



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

MISC APPLICATION CASE NO E12 OF 2021

NORAH NDUNGE HENRY.....1ST APPLICANT

PRISCA MWENDE NDUNDA.....2ND APPLICANT

VERSUS

ABEDNEGO MUTISYA.....1ST RESPONDENT

MESHACK MUTUA NDUNDA.....2ND RESPONDENT

RULING

1. What is before the court for determination is the Notice of Motion application dated 15th of September 2021 brought pursuant Section 1A, 1B and 3A of the Civil Procedure Act, Section 152A and 152E of the Land Act No. 6 of 2012 and all other enabling provisions of the law, the Applicant is seeking for the following orders: -

1) Spent.

2) That this Honourable Court be pleased to issue an order restraining the Respondents, their servants and/or any person or body of persons from trespassing on the land parcel number Tulimani/Yandue/1648 and land parcel number Tulimani/Yandue/1647 pending the inter partes hearing and determination of this application.

3) That this Honourable Court be pleased to issue an eviction order against the Respondents, their servants and/or any other person or body of persons evicting him and them from the suit land.

4) That this Honourable Court be pleased to issue an order restraining the Respondents, their servants and/or any person or body of persons from trespassing on land parcel number Tulimani/Yandue/1648 and land Tulimani/Yandue/1647.

5) That this Honourable Court be pleased to issue an order compelling the Respondents to demolish the structures and clear the crops put up on the suit land.

6) That the Honourable Court be pleased to issue an order authorising the Applicants to demolish the structures and clear the said crops in the event the Respondents fail to adhere to this Honourable Court's orders aforesaid.

7) That this Honourable Court be pleased to order the OCPD Kalawani Police Station to provide security during the eviction, demolition and clearing exercise.

8) That the costs of this application be provided for.

9) Any other relief that this Honourable Court may deem fit to grant.

2. The application is premised on the grounds on the face of the application. These grounds are:

a) That the Respondents continue to illegally occupy, trespass, graze and have put up structures on title number Tulimani/Yandue/1648 and Tulimani/Yandue/1647 which are registered in the names of the Applicants herein.

b) That three months as required by the law have since lapsed from the time the notice to vacate was served upon the

Respondents who have refused to vacate the suit premises.

c) That it is in the interest of justice that the court grants the prayers sought

3. The application is supported by the affidavit of the 1st Applicant sworn on the same day on her own behalf and on behalf of the 2nd Applicant. The Applicants averred that their late father distributed his property to his children before his death and that he bequeathed the properties to the Applicants. She further averred that the Respondents who were her brothers, had trespassed and put up structures on their parcels of land despite having received their own shares from their late father.

4. The application is opposed vide the replying affidavit of the 1st Respondent sworn on 16th of November 2021. The Respondent contends that the application is frivolous vexatious, fatally defective and a gross abuse of the court process. The Respondents further averred that the parcels of land that the Applicants were claiming ownership belonged to the Estate of their late father who had died intestate. The Respondents argued that the Applicants had colluded with their mother and fraudulently caused the properties to be registered in their names. That in order to hoodwink him, the Applicants caused land No 2675 to be registered in his name.

5. The Respondent argued that they had commenced succession proceedings with a view to having the title deeds issued to the Applicants revoked. He further averred that they would be prejudiced if the order sought are granted as they would be denied their rightful share of the Estate of their late father.

6. The application was canvassed by way of written submissions. The Applicant's written submissions were filed on 28th of January 2022 while the Respondents submissions were filed on 18th of February 2022 which I have duly considered.

ANALYSIS AND DETERMINATION

7. The issue for determination is whether a party can seek to enforce a right through a miscellaneous application. The Applicant has sought for restraining and eviction orders against the Respondents herein. The Applicants furnished the court with copies of the title deeds and a Notice to vacate dated 1st of May 2021 issued by the firm of OMA Advocates.

8. As a general rule, suits are instituted by way of a Plaint unless the rules prescribe any other manner. Order 3 Rule 1 of the Civil Procedure Rules stipulates that: -

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.”

9. 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.”

10. For an action for injunction to succeed, the Applicant should adhere to the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provide that an application for restraining orders must be anchored in a suit. It is therefore clear that, for the Applicant to seek for the above orders, there must be in existence a suit upon which this application can be hinged on.

11. 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.

12. As regards an order for eviction, the Applicant should adhere to the provisions of Section 152 (A) to 152 (H) of the Land Act.

13. 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 so finding, In **Tatecoh 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.”

14. It is therefore clear that the court can only grant such orders upon hearing the case on merit.

15. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating Summons. A Notice of Motion is not legally recognised as an originating process. A Notice of Motion can only be within a properly instituted suit.

16. In the end I find that the application before the court is incompetent and I proceed to strike out the same with costs to the Respondents.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS THIS 20TH DAY OF APRIL, 2022.

IN THE PRECENCE OF: -

Court assistant – Mr. Mohammed

Mrs On’guti for the Applicant