



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT HOMABAY

MISCELLANEOUS APPLICATION NO. 7 OF 2021

(FORMERLY MIGORI ELC MISC NO. 52 OF 2017)

JOSEPHAT MOSE MAIRONGI.....APPLICANT

VERSUS

THE CHAIRMAN LAND DISPUTES TRIBUNAL RACHUONYO DISTRICT.....1ST RESPONDENT

JENIPHER AUMA AWENDO.....2ND RESPONDENT

RULING

1. On 22nd February 2021, the Applicant, Josephat Mairongi through the firm of James Nyakundi and Company Advocates filed herein an application by way of Notice of motion dated **18th February 2021** under **sections 1, 1A, 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya** and all enabling provisions of the law. He is seeking the orders infra:

a) Spent.

b) THAT this Honourable Court be pleased to issue an Order of eviction to the 2nd Respondent by herself or agents and/or servants from Land Reference No. **KABONDO/KASEWE 612 (the disputed land herein)**.

c) THAT the 2nd Respondent/Interested party vacate and deliver vacant possession of the disputed land.

d) THAT the O.C.S Othoro Police Station do provide security during the eviction.

e) THAT costs of this Application be borne by the Respondents.

f) THAT any further Orders that this Honourable Court may deem fit.

2. The application is anchored on the applicant's sixteen (16) paragraphed affidavit of even date and a copy of the title deed to the disputed land issued on **4th May 1977** and a copy of the judgment delivered on 19th November 2019 marked as "JMM-1" and "JMM-2" respectively and annexed thereto. The application is also based on grounds (a) to (d) set out on its face. In a nutshell, the applicant's complaint is that he is the registered proprietor of the disputed land and that judgment (JMM-2) was rendered in his favour. That therefore, if the order of eviction sought in the application is not issued, he is likely to suffer grave injustice and loss of the disputed land.

3. The 2nd respondent/interested party, Jenipher Auma Awendo through the firm of Lugano and Lugano Advocates, opposed the application in her statement of grounds of opposition dated **9th June 2021** under **Order 51 Rule 11 (1) of the Civil Procedure Rules, 2010** and filed in this court on 29th September 2021. The grounds are thus;

a) The application dated **18th February 2021** is an afterthought and beleaguered by laches

b) There are no proceedings known in law in which a Notice of Motion can originate a suit hence the current suit offends the provisions of **Order and Rule 1 of the Civil Procedure Rules, 2010**.

c) The suit herein is premature and fatally defective for failure to accord to the doctrine of exhaustion of other revenue of dispute

resolution provided for in law.

d) As a consequence, the suit herein is incompetent, frivolous, fatal defective and an abuse of the court process hence should be struck out with costs to the respondent.

e) The application is otherwise misconceived, bad in law, lacking in merit and ripe for dismissal with costs.

4. On **23rd November 2021**, this court ordered and directed that the application be heard by way of written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**; see also **Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014**.

5. Thus, it must be appreciated that learned counsel for the applicant was given latitude to argue the application bearing in mind **Articles 48 and 50 (1) of the Constitution of Kenya, 2010**. Be that as it may, he failed to file submissions in this application.

6. On the other hand, learned counsel for the 2nd respondent/interested party filed six paged submissions dated **21st November 2021** on **23rd November 2021** stating the gist of the application and framed twin issues for determination namely whether the application offends **Order 3 Rule 1 of the Civil Procedure Rules, 2010** and whether the cost of the application should be borne by the applicant. In the analysis of the issues, counsel submitted that the answer to the twin issues is in the positive and termed the application bad in law, an afterthought, made in bad faith, prejudicial to the expeditious disposal of the matter aimed at defeating justice.

7. To fortify the submissions, counsel cited the decision in **Daniel Kimani Njihia-vs-Francis Mwangi Kimani and another (2015) eKLR** that an omission by a litigant to invoke the correct constitutional and statutory provision is not a mere procedural technicality to be cured under **Article 159 (2) (d) of the Constitution of Kenya, 2010**. Further, counsel cited the case of **Mukisa Biscuit Manufacturing Co. Ltd-vs-West End Distributors Ltd (1969) EA 696 and J.N & 5 others-vs-Board of Management Sr G. School Nairobi and Another (2017) eKLR** that a preliminary objection consists of pure point (s) of law. Therefore, counsel concluded that the application should be dismissed with costs to the 2nd respondent/interested party.

8. I have duly considered the entire application, the statement of grounds of opposition and the 2nd respondent/interested party's submissions together with the issues identified as well as the authorities cited therein. So, is the application merited?

9. The application is commenced under the provisions of the law pertaining to the Overriding Objective, special and inherent powers of this court. I also take into account **Sections 3 and 19 (1) and (2) of the ELC Act, 2015 (2011)** and endorse the reasoning in the case of **Oraro-vs-Mbaja (2005) 1 KLR 142 at 149/150** regarding the discretionary power of the court.

10. The applicant's contention is that he is the registered proprietor of the disputed portion as revealed in document marked as "JMM-1" annexed to his affidavit in support of the application. This court is conscious of the protection of the right to property under **Article 40 (1) of the Constitution of Kenya, 2010** and the provisions of **sections 24, 25, 26 and 28 of the Land Registration Act, 2016 (2012)**.

11. The applicant also relied on the judgment (JMM-2) pursuant to the applicant's claim for judicial review as stipulated under **Articles 23 (3) (f) and 47 of the Constitution of Kenya, 2020**. Plainly, JMM-2 was not a declaration of the applicant's right to the disputed land. In light of principal orders sought in the application, it is instructive that in **Black's Dictionary 10th Edition at page 673**, the term "Eviction" means;

"The act of process of legally dispossessing a person of land or rental property."

12. The 2nd respondent/interested party asserted that the application offends **Order 3 Rule 1** (supra) regarding commencement of suit. I bear in mind the definition of the term "suit" under **section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya**.

13. At paragraph 14 of his affidavit in support of the application, the applicant deposed that he has tried every peaceful means to have the 2nd respondent/interested party leave the disputed land to no avail. According to the 2nd respondent/interested party, the application has failed to accord to the doctrine of exhaustion of other avenues of dispute resolution as prescribed (see **Geoffrey Muthiga Kabiru and 2 others-vs-Samwel Munga Henry and 1756 others (2015) eKLR**). On that score, the parties are encouraged to give a shot at Alternative Dispute resolution methods with a view to resolving this dispute as provided for under **Article 159 (2) (c) of the Constitution of Kenya, 2010**.

14. Clearly, the applicant has not taken essential step as commanded by **Order 3 Rules 1 and 2** (supra) in the institution of this application. Indeed, the omission is not a mere procedural technicality and the natural consequence thereof is that the application has to fail as I subscribe to decision in the case of **Daniel Kimani Njihia case** (supra) and in the case of **Simbiri Nan-Bell Community Health Centre Limited-vs-Erick Odede and 4-others (2020) eKLR**.

15. In the foregone, it is the finding of this court that the application is incompetent, bad in law, fundamentally defective and devoid of merit. I proceed to uphold the 2nd respondent/interested party's grounds of opposition.

16. Accordingly, the application dated **18th February 2021** and lodged in court on **22nd February 2021**, be and is hereby struck out with no orders as to costs.

DELIVERED, DATED and SIGNED at Homa Bay this 23rd February 2022

G.M.A ONG'ONDO

JUDGE

PRESENT;

- a) Mr. Anthony Achura holding brief for Ombwayo instructed by M/Lugano and Lugano Advocates for the 2nd defendant/interested party.
- b) Okello, court assistant.