



**Zete Enterprises Limited v Ganday General Trading and Transport  
Company Limited & another (Miscellaneous Application E026 of 2023)  
[2023] KEELC 21937 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21937 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E026 OF 2023  
MD MWANGI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**ZETE ENTERPRISES LIMITED ..... APPLICANT**

**AND**

**GANDAY GENERAL TRADING AND TRANSPORT COMPANY  
LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**FEISAL ABDULLAHI HASSAN ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. What is before me for determination is a Misc. Application seeking amongst other orders, an order of eviction against the Respondents, an order of mandatory injunction compelling the Respondents to remove all scrap metal, motor vehicle wreckage, industrial waste and garbage on the subject property, L.R. No. 209/16955. The Applicant alternatively prays that the Court allows it to remove or cause to be removed scrap metal, motor vehicle wreckage, industrial waste, garbage and demolish the structures erected on the subject property at the Respondent's cost. Further and again in the alternative, to grant leave to the Applicant within 7 days of eviction to dispose by public auction through High Class Auctioneers any unclaimed movable property that is left behind after eviction.
2. The grounds upon which the application is premised on are on the face of the application. Principally, the Applicant asserts that it is the registered owner of the suit property. The Applicant avers that it had entered into a lease agreement with the Respondents that terminated on 31<sup>st</sup> March, 2022. The Respondents allegedly requested for time to vacate the suit property upon the expiry of the lease. The Applicant acceded to the request and granted the Respondents 12 more months within which time to vacate the suit property. The parties therefore entered into an exit agreement on 28<sup>th</sup> March, 2022 for



one year and which terminated on 31<sup>st</sup> March, 2023. The Respondents however, refused to vacate the suit property and or hand over vacant possession to the applicant.

3. The applicant alleges that he issued the respondents a three (3) months' Statutory Notice but they did not comply with the notice. It is the Applicant's case that the Respondents are therefore in illegal occupation of the suit property and are therefore trespassers. The continued illegal occupation of the subject property by the Respondents has denied the Applicant access, possession and use of the suit property as well as potential revenue. The Applicant had entered into a proposal to lease the suit property to another entity but has been unable to do so in view of the Respondent's refusal to vacate the suit property.
4. The Applicant prays that its application be allowed since the continued occupation of the suit property by the Respondents is an infringement of its right to property.
5. The Application was further supported by the affidavit of Temelso Dejen Misgna sworn on 7<sup>th</sup> August, 2023 which affirms the grounds of the face of the application.

#### **Response by the Respondents:**

6. The respondents responded to the application by way of a preliminary objection dated 12<sup>th</sup> October, 2023 and a Replying Affidavit sworn by one Feisal Abdulahi Hassan on 12<sup>th</sup> October, 2023,
7. The preliminary objection was premised on order 2 rule 15 of the Civil Procedure Rules, 2010. The Respondents asserted that the instant suit contravenes the express provisions of section 6 of the [Civil Procedure Act](#) as the matter herein is sub judge Milimani MC ELC No. E240 of 2023 (Ganday General Trading and Transport Company Ltd –vs- Zete Enterprises Ltd). They therefore prayed for the dismissal of this matter on that basis.
8. In their Replying Affidavit, the Respondents aver that the instant application is frivolous, vexatious and an abject abuse of the process of Court. The Applicant is guilty on material non-disclosure.
9. The deponent deposes that a litigant does not have the right to pursue two court processes pari passu with a view to obtaining victory in one of the processes or both.
10. The deponent affirms that the Respondents filed Milimani MC ELC No. E240 of 2023 through a plaint and an application under certificate of urgency on 3<sup>rd</sup> July, 2023 seeking injunctive orders against the Applicant. The Respondents sought to restrain the Applicant from interfering with the Respondents' peaceful possession of the suit property. They have annexed copies of the pleadings in the matter before the Magistrate's court to the Replying affidavit. The Magistrate Court had issued orders of status quo.
11. The Applicant is not only aware but has also participated in the proceedings before the Magistrates' Court. They accuse the Applicant of forum shopping.

#### **Court's Directions:**

12. The Court's directions were that the application be canvassed by way of written submissions. Both parties complied and the Court has had an opportunity to read the submissions by both the Applicant and the Respondent.

#### **Issues for determination:**

13. Having considered the instant application, the responses by the Respondent and the submissions filed, the issues for determination in the court's opinion are:



- A. Whether a Miscellaneous Application is the proper way of initiating a suit as the instant one seeking substantive and final orders.
- B. Whether the instant application is sub judice and amounts to an abuse of the process of Court in view of the existence of Milimani MC ELC E240 of 2023.
- Analysis and determination:
- a. Whether a Miscellaneous Application is the proper way of initiating a suit as the instant one seeking substantive and final orders.
14. Order 3 rule 1 of the *Civil Procedure Rules* 2010 prescribes the form and manner of institution of a suit.
15. In the case *Kenya Assemblies of God Trustees & ano -vs- Daniel Obuya & ano*, Nrb ELC Misc. App No. E014 of 2023, this court while deciding on a miscellaneous application that had sought substantive and final orders made reference to the case of *Rockland Kenya Ltd -Vs- Commissioner General of KRA & another* (2020) eKLR, where the court held that substantive orders cannot be issued in miscellaneous applications. The court had in turn cited with approval the decision in *Witmore Investment Ltd-vs- County Government of Kirinyaga & 3 others* (2016) eKLR where Limo J had stated that,
- “.....where a party such as an applicant herein seeks an order that in effect appears to resolve with a finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy, raised in the application, it should have moved this court properly in the manner provided by the law.”
16. The court in the case of *Nairobi West Hospital Ltd -Vs- Joseph Karina & Another* (2018) eKLR, made a similar finding that a substantive order cannot be issued through a miscellaneous application.
17. In the case of *Scope Telematics International Sales Ltd -vs- Stoic Company Ltd & Another* [2017] eKLR, the Court of Appeal held that:
- “The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, overlooking a statutory imperative and the above authorities, the learned judge cannot be said to have exercised his discretion properly. There can be no other interpretation of rule 2. The application should have been anchored as a suit. It was not about what prejudice the appellant or and 2<sup>nd</sup> Respondent would suffer or what purpose the suit would have served. The discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was totally incurably defective.”
18. From the emphatic pronouncement of the Court of Appeal in the above cited matter, the manner of initiating a suit is not a mere technicality; it is actually the basis of jurisdiction. The import is that it is matter that is so critical that the court can raise it suo moto without being moved by any party.
19. As already observed earlier on, the Applicant seeks to evict the Respondents from the suit property. Section 152 E of the *Land Act* spells out the conditions/terms that must be met by a Land owner who intends to issue a Notice to evict an ‘unlawful occupier’ from private land.
20. The court needs to make an elaborate enquiry whether the Applicant has met the conditions spelt out in section 152 E of the *Land Act*, and off course interrogate the terms of the tenancy relationship



between the parties. The miscellaneous application does not afford the parties the opportunity to canvass those issues. As presented, this is an attempt at summary disposal of the matter.

21. I make a finding that the substantive and final orders sought by the Applicant in this matter cannot be issued in a Miscellaneous application.
22. Having arrived at the above conclusion, I will refrain from discussing the merits of the matter so as not to prejudice or embarrass the hearing of the case before the Magistrate's court. Further I need not go into the second issue. I must however be emphatic that instituting different actions between the same parties over the same subject matter simultaneously in different courts even though on different grounds amounts to an abuse of the process of court. It may be a good ground for striking out a subsequent suit or matter.
23. Consequently, the Notice of Motion application dated 7<sup>th</sup> August 2023 is struck out with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Masinde h/b for Ms. Ms Wanjiku Nduati for the Applicant

Ms. Muronji h/b for Mr. Juma the Respondents

Yvette: Court Assistant

**M. D. MWANGI**

**JUDGE**

