



**Misigah v Sudi & 4 others (Environment and Land Miscellaneous Application
28 of 2022) [2022] KEELC 14825 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 28 OF 2022
SM KIBUNJA, J
NOVEMBER 15, 2022**

BETWEEN

MARY OBORA MISIGAH APPLICANT

AND

KHAMISI SUDI 1ST RESPONDENT

BAKARI BAKA 2ND RESPONDENT

BIDII JUNJE 3RD RESPONDENT

MATANO 4TH RESPONDENT

VINCENT 5TH RESPONDENT

RULING

[Notice of Motion dated 8th March 2022]

1. The applicant moved the court vide the motion brought pursuant to sections 1A, 3, 3A of the [Civil Procedure Act](#), section 26 of the [Land Registration Act](#), and sections 152A, 152B, 152E, 152G, 152F of the [Land Act](#), dated the 8th March 2022 seeking for an eviction order against the respondents from land parcel Mombasa Plot NO. 364/1/MN, Title NO. CR.1728 measuring 40.60 acres, and that the OCS Bamburi Police Station be directed to provide security during the eviction. The application is based on the five (5) grounds on its face and supported by the affidavits sworn by Mary Obora Misigah, on the 8th March 2022 and 8th June 2022. It is the applicant's case that her late husband and her acquired the suit land in 1986 and by 2019 the land was vacant. That the land was registered in their joint names and upon the death of her husband on the 2nd November 2020, she became the sole proprietor by operations of the law. That she visited the land in October 2021 and found squatters had unlawfully taken possession of about eight (8) acres of the suit land without legal right or authority, and hence this application.



2. The respondents have opposed the application through the replying affidavit sworn by Khamisi Sudi, 1st respondent, deposing inter alia that they have occupied the suit land valued Kshs.400 million for over twelve (12) years. That each acre of the land has a forced market value of Kshs.10 million. That as they have been actual and or physical possession and or occupation of the suit land for over 12 years, the court should dismiss the application and order that they be registered as owners by virtue of sections 38 as read with sections 7 and 17 of the Limitation of Actions Act chapter 22 of Laws of Kenya. That further the application is frivolous, bad in law, incompetent defective and abuse of the court process and should be dismissed with costs.
3. The learned counsel for the applicant and the respondents filed the written submissions dated the 19th September 2022 and 3rd October 2022 respectively, which the court has considered.
4. The following are the issues for the court's determinations;
 - a. Whether the applicant has made out a reasonable case for eviction order to issue.
 - b. Who pays the costs.
5. The court has carefully considered the grounds on the application, affidavit evidence by both sides, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following conclusions;
 - a. That whereas the applicant claims to be the registered and or the beneficial owner of the suit land has not been challenged by the respondents, her application to have the respondents vacate or evicted has been vehemently opposed on the basis that they have been on the laid land for more than 12 years, and therefore have attained ownership by prescription of the law. That is a serious challenge to the applicant's title to the suit land, and this application brought through a miscellaneous application cannot be a proper forum to deal with the dispute.
 - b. That as was submitted by the respondents, contentious civil disputes should be commenced through a suit by either filing a plaint, petition, or originating summons as provided for in the Civil Procedure Rules. The Rules also provide for commencing of judicial review writs through notice of motion, and leave applications through chamber summons. The instant proceeding was commenced through notice of motion which is not an originating summons as was held in Makueni Elc Misc, Appl. E12 of 2021, Norah Ndunge Henry & Another versus Abedinego Mutisya & Another. In Nairobi HCCC No. 249 of 2019, Fredrick Mwangi Nyaga versus Garam Investments & Another and Nairobi HCCC No. 64 of 2006, Vijay Kumar Davalji Kanji Gohil versus Suresh Mohanlal Fatana & 8 Others, where the courts stated that miscellaneous notice of motion and chamber summon applications are not pleadings for purposes of instituting a suit under section 2 of the Civil Procedure Act chapter 21 of the Laws of Kenya.
 - c. The foregoing clearly shows that the applicant has no proper pleadings before the court upon which the issues raised by both sides can be exhaustively deliberated and decided on. That as the applicant and respondents now have notice of the nature of each other's probable claim over the suit land, they should consider filing a proper suit against the other for the desired reliefs or orders.
 - d. That though the court finds the application to be without merit, I find this to be a proper instance where each party should bear their own costs the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.



6. In view of the above conclusions, the court finds and orders as follows;

- a. The applicant's notice of motion dated the 8th March 2022 is without merit and is hereby dismissed.
- b. Each party to bear their own costs.
- c. The file be closed.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF NOVEMBER, 2022.

S.M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

APPLICANT:

RESPONDENTS :

COUNSEL :

WILSON .. COURT ASSISTANT.

S.M. KIBUNJA, J.

ELC MOMBASA.

