



Kithi & another v Muindi & another (Environment and Land Miscellaneous Application E003 of 2022) [2023] KEELC 21421 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2022
TW MURIGI, J
OCTOBER 25, 2023**

BETWEEN

REBECCA MUTINDA KITHI 1ST PLAINTIFF

JOSEPHINE MOKAYA KIAGE 2ND PLAINTIFF

AND

PETER MASAI MUINDI 1ST DEFENDANT

ALBERT MUOKI MASAI 2ND DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 16th March, 2022 brought under Sections 1A and 3A of the *Civil Procedure Act*, Section 7 of the *Arbitration Act*, Rule 2 of the Arbitration Rules, Section 68 of the *Land Registration Act*, Article 159(2)(c) of *the Constitution* of Kenya 2010 and all other enabling provisions of the Law in which the Applicants seek the following orders:-
 1. Spent.
 2. Pending the hearing of this application inter parties, this Honourable Court do issue an ex parte temporary injunction restraining the Respondents either by the themselves, their agents, servants, employees and/or persons acting under their instructions from selling, transferring or disposing of the property known as Konza South/konza South/Block 5/422.
 3. Pending the hearing and determination of the Arbitration proceedings, this Honourable court do issue a temporary injunction preventing the Respondents either by themselves, their agents, servants, employees and/or persons acting under their instructions from selling, transferring or disposing of property known as Konza South/konza South/Block 5/422.



4. Pending the hearing and determination of the Arbitration proceedings, this Honourable Court do issue an inhibition order preventing any dealings with all that land known as Konza South/Konza South/Block 5/422.
5. The costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Rebecca Mutindi Kithi sworn on even date.
3. The deponent averred that she entered into a sale agreement with the 1st Respondent on 18/04/2017 for the purchase of land known as Plot 0197 Konza Ranching & Farming Co-operative Society LTD. She further averred that the purchase price was Kshs. 2,500,000/= which she paid in full. It was averred that the sale agreement contained a valid arbitration clause. It was further averred that the 1st Respondent transferred the plot to the 2nd Respondent on 09/06/2017 instead of transferring it to the Applicants.
4. The Applicant averred that the Respondents conspired to defraud her of the property and sold the same to Nancy Munania on 07/07/2017. That subsequently, a green card was created in her favour but was later cancelled by the Registrar of lands which is prima facie evidence of fraud on the part of the Respondents.
5. The Applicant further averred that she reported the matter to the DCIO Machakos and consequently, the Respondents were arrested and charged with the offence of obtaining money by false pretences and conspiracy to commit a felony. The Applicant contended that her Advocate issued to the Respondents a notice of intention to institute arbitration proceedings. She contended that unless the orders sought are granted her claim against the Respondents will be rendered an academic exercise.
6. Though duly served, the Respondents did not file any response to the application.
7. The Applicants commenced these proceedings by way of a Miscellaneous application.
8. As a general rule a suit can only be instituted by way of a Complaint, Petition or an originating summons.
9. Section 19 of the *Civil Procedure Act* states that;

“ Every suit shall be instituted in such manner as may be prescribed by the rules.”
10. Order 3 Rule 1 of the *Civil Procedure Rules* further provides that;

“ Every suit shall be instituted by presenting a complaint to the court or in such other manner as may be prescribed.”
11. The issue for determination is whether the Applicants can enforce a right through a Miscellaneous application.
12. The Applicants are seeking for an order of injunction to restrain the Respondents from selling, transferring or disposing of land parcel No. Konza South/Konza South/Block 5/422. They are also seeking for an order of inhibition to restrain the Respondents from dealing with the said land.
13. It is my considered view that for an order of injunction and/or inhibition to issue, the claim must be commenced by way of a Complaint. A Notice of Motion can only be filed within a properly instituted suit. The dispute in the Motion involves ownership of land parcel No. Konza/South/Konza/South/Block 5/422. These are substantive issues which ought to be canvassed in the main suit where the Applicants will furnish the Court with the relevant documents alluded to in their supporting affidavit.



14. I will not go into the merits of the application because the procedure used is void abinitio.
15. Accordingly, the application dated 16th March, 2022 is hereby struck out with no orders as to costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF OCTOBER, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

In the absence of the parties.

