Muyesu v Biwott & another (Environment and Land Miscellaneous Application E016 of 2022) [2022] KEELC 12583 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12583 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2022

SM KIBUNJA, J

SEPTEMBER 23, 2022

BETWEEN

JOSEPH NDAYALA MUYESU .... APPLICANT

AND

THOMAS KIMUTAI BIWOTT .... 1ST RESPONDENT

JOSIAH KIMUTAI KIBIAS .... 2ND RESPONDENT

RULING

1. This matter was commenced through the notice of motion dated the March 10, 2022 in which the applicant seeks for among others to have the "respondents, their agents, servants and/or family members move and vacate together with their belongings the suit land namely LR NO UG/Illula Scheme/126 pursuant to the judgment delivered by the Court of Appeal vide ELC Appeal No 112 of 2018 on the July 9, 2021."

2. In response thereto, the respondents' filed a Notice of Preliminary objection dated April 22, 2022 premised on the following grounds;

   a. That there is no suit properly filed before this honourable court for determination.

   b. That the present miscellaneous ELC E016 OF 2022 has been commenced through unprocedural means and thus it is fatally defective and incapable of obtaining the orders sought.

   c. That the application before this honourable court is a clear contravention of article 159 of the *Constitution* of Kenya 2010 sections 1A and 1B of the *Civil Procedure Act* and *Civil Procedure Rules*, 2010 for commencement of a suit and should therefore be rejected.

   d. That the Miscellaneous ELC No E016 of 2022 is fatally defective, incompetent, bad in law and should be struck out with costs to the 1st and 2nd respondent.

3. That after hearing the counsel for the parties on the April 20, 2022 the court directed that the preliminary objection be heard and determined first by way of written submissions. The learned counsel for the respondents and applicant thereafter, filed their written submissions dated April, 22nd, 2022 and June 3, 2022 respectively, summarized as follows:

   a. In their submissions, the respondents relied on the provisions of section 2 as read with section 29 of the *Civil Procedure Act* regarding suits filed in court. They further cited the case of *Joseph Kibowen Chemjor v William C Kisera* (2013) eKLR where is was held that;

      > The word "suit" has several meanings. Black's Law Dictionary [6] defines "suit" as any proceedings by a party or parties against another in a court of law. [7]"Suit of a civil nature" is defined to be a civil action[8] "A civil action" is an action brought to enforce, redress, or protect a private or civil right.[9] Section 2 of the *Civil Procedure Act*, defines "suit" as all civil proceedings commenced in any manner prescribed.[10] "prescribed" under section 2 means prescribed by rules [11] "Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts. [12 "pleadings" includes 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 to any defence or counterclaim of a defendant.[13] Under section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules." There could be rules in other statutes on how proceedings may be commenced. For example the Probate & Administration Rules under the Succession Act, [14] 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 (in this instance to enforce a civil action), he needs to follow prescribed rules."

The respondents further submitted that the applicant cannot approach this court through a non-existent procedure, and specifically through the provisions of order 51 rule 1 of the *Civil Procedure Rules*, since there is no existent suit upon which this particular application is being filed. The respondents further relied on, *Joseph Kibowen Chemjor v William C Kisera* (*supra*) where the court stated that;

> " The prior procedure did not provide for cautions to be removed by way of miscellaneous application or Originating Summons as we have seen above. In such instance the fall back is to commence suit by way of plaint as noted in the *Civil Procedure Act*.[20] It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of Plaint in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed.
>
> 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. Courts have had occasion to consider whether suits instituted by way of miscellaneous application are valid.
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> I am alive to the provisions of article 159 (2) (d) of the *Constitution* [25] which 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. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of "suit by a letter" which Mr Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.".

The respondents urged the court to strike out the matter as it amounted to abuse of court process, and a waste of court's time as it offends the provisions of articles 50 and 159 of the *Constitution*, as well as section 1A and 1B of the *Civil Procedure Act*, which provisions impress upon the courts to administer justice without undue regard to procedural technicalities. It was submitted that as held by Nyamu J in *Safaricom Limited vs OceanView Beach Hotel Limited and 2 others*, applying the overriding objective will depend on the circumstances of each case, so that both sides of the case need to be looked at to determine the intention of the parties, to ensure the parties do not misuse court process and seek refuge in the provisions of article 159 of he Constitution. The respondents further relied on the following cases in support of their objection: *Shah v Mbogo* (1967) EA 116 at 123 B as well as *Fredrick Mutonyi Gitonga v Isaiah Mutonyi Wambugu & Another* (2015) eKLR. The respondents also submitted that the applicant is wasting this court's time and no excusable error or mistake has been shown for this court to exercise the discretion as sought. Further, the respondents contend that great prejudice will occur should the court proceed with the matter as the applicant is seeking to obtain an eviction order against the respondents, yet no such relief for eviction and/or vacant possession was issued in ELC Appeal No 112 of 2018. In view of this, the respondents urged the court to dismiss the application and uphold the preliminary objection.

b. On his part, the applicant submitted that the preliminary objection is untenable, misconceived and otherwise an abuse of court process. He re-iterated that the law on preliminary objection is well settled vide the decision in *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 697 where the Court held;

> " .... preliminary objection is in the nature of what used to be called a demurrer. It raises pure points of law which if argued on assumption that all pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Further, he submitted that article 159 (2) (d) of the *Constitution* of Kenya 2010, and sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* provides that courts have discretion to do substantive justice without undue regard to technicalities. The applicant equally addressed the issue of jurisdiction of this court as provided for under article 162 (2) of the *Constitution* as well as section 13 of the *Environment and Land Court Act* which empowers this Court to hear and determine all disputes in accordance with article 162 (2) (b) including supervisory powers and hence according to the applicant, the court has powers to determine the issues or orders being sought in the application before this court. The applicant submitted that he was the plaintiff before the Chief Magistrates Court at Eldoret vide Eldoret CMCC Case No 885 of 2007 where he lost. He then appealed against the decision of the magistrates court to this court vide Eldoret ELCA NO 8 OF 2014 and was successful as this court overturned the decision of the lower Court, vide a judgement delivered on July 11, 2018. Dissatisfied by the said decision, the respondents approached the Court of Appeal in Civil Appeal No 112 of 2018 in which

the Court of Appeal delivered its judgement in favour of the applicant herein. In the decision of the Court of Appeal, the applicant was declared as the lawful owner of all that parcel of land known as Uasin Gishu/Illula Scheme/126, but the respondents have refused to vacate the suit land in contempt of court orders flowing from the decision of the Court of Appeal. That the applicant is now before this court seeking for an enforcement order for specific performance in regard to the suit property in light of the Court of Appeal decision. The applicant cited the decision in *Republic v Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya*, HCMCA No 13 of 2008 where it was held that;

> " ...that the High Court has a responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under *Constitution* or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court, the court is perfectly within its rights to adopt such procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the court by section 3A of the *Civil Procedure Act* to grant such orders that meets ends of justice and avoid abuse of the Court process."

The applicant finally submitted that despite pronouncement of the courts entitling him ownership of the property, the respondents have refused to comply with the said order, yet the same is binding and requires compliance by the respondents. He thus sought to have the preliminary objection dismissed with costs.

4. The following are the issues for the court's determinations;

    a. Whether the preliminary objection raises pure points of law that if upheld could determine the application herein.

    b. Who pays the costs.

5. The court has carefully considered the grounds in the preliminary objection, submissions by the learned counsel, the superior courts decisions cited therein, and come to the following determinations:

    a. In determining whether the matters raised in the notice of preliminary objection constitute pure points of law, the court is guided by the decision in the case of *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Limited* (1969) EA 696 where it was held that:

    > " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion."

    The Court further stated that;

    > " a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit."

    b. Section 2 of the *Civil Procedure Act*, Cap 21 Laws of Kenya defines "suit" as all civil proceedings commenced in any manner prescribed. "Prescribed" under section 2 means prescribed by rules.

"Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts. Under section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules.

c. In this matter, the issue at hand is whether the applicant's notice of motion dated March 10, 2022 commenced through as a miscellaneous application amounts to a valid suit. It is a well established legal principle that the litigants need to comply with not only the law but also the applicable rules when instituting a suit. Under section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules. Section 19 strictly provides that suits may be instituted in the manner prescribed by rules and by virtue of this, any person commencing a suit must do so in the manner provided by law, as well as the applicable rules. Whereas the applicant is seeking an order of specific performance in the instant matter, it is however evident that the above provisions of the law were not complied with in instituting this matter, and there is therefore no suit before the court, upon which the notice of motion could be based upon.

d. There are rules that provides for the procedure to be followed when filing an application where there is no "action". Where the law and rules guiding the instituting of suits are not followed, such a matter is for striking out as was done in the case of *Peter Kwema Kahoro Vs Benson Maina Githethuki* [2005] eKLR, where the court stated that:

.... the only objection which has caused me anxiety is the one directed at the manner in which the applicants have originated these proceedings. Section 19 of the *Civil Procedure Act* provides as follows:

> " 19. Every suit shall be instituted in such manner as may be prescribed by rules".
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> And order IV Rule 1 of the Civil Procedure Rules reads:
>
> > " 1. Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed". The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under *Advocates Act*. In the light of the above, I am not persuaded that the applicants were entitled to institute these proceedings by way of a Chamber Summons in a miscellaneous application. Being of this persuasion I find and hold that the application dated February 2nd, 2005 and filed on February 4th, 2005 in incompetent and it struck out with costs".

e. That if the applicant's desire as borne in prayer 2 was to execute the orders issued by the Court of Appeal, then the forum to use should be either the Court of Appeal file where the orders were made, or this court's file where the order subject matter of the appeal emanated from. The court is of the view that there is no proper suit before it, and the commencement of this matter by way of miscellaneous application is not envisaged by the law and accordingly, the court has no authority and/or power to adjudicate over an application that has not been properly brought before it. In my view this is not an issue that can be cured by virtue of the provisions of article 159 of *the Constitution*.

f. The respondents' preliminary objection has merit, and in terms of section 27 of the *Civil Procedure Act*, they are entitled to the costs.

6. That flowing from the foregoing, the court finds and orders as follows;

   a. That the respondents preliminary objection dated the April 22, 2022 has merit and is hereby upheld.

   b. That accordingly, the applicant's Notice of Motion under certificate of urgency dated the March 10, 2022 and filed on the March 15, 2022is hereby struck out with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 23rdDAY OF SEPTEMBER, 2022

S M KIBUNJA,J

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

APPLICANT: .....Absent......

RESPONDENTS: ......Absent

COUNSEL: ....Ms. Kimeli for Respondents....................

COURT ASSISTANT: ONIALA

SMKibunja,J