



Nyaberi & another v Akoth & another (Environmental and Land Originating Summons E033 of 2024) [2025] KEELC 3470 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E033 OF 2024
NA MATHEKA, J
APRIL 30, 2025**

BETWEEN

FRANCIS PIUS OMWERI NYABERI 1ST APPLICANT

REBECCA NYABOKE OMWERI 2ND APPLICANT

AND

BEATRICE AKOTH 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

RULING

1. The originating summons application is dated 3rd May 2024 and is brought under Order 37(5) of the Civil Procedure Rules and Section 78(2) of the Land Registration Act seeking the following orders;
 1. The caveat/restriction placed on land reference Mavoko Municipality 27770/761 IR No. 132725 be removed by the Chief Land Registrar.
 2. The costs of the Originating Summons be borne by the Respondent.
2. It is grounded on the Affidavit of Francis Pius Omweri Nyaberi and the following grounds that the Applicants are the registered owners of the suit parcel of land. The 1st Respondent filed a suit against the Applicants in Nairobi Milimani ELC. No. 1210 of 2013 which was transferred and reassigned Machakos ELC No. 19 of 2017 (formerly Nairobi Milimani ELC. No. 1210 of 2013). The case was determined in favour of the Applicants as the 1st Respondent's claim as a purchaser was dismissed. The decision and the appeal of this Honourable Court has been confirmed by the Court of Appeal in Nairobi CACA No. 248 of 2018. Despite the case having been determined in the Applicants' favour the 1st Respondent caused a caveat/restriction to be registered against the title to the suit land. The registration of the caveat on the suit land is detrimental and prejudicial to the Applicants' interest. The ends of justice require that the caveat/restriction be removed.



3. The 1st Respondent opposed the application stating that removal of the caveat prior to being refunded the purchase price plus interest may lead to the applicant selling the suit land which will be prejudicial to the 1st Respondent. That as per the agreement dated 30th July 2012, the purchase price of the suit land was kshs. 4,000,000/= and towards the same she paid kshs. 4,000,000/= before the agreement was frustrated by the applicants.
4. I find that this matter relates to Machakos ELC No. 19 of 2017 where judgement was delivered and the plaintiff's case was dismissed. Her appeal was also dismissed. It would have then been proper to pursue the matter in the same file and not a separate originating summons altogether as the matter is res judicata.
5. Be that as it may, Courts have taken the position that substantive orders cannot be issued in applications. Granting the orders suit will indeed conclude this matter. This is the position that was adopted in *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others* (2016) eKLR wherein it was held;

"So where a party such as an applicant herein seeks an order that in effect appears to resolve with 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 law."

6. In the case of *Nairobi West Hospital Limited vs Joseph Kariha & Another* (2018) eKLR it was held that;

".....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out."
7. For these reasons I find this originating summons application is unmerited is dismiss it with costs to the 1st Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

