owner or individual in charge of a property intending to evict a person unlawfully occupying it who issues a notice of intention to vacate has no reason to move the Court for validation of the notice. It is clear that by the serving the notice he/she informs the unlawful occupant, "move out or I evict you." If the occupant disputes the intended eviction he has chance to move the Court before the expiry of the period for the orders contemplated in Section 152F (2) of the Act. Otherwise, why would an owner of land entertain an unlawful occupant on his/her land for three (3) months and still move the Court? He/she would rather issue the usual seven (7) to fourteen (14) days' demand to sue and proceed with a suit for eviction.

35. I now analyze the third (3) ground which was that the trial magistrate erred in law and fact in failing to consider the submissions and authorities supplied to her hence went against the principle of stare decisis. The Principle of stare decisis is an important tool in the functioning of the Rule of Law particularly in Common Law jurisdictions. It brings in the element of uniformity, certainty and order. While not fettering discretion, it does away with confusion and arbitrariness. It is to the effect the lower courts are bound by decisions of courts superior to them where they relate to the same issue of law supported by similar facts. Thus, in Dodhia v National & Grindlays Bank Limited and Another [1970] EA 195, Duffus V. P. stated that:

> " The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."

36. The Appellant questioned the decision of the trial magistrate for going against the principle explained above. She argued first that the trial magistrate did not consider the submissions on her behalf. This Court finds that indeed submissions dated 18/01/2022 were made by learned counsel on her behalf, and filed on 31/01/2022. In regard to whether or not the Court took the submissions into account, page 2 of the impugned Ruling shows that the trial court noted that the application was canvassed by way of written submissions. It does not state later whether or not the court took the filed submissions into account.

37. As to whether failure to consider submissions is a ground fatal to the Ruling, this Court has to explain the import of submissions in decision processes of courts. Submissions do not constitute pleadings or evidence. They are simply arguments that parties use to market their idea or issue to the Court. They do not take the place of evidence. Failure to consider them is not fatal to a decision. Indeed, it was stated by this Court in Patrick Simiyu Khaemba v Kenya Electricity Transmission & another [2021] eKLR as follows:-

> " As such, since submissions are "marketing tools" for parties, they must contain what is being marketed... But counsel, and learned for that matter, often market their clients' issues to judges and judicial officers generally through submissions."

38. Also, the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR stated that:

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented".

39. In Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 his Lordship stated as follows:

> " Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case."

40. Therefore, it is the considered view of this Court that the failure, if any, on the part of the trial Court to consider the submissions of the Appellant did not render her Ruling defective. Even as I find that, the outstanding issue then is: what about the failure to adhere to the legal authorities that were presented together with the submissions hence the Appellant's argument that the court erred in neglecting the doctrine of stare decisis? In regard to the main issue in the instant matter, being how to effect the Notice of intended Eviction issued under Section 152E of the *Land Act*, it is worth noting that courts are divided over which process should be followed in giving effect to such a Notice.

41. Some courts hold that the Notice of intended eviction should be given effect through a suit while others hold that it may be by way of filing a Miscellaneous Application such as the one which finally gave rise to the instant appeal, and each case seems to present its uniqueness and is considered on its own facts. For this, the Court invites the parties herein to look at the decisions of Grace Wangari Mureithi v David Njoroge [2021] eKLR; Margaret Karwirwa Mwongera v. Francis Kofi [2019] eKLR; Ringera v. Muhindi (Environment and Land Miscellaneous Application E128 of 2022 (2022) KEELC 2481 (KLR) (7 July 2022) (Judgment); James Mathuva Makewa v Nzavi Ngului[2021] eKLR; Lucy Ghati v Alex Wambura John & another [2019] eKLR; Tatecoh Housing and Coop Sacco Limited v. Qwetu Sacco Limited [2021] eKLR, among others.

42. This being the case, this Court is of the view that the trial magistrate did not err in failing to follow the decisions that were presented to her as authorities and therefore did not neglect the principle of stare decisis. In any event, as is explained elsewhere, under Section 152 F(2) of the Act, it is the recipient of the Court who should move the Court for confirmation, variation or suspension of the notice and an order for compensation. The law is silent on what the proprietor of the land should do when he/she issues the notice of intended eviction and the recipient does not apply to Court over it. This Court takes the view that there is no need for the owner to give the Notice of intended eviction and then move the Court for giving it effect. Rather, he should proceed to effect the notice, with the assistance of the Police, without the need for a Court order. Therefore, this ground of appeal fails.

43. Regarding the first, second and fourth grounds of appeal, this Court of the humble view that they relate to the same point of law, being the interpretation of the procedure applicable in giving effect a Notice of Vacation of land, issued under Sections 152E and 152F of the Act. The appellant contended that the trial magistrate did not invoke the two provisions which in her view were clear that the procedure to be followed in such a case is the filing of a Miscellaneous Application as she did and therefore the finding by the Court that the constitutional right of the defendant to be heard could not be guaranteed in the Application was wrong. In her submissions she reproduced the content of the two provisions of law and contented that the two introduced a procedure which governs evictions of persons deemed to be unlawfully occupying one's land. In her view "the repercussions of such an eviction notice" of intended eviction "are that" it may now be effected by the (recipients) "persons being evicted in absence of a formal court order" [emphasis, appellant's]. He relied on the decision of Atik Mohammed Omar

Atik & 3 others v. Joseph Katama & another [2019] eKLR. The Respondent contended that that is not the position in law.

44. This Court agrees with the Appellant on the understanding of the law that indeed under the new land regime, Sections 152E and 152F of the Act, persons served with the intended notice of eviction may now be evicted without a formal order of the Court. What that means is that there was no need for the Appellant to move the Court by whichever form, be it a Miscellaneous Application or a Plaint, as long as she duly served the notice and it was not challenged by the recipient. It is vital for the owners of parcels of land to understand and follow the law. It serves as duplication of efforts, and unnecessarily clogging the court system, to serve a notice of intended eviction on a person unlawfully occupying one's land and after the expiry of the notice thereof without the recipient moving the Court as the required under Section 152F of the Act, for the owner of the land to again move the Court for orders of eviction. The last line of Section 152E(1) of the Act is clear, "... the owner or person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction" [emphasis mine].

45. In simple terms, the import of the provision is that the owner of the land or the person he/she has put in charge thereof notifies that person unlawfully occupying it as follows, "after the end of three months, I will evict you from this land. In case you dispute the intended step, apply to court so that the Court may judge whether the step I intend to take is right or not, otherwise, as for me, I will evict you if that is not done." In case the recipient is opposed to the notice, he/she should move the Court in terms of Section 152F(1). If the Court is moved, it may confirm, vary, cancel, alter or suspend the notice or order for compensation. I see nowhere in the Act where the owner of the land is required to go to court to confirm the notice. In case he/she wishes to do so, then he/she then has to file suit.

46. In Erot v Al-Momin Foundation (Environment and Land Appeal 20 of 2022) [2023] KEELC 17557 (KLR) (25 May 2023) (Judgment), the Court in considering a similar issue stated, and I agree with the position, as follows:

> " The reasons for the finding are that the provisions in issue do not bar anyone from issuing such a notice as long as they are of the view that the are owners of land. Anyone can issue the notice but the ultimate determiner as to the success or otherwise of the notice where the recipient does not vacate voluntarily is the Court. Thus, it is not surprising to find notices being issued by all and sundry who believe to be owners. That is why the same law, Section 152F(2) of the Act as amended, provides for four types of reliefs to a person challenging the notice. These are confirmation, variation or suspension of the notice and an order for compensation".

47. For the reasons above I find that the first, second and fourth grounds of appeal fail. If the Appellant wanted any of the rights of the parties to be determined by the trial Court she should have filed a suit and proceed accordingly, otherwise there was no need for filing even the application that was dismissed by the trial court.

48. The fifth ground of appeal was that the trial Court erred in hoisting the Respondent's rights over the Appellants. On this, the Appellant submitted that for the trial court to hold that the constitutional rights of the Respondent who claimed an interest in the land could not be guaranteed in a determination of the same in an application of the nature before her it was an error in law and fact. In my view, the trial court was right in finding that where there was contestation as to the legal interest of the parties over the suit land the manner of approaching the Court was by way of a suit which then could safeguard the parties' right to be heard as provided for under Article 50(1) of *the Constitution*. In any event, I have found above that the law as it is does not make provision for the person issuing

a notice of intended eviction to approach Court by the manner in which the Appellant herein did. Rather she should have only moved the court by a suit. Both parties had rights to be considered by the Court. The trial Court did so and found that the right to be heard would be best assured by way of filing a suit and adducing evidence. There is no evidence that the Court placed this right over and above the Appellant's rights. Thus, the fifth ground too fails.

49. Lastly, the Appellant raised the ground of appeal that the court misdirected itself in delivering the Ruling by failing to consider and appreciate the evidence on record as tendered by the Applicant. I have carefully considered the Ruling of the trial Court. In my view the finding of the Court was not on the evidence tendered by the parties but on the requirements of the law. The Court found, and I have held that to be the proper finding of the trial Court, that in bringing the Application for the enforcement of the notice of intended eviction, it was short of the requirements of the law. It was on that account that the Application failed. Thus, the sixth ground of appeal is neither here nor there since the court did not address itself on the evidence but purely on the law.

50. The upshot of the analysis above is that the entire appeal fails. Therefore, it is dismissed with costs to the Respondent. The Ruling delivered by Hon. S. Makila PM on 13/04/2022 in Kitale Chief Magistrate's Court Miscellaneous Civil Application No. E052 of 2021 is hereby upheld.

51. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 10TH DAY OF AUGUST, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**