



**Mukulo v Sammy (Environment & Land Miscellaneous Case
E007 of 2022) [2023] KEELC 21732 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND MISCELLANEOUS CASE E007 OF 2022**

TW MURIGI, J

NOVEMBER 15, 2023

BETWEEN

ANNAH MWIKALI MUKULO PLAINTIFF

AND

ROSE MBAIKA SAMMY DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 20th September, 2022 brought under Sections 1A, 1B and 63 of the [Civil Procedure Act](#) and Order 40 of the [Civil Procedure Rules](#) in which the Applicant seeks the following orders:-
 1. Spent.
 2. That the Honourable Court be pleased to issue an order to evict the Defendant/Respondent from Land Parcel No. Nzau/Matiliku/43.
 3. That the OCS Emali Police Station to oversee the eviction.
 4. That the Defendant/Respondent be ordered to pay for the costs of the application.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Annah Mwikali Mukolo sworn on even date.

The Applicant's Case

3. The Applicant averred that she is the bona fide owner of Land Parcel No. Nzau/Matiliku/43.



4. She further averred that, the Defendant has refused to vacate the suit property despite being issued with a notice to vacate. Lastly, the Applicant contended that she will suffer irreparable loss if the orders sought are not granted.

The Respondent's Case

5. Opposing the application, the Respondent vide her replying affidavit sworn on 9th June, 2023 averred that the Applicant is not the legal administrator of the Estate of Mukolo Makau Mua, the registered owner of the property and as such she has no capacity to institute the present application. She denied that she is in occupation of the suit property and maintained that she resides on land parcel No. Nzaiu/Kithumba/492 which borders Land Parcel No. Nzaiu/Matiliku/43 where the Applicant resides.
6. Lastly the Respondent contended that the orders sought are final in nature and can only be determined in a suit and not in a miscellaneous application.

Analysis and Determination

7. Having considered the application and the respective affidavits, the only issue that arises for determination is whether a party can seek to enforce a right through a miscellaneous application.
8. The Applicant is seeking for an order to evict the Respondent from Plot No. 10 Wote Town. She averred that she is the bona fide owner of the suit property. She alleged that the Respondent has refused to vacate despite being issued with a Notice to vacate the suit property.
9. On the other hand, the Respondent contended that an order of eviction can only be issued after a suit has been heard and determined on merits.
10. The Applicant commenced these proceedings by way of a miscellaneous application. As a general rule, a suit can only be instituted by way of a Plaint, a Petition or an Originating summons.
11. Order 3 Rule 1 of the *Civil Procedure Rules* provides as follows;

“Every suit shall be instituted by way of a Plaint or in any other manner that may be prescribed.”

12. Similarly, Section 19 of the *Civil Procedure Act* provides that: -

“Every suit shall be instituted in such manner as may be prescribed by the rules.”

13. In the case of Joseph Kibowen Chemor Vs William C Kasera (2013) eKLR the Court defined the filing of suits as follows;

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.

14. Eviction orders are serious orders. They must be anchored in a suit as per the provisions of the Civil Procedure Rules and the *Land Act*. In the case of *Tatecob Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd (2021)* eKLR the court held that;

“Without much ado, I will agree with the position of the respondentthat 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.”

15. In associating myself with the above decision, I find that the issues relating to eviction are substantive issues which ought to be canvassed in the main suit where the Applicant will furnish the Court with the relevant documents alluded to in her supporting affidavit. The orders sought can only be granted upon hearing the case on merit. It goes without saying that, there must be a suit in existence upon which this application can be hinged on.
16. In the end, I find that the application dated 20th September, 2022 is incompetent and the same is hereby struck out with no orders as to costs.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF NOVEMBER, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Applicant in person.

Respondent in person.

