



**Wanjohi & another v Gichuhi & another (Sued as Administrator of the Estate of Margaret Wanjiru Gachuhi) (Miscellaneous Application E115 of 2023) [2023] KEELC 22227 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22227 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E115 OF 2023  
AA OMOLLO, J  
DECEMBER 14, 2023**

**BETWEEN**

**ISAAC GATHUNGU WANJOHI & ANOTHER ..... APPLICANT**

**AND**

**JOHNSONE HOME GICHUHI AND GEORGE MURIUKI GICHUHI (SUED AS ADMINISTRATOR OF THE ESTATE OF MARGARET WANJIRU GACHUHI) ..... RESPONDENT**

**RULING**

1. The Respondent filed the notice of motion application dated 21<sup>st</sup> June 2023 pursuant to the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 2 rule 15(b), (c) and (d) of the Rules. They seek orders that:
  - a. The Court be pleased to strike out the Originating Notice of Motion application dated 5<sup>th</sup> May, 2023.
  - b. Costs of the application be provided for
2. The application on the grounds *inter alia*:
  - i. That the Applicants sought substantive orders in a misc application which is not founded upon by any substantive pleadings and if any special jurisdiction of the Court is being sought, it is not specified.
  - ii. That the legal ownership to the suit property has always been in contention as can be seen from the numerous court cases cited by the Applicants hence this court cannot grant any orders relating to the same in a miscellaneous application



- iii. That the impugned application is made under order 51 rule 1-3 of the Civil Procedure Rules which relates to applications and as such cannot be categorised as pleadings in the form of a plaint or petition or chamber summons under order 3
3. The application was also premised on the affidavit of George Muriuki Gichuhi sworn on 21<sup>st</sup> June 2023. Mr Gichuhi deposed that his co-Respondent, Johnson Home is deceased as per the certificate of death issued on 17<sup>th</sup> April 2023. He then reiterated the reasons listed on the face of the application and added that the suit land L.R No 209/1461 is legally owned by the late Margaret Wanjiru Gichuhi. The Respondent deposed that the family of the late Margaret Wanjiru have utilized and had possession of the suit property since her death. He further cited the provisions of section 152E of the Land Act and in concluding urged the court to allow their application.
4. The application was opposed through the replying affidavit of the 1<sup>st</sup> Applicant, Isaac Gathungu wanjohi. The Applicants restated the contents of their originating motion which included reference to a sale agreement dated 16<sup>th</sup> December 2002 executed between them and the late Margaret Wanjiru over the suit parcel of land and a copy of the conveyance which transferred the suit property to the Applicants. The Applicants averred that the late Margaret Wanjiru was represented by the firm of Messrs Koome Mbogo and Co advocates during the transaction.
5. The parties opted to prosecute this application by way of written submissions which submissions I have read and considered. The issue for my consideration is whether or not to strike out the originating motion. The Respondent has referred to the provisions of section 19 of the Civil Procedure Act and order 3 of the Civil Procedure Rules in support of their application. The remainder parts of the submissions touched on the merits of the originating motion which is not under review in this instant.
6. Section 19 provides that every suit shall be instituted in such manner as may be prescribed by rules. Order 3 rule 1 states that;
- “Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”
7. The Respondent relied on 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.”
8. The Respondent also cited Justice Gikonyo in Abdi Abdullahi Somo v Ben Chikamai & 2 others [2016] eKLR where the Court held that:-
- “In my life as a Judge I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that as a matter of general principal, a notice of Motion is a competent way of initiating substantive proceedings in Court. it will all depend on the particular statute governing the particular



proceeding in question. Therefore, where the law provides for the manner of commencing a suit or proceedings in court then that procedure applies...”

9. For the applicant, the cited the case of *Ringera v Mubindi* ELC Misc application E128 of 2021 (2022)KEELC 2481 in which Okong’o J stated thus, “The Applicant’s application is in the circumstances properly before the court. I am of the view that the provisions of Sections 152E to 152 I of the *Act* were enacted not only to provide a humane manner of carrying out evictions in line with the internationally acceptable standards but also a summary procedure for determining disputes over trespass to land where there is no contestation over title to land. I am satisfied from the material before me that the Applicant is the lawful owner of the suit property. The Applicant has placed evidence before the court showing that the suit property was allocated to him by the Commissioner of Lands and that he complied with the terms of allotment.”

The Applicant has also proved that the Respondent is occupying the suit property unlawfully. The Applicant has proved that the Respondent was charged at Makadara Law Court with the offence of unlawful detainer of the suit property in Chief Magistrates Court Criminal Case No. 4906 of 2008. The Respondent was convicted of the offence on 10th June 2010 and sentenced to pay a fine of Kshs. 20,000/- in default of which he was to serve 6 months imprisonment. The criminal court found that the suit property belonged to the Applicant and that the Respondent was unlawfully occupying the same. The Respondent told the criminal court that he was duped into purchasing the suit property from the person who sold it to him.” (underline mine for emphasis).

10. The Applicant also referred to the case of *Margaret Karwirwa Mwongera v Francis Kosi* (2019)eKLR which matter was unopposed. In this case, there a previous case ELC case no 1006 of 2016 between the parties herein was concluded without determining the issues in dispute as it was dismissed for want of prosecution. In that former suit, the previous registered owner had sued the present Applicants over ownership of the suit property which then makes it distinguishable to the Ringera v Muhindi case supra.
11. I am not persuaded to adopt the decision taken by the learned judges in the decisions cited by the Applicants *Isaac Gathungu and another*) on the basis that the ownership of the suit property is contested and secondly it is my view that the sections provided are not clear on the procedure of moving the court. Section 152E of the *Land Act* provides for service of notice of eviction in writing to unlawful occupiers of private land. Section 152F states that “Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.”The Act does not provide for Rules or Regulations on how to bring a chose of action under it.
12. It is my considered view that where the Statute is silent on how to bring a cause of action, then the provisions of section 19 of the *Civil Procedure Act* and order 3 rule 1 becomes applicable. The said order provides “that every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”
13. The Court of Appeal in the case of *Scope Telematics International Sales Ltd v Stoik Company Ltd and another* (2017)eKLR stated thus

“Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or Statute, that procedure should be strictly followed (See *Speaker of National Assembly v. Njenga Karume* [2008] 1 KLR 425). The 1<sup>st</sup> respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of the *Constitution* for the proposition that justice is to be administered



without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of the *Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors* [2010] eKLR). .... The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly.”

14. In light of the provisions of the law and the cases referred to, it is my considered opinion and I so hold that the since the Applicant is seeking eviction orders which are substantive in nature, they ought to have moved the court in the manner provided under section 19 of the *Civil Procedure Act* and Order 3 rules 1 and 2 of the *Civil Procedure Rules*. The originating motion has no foundation in law based on the orders it sought. Hence, I find merit in the application dated 21<sup>st</sup> June 2023 seeking to strike it out. The same is allowed with the consequence that the originating notice of motion dated 5<sup>th</sup> May 2023 is struck out with costs to the Respondents. The Respondents shall also have the costs of their application dated 21<sup>st</sup> June 2023.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023.**

**A. OMOLLO**

**JUDGE**

