



**Tonui v Siele (Miscellaneous Application 5 of 2020)
[2022] KEELC 14925 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
MISCELLANEOUS APPLICATION 5 OF 2020**

**JM MUTUNGI, J
NOVEMBER 17, 2022**

BETWEEN

SAMUEL KIBET TONU I APPLICANT

AND

STANLEY KIPKOECH SIELE RESPONDENT

RULING

1. On January 19, 2021, the court made an order that the respondent, Stanley Kipkoech Siele, be evicted from land parcel Molo South/Kapsabet Block 2/33 (Kendamet) and the OCS, Keringet Police Station was ordered to provide security during the eviction exercise. By an application dated June 14, 2022, the applicant Samuel Kibet Tonui contends that the respondent and the OCS were in contempt for disobeying the court order issued on January 27, 2021 and *inter alia*, sought orders for their imprisonment. The applicant argued that the respondent and the OCS had been served with the court order on February 9, 2021 and had failed to comply with the terms of the order.
2. The respondent apparently upon being served with the applicant's application, on July 5, 2022 filed the notice of motion dated the same date praying for orders that the court do set aside the proceedings and subsequent orders made against the applicant on January 27, 2021; and further that the court do reinstate the application dated February 24, 2020 and filed on February 26, 2020 for disposal on merits.
3. The respondent/applicant averred that the application dated February 24, 2020 proceeded in the absence of the applicant as he was never served with the application. He contended that the application raised issues of ownership and he was not afforded an opportunity of being heard. He averred that he had never been served with the application dated February 24, 2020 to enable him to respond to the same and that he had been unaware of the existence of the suit until when he was served with the court order issued on January 27, 2021.



4. The applicant initiated the instant suit by way of a miscellaneous application (notice of motion dated February 24, 2020) predicated under sections 152A, 152B, 152E, 152G and 152 F of the Land Act, 2012. The aforesaid provisions were inserted as an amendment to the Land Act, No 6 of 2012 to provide the procedure to be followed whenever there were evictions to be undertaken. They provide guidelines whenever any evictions are effected and they mirror the United Nations Guidelines on steps that ought to be taken in effecting evictions. While the guidelines were previously targeted at ensuring orderliness where there were mass evictions, and to ensure that evictions were effected in a humane manner where human dignity was respected, the guidelines also apply where private land is involved and it becomes necessary for the owner of such land to effect an eviction of any person from the land.
5. The operationalization of the provisions of sections 152A to 152G of the Land Act has not been without challenges. It is not clear whether in case of private land, all that a proprietor needs to do is to issue a notice under section 152E where he considers somebody is in occupation of his land unlawfully. What happens where the recipient of the notice does not comply? Section 152F of the Act appears to provide recourse though it does not clarify in what manner a party approaches the court. Section 152F provides:-
 1. 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.
 2. The court after considering the matters set out in sections 152C, 152D and 152E, may:-
 - a. Confirm the notice and order the person to vacate;
 - b. Cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - c. Suspend the operation of the notice for any period which the court shall determine; or
 - d. Order for compensation.

In my view, the provisions of sections 152A to 152G save for providing guidelines on the procedure to be followed when eviction has to be effected, would have no application in instances where ownership of the land is disputed unless a determination relating to the ownership of the land has been made by a competent court.

6. My understanding of the provisions of sections 152A to 152G is that they were never intended to do away with the necessity to have ownership disputes relating to land adjudicated by the court through the usual civil process where a suit is instituted either by way of plaint, petition and/or originating summons. Section 152F that provides that a party served with a notice to vacate may apply to court for relief does not specify the nature or form of application to be made to court by such party. For instance, if ownership is disputed, would a party make an application or institute suit for the issue of ownerships to be determined? In my view in such instance, a substantive suit would be necessary to enable evidence to be adduced for the court to make a determination respecting of the ownership of the property in dispute.
7. In the present matter, the applicant served upon the respondent the notice of eviction envisaged under sections 152A, 152B and 152E of the Land Act, 2012 which the applicant avers the respondent failed to comply with necessitating the applicant to apply to the court for an order of eviction of the respondent to issue.

The applicant averred that the respondent did not appear when he was served with the application and the court on January 19, 2021 allowed the application and granted the order of eviction and directed



that the OCS, Keringet Police Station provide security during the eviction exercise. These are the orders that the applicant complains were not obeyed and by the notice of motion dated June 14, 2022, the applicant seeks that the respondent and the OCS Keringet Police Station be cited for contempt of court for disobeying the orders of the court. The respondent upon being served with the application dated June 14, 2022 filed a replying affidavit on July 5, 2022 *vide* which he averred he was only served with the orders issued on the application dated February 24, 2021 and not the application. He stated he was then unaware of any suit between him and the applicant which prompted him to visit the OCS Keringet to obtain more particulars. The OCS had equally been served with the same court order. The respondent averred the dispute between him and the applicant related to their respective plot Nos 33 and 34 which bordered each other.

8. I have carefully considered and reviewed the two applications, the subject of this ruling. The application by the applicant to cite the respondent and the OCS, Keringet Police Station for contempt of court, and the application by the respondent/applicant to have the orders of eviction issued by the court on January 19, 2021 set aside and the application dated February 24, 2020 reinstated for hearing on merit. In my view, there appears to be a dispute either of ownership and/or boundary dispute respecting land parcels Molo South/Kapsambei Block 2/33 and Molo South/Kapsambei/34 owned by the applicant and the respondent respectively. I do not consider that the provisions of sections 152A to 152G of the Land Act would be applicable in instances where there is a dispute. The dispute has first to be adjudicated. The said provisions invite summary procedure not appropriate for taking evidence and would not be appropriate where parties may need to be heard, adduce evidence and cross-examine witnesses.
9. The report by the regional surveyor, Rift Valley dated June 18, 2019 which apparently was prepared after a site visit when both the owners of parcels 33 and 34 were present under findings (c) and (d) indicated the positioning of parcel 33 and 34, on the ground were in one position. The regional surveyor concluded that the issue possibly was one that related to a land claim as it was not possible that the same spot on ground was owned by two persons; who then between the applicant and the respondent was the owner of the disputed portion on the ground? Indeed, even the subsequent survey report by Geodata Land Surveyors and Consultants made on July 15, 2021 indicated that the position on the ground is claimed by the owner of parcel 33 and the owner of parcel 34 with the latter having planted trees thereon. It is necessary for the ownership of the disputed portion to be adjudicated finally and that cannot possibly be done in the application dated February 24, 2020.
10. In the premises, while I think there would be merit to have the court order granted on January 19, 2021 set aside so that the application dated February 24, 2020 is heard on its merits, I do not consider that any purpose would be served in reinstating the application for the reasons that I have advanced. This in my view is a land claim that that could even involve one of the titles to parcels 33 and 34 being cancelled since there cannot be two titles over the same land. I will thus allow the respondent's application and set aside the eviction order but rather than reinstate the application by the applicant dated February 24, 2020, I will order the same struck out with liberty to both parties to institute any appropriate suit before a court of competent jurisdiction for appropriate reliefs.
11. The costs of the applications herein shall be borne by each of the parties with each party bearing their own costs. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LINK THIS 17TH DAY OF NOVEMBER, 2022.

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HON. J.M. MUTUNGI



ELC JUDGE

