



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MISC APPLICATION NO.E122 OF 2021

LYNETTE NASIMIYU WAFULA.....APPLICANT

=VERSUS=

DAVID MWANGI.....1ST RESPONDENT

ISAAC KINUTHIA NJOGU.....2ND RESPONDENT

SYLVESTER KAITAN.....3RD RESPONDENT

NAFTALI WAHOME.....4TH RESPONDENT

MWEMBIA.....5TH RESPONDENT

RULING

1. This suit was instituted by way of the Notice of Motion dated 18th June 2021. It was brought under Sections 152A, 152B, 152E, 152G and 152 F of the Land Act and Sections 1A and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

2. It sought orders:-

a. Spent.

b. That this Honourable court be pleased to grant orders of eviction and demolition against the Respondents herein from the Applicant's land parcel No.NAIROBI /BLOCK 118/1531.

c. That the officer commanding Kamulu police station (OCS) be and is hereby ordered to offer security to the auctioneers appointed by the Applicant in carrying out the eviction and demolition exercise and maintain law and order.

d. That the costs of the application be awarded to the Plaintiff.

3. The application was premised on the grounds stated in paragraphs 1 to 5 on the face of the application and the annexed affidavit sworn by the Applicant on 18th June 2021.

4. The Respondents objected to the application by way of the replying affidavit sworn on 27th July 2021 by one Mercy Gakii Gature.

5. The Respondents also filed a Notice of preliminary objection dated 21st July 2021 which is for determination before this court. It raises grounds:-

a. That 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 3 Rule 1 of the Civil Procedure Rules, 2010.

b. That the mandatory orders sought in the application are contrary to Order 40 of the Civil Procedure Rules and cannot be granted by the court at this time.

c. That the application has been brought in bad faith, is frivolous, vexatious and an abuse of the court process which ought to be dismissed with costs.

6. In response to the preliminary objection, the Applicant filed her replying affidavit sworn on 27th July 2021. She deponed that she is the registered owner of the suit land as evidenced by a copy certificate of official search.

7. She further deponed that guided by Section 152 of the Land Act as read with Section 24 and 26 of the Land Registration Act on the procedure to regain possession of private land, she served the Respondents with a three (3) months' notice to vacate the suit land. She added that according to Section 152, the Respondents were required to challenge the notice within ninety (90) days but they failed to do so.

8. She deponed that upon expiry of the ninety (90) days notice, Section 152 of the Land Act is silent on the mode of approaching the court by the private land owner and since there are no issues of rights to be determined save to grant the Applicant a specific prayer of eviction, a miscellaneous application is proper.

9. She further deponed on advice of her counsel that Section 152 of the Land Act does not contemplate a situation where a land owner is required to file a suit to evict an illegal occupant as it contemplates that such a land owner would directly apply for an eviction order.

10. She also deponed that based on the nature of the proceedings, there is no requirement for strict compliance with Order 40 of the Civil Procedure Rules as it has already been complied with by according the Respondents a chance to show cause why they should not be evicted.

11. On the 27th July 2021, the court directed that the preliminary objection be heard first in priority to the Notice of Motion. It also directed that the same be disposed of by way of written submissions.

The Applicant's submissions

12. They are dated 6th October 2021. The Applicant submitted that according to Section 152 of the Land Act, an owner of land is required to serve an illegal occupant with a ninety (90) days eviction notice and if the illegal occupant does not seek court's intervention within the notice period, the duty vested upon the Applicant is to seek for formal authorization to evict the illegal occupant. The Applicant relied on the case of **Margaret Karwira v. Francis Kofi [2019] eKLR** to submit that proceedings to seek the said authorization are ex parte in nature thus the illegal occupant need not be served.

The Respondent's submissions

13. They are dated 4th August 2021. The Respondents faulted the Applicant for circumventing provisions of Order 3 Rule 1 of the Civil procedure Rules 2010. They relied on the case of **Tatecoh Housing and Co-op Sacco Limited v Qwetu Sacco Limited [2021] eKLR** and the case of **Edna Cherono Bore v Spire Bank Limited & another [2018] eKLR**.

14. I have considered the preliminary objection and the reply thereto. I have considered the rival submissions. The issue for determination is whether the preliminary objection is merited.

15. In her supporting affidavit the applicant states that she is the registered owner of land parcel number Nairobi/Block/118/531. In paragraph 4 she depones:-

"That sometime last year I learnt from my friend that strangers have taken advantage of my absence, trespassed and erected houses on my land without my consent or permission".

In paragraph 6, she depones,

"That despite being duly served with the notice to vacate my land the respondents have deliberately refused to comply with the said orders".

16. It is clear from the above averments that the Applicant seeks to enforce her rights as the registered owner of the suit property. She also prays that the Respondents be evicted from the suit property. Section 2 of the Civil Procedure Act defines:

" "suit" to mean all civil proceedings commenced in any manner prescribed" prescribed means "prescribed by rules" and

"Rules" means rules and forms made by the Rules committee to regulate the procedure of courts"

17. As stated above the Applicant seeks to enforce her rights as a registered owner of the suit property. She ought to have filed a plaint so that the matter can be heard on its merits. **Order 3 rule (1)** of the Civil Procedure Rules provides that:-

"(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed."

18. In the case of **Joseph Kibowen Chemjor vs William C Kisera [2013] eKLR** Munyao Sila J observed thus:-

“It is always advisable for a claimant to commence action by way of plaint unless there is a clear alternative provided by statute or the rules thereunder.....”

The learned judge went further to state:-

“....I am alive to the provisions of Article 159(2) (d) of the Constitution that provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings”, goes beyond a mere technicality.....”

I am guided by the above authority in finding that the Applicant herein ought to have commenced her action by filing a plaint.

19. Since the Applicant has approached the court seeking an eviction order, the Respondents must be accorded a fair hearing by being served with the pleadings. Article 50 of the Constitution provides for the right to a fair hearing. This can only be possible by each party filing documents in support of his/her case.

20. The upshot of the matter is that I find merit in the preliminary objection. The same is upheld. Consequently, the notice of motion dated 18th June 2021 is struck out with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 10TH FEBRUARY, 2022

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Applicant

Mr. Angaya for the Respondents

Steve - Court Assistant