



REPUBLIC OF KENYA



Maweu & 2 others v Kenya Commercial Bank Ltd & another (Environment and Land Miscellaneous Application 3 of 2023) [2023] KEELC 21854 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2023
CA OCHIENG, J
NOVEMBER 27, 2023**

BETWEEN

**JACKSON WAMBUA MAWEU 1ST APPLICANT
JOSHUA KIPKOSGEI KORIR 2ND APPLICANT
ABEUTY LIKHAKASI MULEHI 3RD APPLICANT**

AND

**KENYA COMMERCIAL BANK LTD 1ST RESPONDENT
MILIKISPACE PROPERTIES LTD 2ND RESPONDENT**

RULING

1. What is before Court for determination is the Applicants' Notice of Motion Application dated the 20th February, 2023 brought pursuant to Sections 82(3), 97, 103 and 104 of the Land Act; Order 40 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 63(e) of the Civil Procedure Act including Article 159 of the Constitution. The Applicants' seek the following Orders:
 1. Spent
 2. Spent
 3. That this Honourable Court grants an order of restraining the Defendants by themselves, their employees, servants, agents, clients or anybody claiming through them from disposing off, alienating, transferring, advertising for sale or selling by way of public auction, private treaty or in any other manner interfering with the Plaintiff's ownership of the parcel of land known as LR no 8786 and LR no 8784/654 pending the hearing and determination of the Plaintiffs' suit herein.



4. That this Honourable Court be pleased to give the earliest date thereafter for directions in this matter.
5. That cost of this Application be in the cause.
2. The Application is based on the grounds on the face of it and the Supporting Affidavit of the 1st Applicant Jackson Wambua Maweu where he deposes that he is one of the beneficial owners of land parcel numbers LR no 8786 and 8784/654, hereinafter referred to as the 'suit land'. He claims they have been in occupation of the suit land for over twelve (12) years and constructed residential houses thereon. He explains that in the subsistence of their occupation of the suit land, they engaged the current and former registered owners of the said land and towards this, they were provided with title documents of the property. He avers that the suit land has been offered for sale to the 2nd Respondent and they are hence seeking restraining orders. He reiterates that they require the intervention of the court to safeguard their property. He reaffirms that no prejudice will be occasioned to the Respondents if the orders sought are granted.
3. The 1st Respondent opposed the instant Application by filing Grounds of Opposition and Notice of Preliminary Objection, both dated the 27th February, 2023. It contends that the Applicants have not established a prima facie case as they have not demonstrated the basis they seek ownership of the suit land. It explains that the suit land is registered in the name of the 1st Respondent pursuant to an Order of Court issued in Milimani HCCOMMMISC/E1322/2020 granting the 1st Respondent leave to purchase the said property from East African Portland Cement and a transfer was subsequently registered on the title. It avers that the Applicants' have not demonstrated they are in possession of the suit land. Further, they have not satisfied the requisite conditions to warrant the grant of the orders of temporary injunction. It insists that there is no allegation of irregularity or illegality that has been made or can be construed from the pleadings and evidence adduced against it. It reiterates that the Applicants' Application as drawn and presented is frivolous, bad in law, vexatious, lacks merit, misconceived and an abuse of the Court process.
4. In the Notice of Preliminary Objection, the 1st Respondent sought for the instant Application to be struck out with costs, on the following grounds:-
 1. The Application herein is incurably defective, incompetent ab ignition and bad in law for the following reasons:
 - a. It seeks substantive orders in a Miscellaneous Application which is not founded upon any substantive pleading, whether a claim, Petition or Application for Judicial Review hence it will deny the Respondent an opportunity to be heard on the substance of the suit.
 - b. The reliefs sought in the Application seek final resolution of the issues in controversy and as such cannot be granted by way of a miscellaneous application.
 2. The Applicants do not have the requisite *locus standi* to institute the instant suit pursuant to Section 19 of the [Civil Procedure Act](#) as the suit property is lawfully and legitimately registered in the name of the 1st Defendant.

The Application was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the Grounds of Opposition, Notice of Preliminary Objection and rivaling submissions, the following are the issues for determination: Whether the Applicants can seek substantive orders in a miscellaneous cause. Whether the Applicants are entitled to orders of interlocutory injunction restraining the Respondents from disposing off, the suit land pending the outcome of this suit.
6. The Applicants in their submissions contend that they have established a *prima facie* case as they have resided on the suit land for more than twelve (12) years hence seek to be registered as owners of the said suit lands. They argue that the registered proprietors' right over the suit land was extinguished and they are hence entitled to the said land through adverse possession. They further submit that they will suffer irreparable loss which cannot be compensated by an Award of Damages as they will experience mental anguish for the loss of their homes due to the 1st Respondent's illegal actions. To buttress their averments, they relied on Sections 7 and 13 of the [Limitation of Actions Act](#), Section 17 of the [Land Registration Act](#) as well as the following decisions: [Kasuve v Mwaani Investments Limited & 4 Others](#) 1KLR; [Mtana Lewa v Kabindi Ngala Mwangandi](#) (2015) eKLR; [Wilson Njoroge Kamau v Nganga Muceru Kamau](#) (2020) eKLR and [Exclusive Estates Ltd v Kenya Posts & Telecommunications Corporation & another](#) Civil Appl. no 62 of 2004.
7. The 1st Respondent in its submissions has reiterated its averments as per the Grounds of Opposition and Notice of Preliminary Objection. It insists that the Applicants do not have the requisite *locus standi* to institute the instant suit pursuant to Section 19 of the [Civil Procedure Act](#) as the suit land is registered in the name of the 1st Respondent. It contends that the Applicants have not established a *prima facie* to warrant the orders sought as they have not demonstrated the basis of ownership of the suit land. Further, that since the transfer of the suit land was effected from East African Portland Cement Ltd to the 1st Respondent, which land was public land, the doctrine of adverse possession does not apply. To support its arguments, it relied on the following decisions: [Norah Ndunge Henry & another v Abednego Mutisya & another](#) (2022) eKLR; [Kalyonge v Karanja](#) (Miscellaneous Application E070 of 2021) (2022) KEHC 16174 (KLR) Commercial and Tax) (9 December 2022) (Ruling); [Kenya v Commissioner of Lands & 2 Others](#) (2001) eKLR; [Moses C. Mubia Njoroge v Jane W. Lesaloi & 5 Others](#) (2014) eKLR and [Mrao Ltd v First American Bank of Kenya & 2 Others](#) (2003) KLR 125.
8. The Applicants have sought for orders of interlocutory injunction through this Miscellaneous Cause. The legal provisions governing Applications for injunction are contained in Order 40 Rule 1 of the [Civil Procedure Rules](#) which provides that:-

“Where in any suit it is proved by affidavit or otherwise — (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

Or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



9. Further, Section 2 of the [Civil Procedure Act](#) defines a Suit as follows:
- “All civil proceedings commenced in any manner prescribed.”
10. On institution of suits, Section 19 of the [Civil Procedure Act](#) states *inter alia*:-
- “Every suit shall be instituted in such manner as may be prescribed by rules.”
11. In the case of [Joseph Kibowen Chemor v William C Kasera](#) (2013) eKLR the court observed that:
- “The word “suit” has several meanings. [Black’s Law Dictionary](#) defines “suit” as any proceedings by a party or parties against another in a court of law. Suit of a civil nature is defined to be a civil action. A civil action is an action brought to enforce, redress, or protect a private or civil right. Rules means rules and forms made by the Rules Committee to regulate the procedure of courts. Pleadings include a petition or summons and the statements in writing of the claim or demand of any Plaintiff and of the defence of any Defendant thereto, and of the reply of the Plaintiff any defence or counter claim of a Defendant. Section 2 of the [Civil Procedure Act](#) defines “suit” as all civil proceedings commenced in any manner prescribed under section 2 means prescribed rules.
- Under section 19 of the [Civil Procedure Act](#), every suit shall be instituted in such manner as may be prescribed by the rules. It will be observed that section 19 does not pretend that the [Civil Procedure Rules](#) have a monopoly on how suits may be instituted. It provides that suits may be instituted in the manner prescribed by the rules. There could be rules in other statutes on how proceedings may be commenced. For example, [Probate & Administration Rules](#) under the [Succession Act](#) prescribe how matters touching on succession of estates of deceased persons need to be instituted. It means therefore that where a person is commencing a civil suit to enforce a civil action he needs to follow the prescribed rules.”
12. While in the case of [Tatecob Housing and Co-op Sacco Ltd v Qwetu Sacco Ltd](#) (2021) eKLR the court held that:-
- “Without much ado, I will agree with the position of the respondent... that the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction. one will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and If successful, that an order of eviction would issue.”
13. From perusal of the instant Notice of Motion Application herein including the annexures, noting that the Applicants’ claim revolves around adverse possession over land registered in the name of the 1st Respondent, I find that the dispute will require proof through *viva voce* evidence.
14. Based on the facts before me, while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that since the issues raised by the Applicants are substantive in nature, noting that Order 40 Rule 1 of the [Civil Procedure Rules](#) is clear in instances where a party can seek an order of injunction and it has to be in a suit, I opine that this claim ought to have been commenced by way of a Plaint and not a Miscellaneous Cause.



15. In the circumstance, I find the Notice of Preliminary Objection merited and hold that this Miscellaneous Cause as it stands is incompetent and will proceed to strike it out with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

