



**Mageu & 2 others v SMEP Microfinance Bank & 3 others (Environment & Land
Miscellaneous Case E015 of 2022) [2022] KEELC 14676 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND MISCELLANEOUS CASE E015 OF 2022**

CK YANO, J

NOVEMBER 9, 2022

BETWEEN

GIDIEL MUCÉE MAGEU 1ST APPLICANT

JAMES MWENDA MAGEU 2ND APPLICANT

DAVID KIMATHI MAGEU 3RD APPLICANT

AND

SMEP MICROFINANCE BANK 1ST RESPONDENT

VIEWLINE AUCTIONEERS 2ND RESPONDENT

DAVID G. MAGEU 3RD RESPONDENT

JOHN GITHINJI MBUI 4TH RESPONDENT

RULING

1. By a Notice of Motion dated June 29, 2022 and brought under article 159 of the [Constitution](#), section 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), section 3(2) of the [Judicature Act](#), section 28 and 68(1) of the [Land Registration Act](#), the Applicants seek the following orders:
 1. That the application be certified urgent and it be heard *ex parte* in the first instance hence service be dispensed with as against the respondents.
 2. That pending inter partes hearing of the application the court issues an interim order of injunction restraining the 1st and 2nd Respondents, its agents, workers, auctioneers, assigns, contractors or any other person acting at their directions, contract or behest from advertising, selling by way of public auction or private treaty Title No. Kathwana/845 measuring 14.17 Ha.
 3. That pending the hearing and determination of the suit herein or until further orders of the court an order of temporary injunction be issued, restraining the 1st and 2nd Respondents, its



agents, workers, auctioneers, assigns, contractors or any other person acting at the directions, contract or behest from advertising, selling by way of public auction or private treaty Title No. Kathwana/845.

4. That pending of the application an order of inhibition be issued, inhibiting the registration of any dealings over Title No. Kathwana/845 and the Land Registrar at Meru be directed to register the inhibition so issued.
 5. A declaration that the 3rd Respondent holds the land title No. Kathwana/845 in trust for himself the applicants and the entire Mageu Family.
 6. That an order do issue for the 1st Respondent to disclose bank statements, letter of offer and charge/charges registered in their favour on Title No. Kathwana/845.
 7. That costs of this application be provided for.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Giddiel Mucee Mageu the 1st applicant, sworn on June 29, 2022 and a supplementary affidavit sworn on September 5, 2022. The deponent has sworn that he has authority to swear the affidavit on behalf of the 2nd and 3rd applicants who are his half-brothers. The deponent avers that his father Peter Mageu Mwindu had two wives to which he is the only son to the 1st house while the 2nd and 3rd Respondents are sons of the 2nd house. That their father was allocated land Title Kathwana/845 (hereinafter called “the suit property”) in the 1960s during land demarcation period as a trustee of the Mageu family and that even after his demise in 1985, his remains were interred in the suit land. The applicants aver that their mothers are also buried on the said land next to their father. A photograph of a grave said to be that of the mother to the 2nd house has been annexed and marked “GMM1”.
 3. The applicants aver that both houses have lived peacefully in the said land to date. The applicants state that they bestowed their brother, the 3rd Respondent, with trust to follow up on the adjudication process as the first born of the 2nd house in 1995/1996 upon which he was registered as the owner of the suit property as a trustee of the applicants and the entire Mageu family. The applicants state that they could have undertaken the adjudication process together but the 1st applicant was very ill at the time while the 2nd and 3rd applicants were still young.
 4. The applicants state that on May 13, 2022, notification of sale and redemption notices were attached at the suit land and that is when they realized that the 3rd Respondent had charged their entire customary land Kathwana/845 measuring approximately 14.17 Ha. Copies of the notification of sale and the redemption notice have been annexed and marked “GMM 2(a) & (b)”.
 5. The Applicants aver that the 1st Applicant and his son as well as the 3rd Applicant are in actual possession of the land and have annexed photographs marked “GMM 3(a) (b) & (c) and 4 (a) & (b)” showing their houses and those of their parents. It is the Applicants’ contention that the 3rd Respondent who is just the registered owner as trustee has no actual possession of the suit land but charged it as a guarantee to secure a loan advanced to the 4th respondent by the 1st respondent and that no consent and/or authority and or permission was sought and obtained from the applicants as the beneficiaries of the land. The applicants aver that they are to be prejudiced by the intended sale as they will be left homeless and destitute.
 6. The applicants aver that the 1st respondent failed to conduct due diligence in order to establish that the suit land is customary and/or ancestral before charging it. They further state that they have no other land and only depend on the suit land, which is their home and where they carry out farming to earn a living. That they stand to suffer irreparable loss and damage if the suit property is sold, adding that



- they were never served with any statutory notices by the 1st respondent as beneficiaries and residents of the land. They further state that the 1st and 2nd respondents have not undertaken a current valuation of the suit land before offering the same, and that the value of the land is about Kshs.80,000,000/= which is higher than the charged amount plus interest of Kshs.2,656,655,17.
7. In the supplementary affidavit, the applicants aver inter alia, that back in 2005, one Patricio Kinyua, Mbaka Macea, Stanley Mugambi and Boniface Murimi had raised objections Nos. 7, 43, 68 and 209 respectively at the Land's Tribunal challenging the adjudication register in which the adjudication committee had registered the 3rd Respondent as the owner of the suit land and claimed a share of it. That upon hearing of the objections, the then Land Tribunal made the finding that Boniface Murimi and Mbaka Macea came from the same lineage/clan as the 3rd Respondent and were entitled to a share of the suit land. The objection proceedings marked "GMM5" have been annexed in which the applicants state that they show that the suit land belongs to a specific clan/lineage of Kamurige ya Ndathe which the Mageu family belongs to.
 8. The 1st applicant has stated that he has been informed by his advocates on record, which information he verily believes to be true, that the application herein was accompanied by a plaint which has high chances of success, and that the plaint was inadvertently not placed in the court file by the registry. That she will swear an affidavit to bring the issue to the attention of the court in order to have the plaint in the court file.
 9. The 1st applicant pointed out that whereas the 4th respondent in his replying affidavit claims that the 3rd respondent is the registered owner of the suit land, his annexure marked "JGM1" shows a search certificate for a different land Kathwana /929, and that annexure "JGM2" shows two titles were to be charged, that is Inoi/thaita/1763 in the name of the 4th respondent and Kathwana/485 in the name of the 3rd respondent. That annexure "DGM2" of the 3rd respondent's replying affidavit shows that title No. Inoi/thaita/1763 was never charged as per the loan offer, and the applicants argue that the 1st and 4th respondents colluded and charged the suit land illegally.
 10. In opposing the application, the 1st respondent on September 26, 2022 filed a replying affidavit sworn by Ruth Njuguna in which it is deponed inter alia, that the application is an afterthought, brought in bad faith and with the sold intention of impeding the 1st respondent's right of statutory power of sale. That the 3rd and 4th respondents trading as a partnership in the name and style of Matokeo Animal Feeds approached the 1st respondent for a loan of Kshs.2,100,000/= in the year 2018 and the 1st respondent consequently communicated the terms and conditions of the proposed loan to the 3rd and 4th respondents through a letter of offer annexed and marked "RN1". That the 3rd and 4th respondents agreed to the terms and conditions of the loan and the 1st respondent consequently approved the loan which was secured by the registration of a charge in favour of the 1st respondent on L.R. No. Kathwana/845 which is registered in the name of the 3rd respondent as proprietor. A copy of the charge instrument dated October 12, 2018 and marked "RN2" is annexed. The deponent has sworn that the loan amount was thereby released to the 4th respondent in accordance with the terms of the Agreement and was to be paid up in thirty-six equal installments of Kshs.84,584 until payment in full.
 11. That prior to the perfection of the said security, the 1st respondent had performed all the sufficient and necessary due diligence which at the time would include the procurement of the spousal consent to make the relevant spouse aware and agree to the transaction in the event the property were matrimonial property. A copy of the spousal consent is annexed and marked "RN3". That all the relevant parties to the transaction (including the spouse of the chargor) well aware of the terms and conditions of the transaction and the possible risks and potential outcomes in the event of default by the borrower and they agreed to be bound by the said terms.



12. That in the year 2020, the 3rd and 4th respondents breached the loan agreement by defaulting the monthly payment as required of them under the terms and conditions of the loan, and the 1st respondent subsequently issued notices to the 4th respondent. Copies of the Demand Notices dated 17/06/20, July 8, 2020, February 2, 2021, April 15, 2021 and 7/12/2021 are annexed and marked “RN4 a-e”. That the notices never elicited any response from the 3rd and 4th respondents and eventually the 1st respondent set the law in motion against the chargor by instructing the 2nd respondent with the task of repossession in accordance to the proper procedure and the chargee’s statutory power of sale under the Land Act 2012. That the 3rd and 4th respondents were consequently served with a 45-day redemption notice on May 13, 2022 and issued with a notification of sale on April 30, 2022. The notices are annexed and marked “RN5” and “RN6” respectively. That despite the numerous notices, the 3rd and 4th Respondents have not shown any effort in attempting to service the loan and the loan arrears plus interest which was at Kshs.2,656,665.17 on April 30, 2022. The 1st respondent states that it is a stranger to the applicants in this suit and holds the firm view that they are proxies of the 3rd and 4th respondents who have instructions to frustrate the actualization of the 1st respondent’s right to statutory power of sale, adding that if at all the applicants have any interest in the said property, the same cannot override the 1st respondent’s right to statutory power of sale especially since the charge was created and perfected properly with regard to form and substance. That if at all the Applicants claim that the property is subject to a Trust relationship between the applicants and the 3rd respondent, then the said claim should be against the 3rd respondent and that the current suit against the 1st and 2nd respondents should be dismissed. The 1st respondent’s contention is that it performed proper and satisfactory due diligence and established that L.R. No. Kathwana/845 belongs to the 3rd respondent only and which is charged in favour of the 1st respondent and that the introduction of Inoi/thaita/1763 in these proceedings is intended to clog the issues at hand. The 1st respondent’s case is that its statutory power of sale over the suit property has lawfully arisen and that all the procedural requirements of the law have been met and cannot be curtailed on the basis of flimsy grounds raised by the applicants in this application. That there is no substantive suit before the court challenging the exercise of statutory power of sale by the 1st respondent and that the instant application seeks orders in a vacuum and that to that extent the application is grossly incompetent and is for dismissal with costs to the 1st respondent.
13. In response to the application, the 3rd respondent filed a replying affidavit sworn on August 15, 2022. He admits that the applicants are all his brothers. The 3rd respondent has deponed that the suit land initially belonged to his father Peter Mage Mwindu but states that he is the one who followed up on the adjudication process and got title in his name. that the applicants are in actual possession of the land but that the 3rd respondent is the exclusive owner having title, but does not reside in the land.
14. The 3rd respondent has deponed inter alia, that he used to be friends with the 4th respondent and in the year 2018, the 4th respondent approached him over a business idea and told him that he had approached the 1st respondent for a loan of Kshs,2,000,000/= and that his Title No. Inoi/thaita/1763 had been valued by the Bank at around Kshs.1,300,000/= with a loan offer of Kshs.2,100,000/= with the condition of a guarantor for the remaining sum of Kshs.800,000/= which he requested him to guarantee with his Title No. Kathwana/845 while the 4th respondent’s title No. Inoi/thaita/1763 guaranteed the larger sum o Kshs.1,300,000 of which they signed a loan offer for the respective amounts. That on July 8, 2020, he received a letter from the bank demanding the repayment of the said loan which the 4th respondent had defaulted and that the bank threatened to dispose off both titles. The letter is annexed and marked “DGM1”.
15. The 3rd respondent has deponed that it is peculiar that the 1st respondent wants to realize his property first before exhausting all means available to recover the debt from the principal debtor. That it is



even more peculiar that after conducting a search to Title LR. Inoi/thaita/1763, the same was never charged to the 1st respondent but to a different Bank, Co-operative Bank for Kshs.500,000/=. The 3rd respondent avers that he also conducted a search of the suit land Title No. Kathwana/845 and realized that the same was solely charged to guarantee the entire loan of Kshs.2,100,000/= contrary to the loan offer that he had guaranteed. The search is annexed and marked “DGM 3”. The 3rd respondent’s contention is that he is a victim of misrepresentation and fraud by the 1st and 4th respondents. That on July 16, 2020

16. The 3rd respondent argues that the 1st respondent should be estopped from benefitting from fraud particulars of which he has given, adding that a recent valuation of the suit land is Kshs.70,000,000/=. The valuation report marked “DGM 6” is annexed.
17. On his part, the 4th respondent filed a notice of preliminary objection dated August 8, 2022 and a replying affidavit sworn on August 25, 2022. He seeks for the striking out of the application and the entire suit on the grounds that the same offends the clear provisions of Order 3 Rule (i) (ii) of the [Civil Procedure Rules](#) that states that every suit shall be instituted by way of a plaint, petition and or any originating summons. The 4th respondent cited the case of [Rajab Kosgei Mugut v Nuru Jepleting Choge](#) [2020] eKLR.
18. The 4th respondent has deponed inter alia, that the 3rd respondent is the sole legal registered owner of the suit property and that he had an agreement with him to have the title Kathwana/845 used as security for him to secure a loan facility at the 1st respondent. Copies of search and letter of offer marked JGM 1 and JGM 2 are annexed.
19. The 4th respondent states that in or about August, 2018, he was issued with a credit facility of Kshs.2,100,000/= by the 1st respondent which was to be repaid with interest within three years at Kshs.84,584/= and that he has been committed in paying the loan until March 2020 when Covid-19 pandemic hit the country affecting his business and made it difficult to repay the loan amount. That in May, 2020, he proposed a loan restructure to pay Kshs.50,000/= per month which was agreed by the 1st Respondent and which he started remitting. That he was shocked that the 3rd respondent was sent a notice of sale by the 2nd respondent under the instructions of the 1st respondent to dispose off the suit land. the 4th respondent argues that the 1st respondent’s actions are motivated by malice, desire to enrich itself and that the same is an outright breach of fiduciary duty of care. Replying on legal advise the 4th respondent’s believes the 1st respondent’s letter of offer is ambiguous. He avers that it is not his desire to default and is enthusiastic about paying the loan to finality, but that the 1st respondent should be stopped as the amount claimed is exorbitant and double the amount borrowed.
20. The application was canvassed by way of written submissions. The applicants filed two sets of submissions, the first on September 15, 2022 and the second on October 7, 2022. The applicants have submitted inter alia, that they have established that they have protectable customary trust or interest in the suit land and that the 3rd respondent only holds the title in trust for himself and the entire Magen family who belong to the Kamurige ya Ndathe Clan. The applicants relied on the case of [Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & another](#) [2018] eKLR, [Kareu Ndebu v Ndege Ndebu](#) [2020] eKLR. The Applicants also cited section 28(b) of the [Land Registration Act](#) that recognizes customary trusts as overriding interests and article 63 of the [Constitution](#). It is their submission that they have a genuine and arguable case which calls for preservation of the suit land pending the determination of the main suit, and that they have also demonstrated possibility of suffering irreparable loss that cannot be atoned by damages. It is also the applicants’ submissions that the balance of convenience tilts in their favour. The applicants relied on [Giella v Cassman Brown and](#)



Co. Ltd, Fredrick Nganga Thuo v Peter Mungai Njubo [2019] eKLR, *Alice Karuru Kitbinji Limberia* [1997] eKLR and *in re Estate of Mgwika Rimberia (deceased)* [2021] eKLR.

21. The applicants further submitted inter alia, that the prayers in the application herein are for temporary injunction to stop the sale of the suit land pending the hearing of the suit in the plaint duly filed as ELC Case No. E003 of 2022.
22. In his submissions filed on October 5, 2022, the 3rd respondent basically repeated the averments in his replying affidavit.
23. The 1st respondent filed their submissions on October 6, 2022 in which they submit inter alia, that the applicants' omission to file a substantive suit together with the current application renders the suit a candidate for dismissal for being defective and incompetent. They relied on the case of *Mukoa wa Njiri v National Land Commission & another, Jimna Njuguna Kimunya & another (Interested Party)* [2021] eKLR. The 1st Respondent further submits that it is within its rights to exercise the statutory power of sale as empowered by law and cited the provisions of section 90(3) as read with (e) and section 90 (4) (ii) of the *Land Act* and relied on the case of *John Mburu -v- Consolidated Bank of Kenya* [2018] eKLR; *Titus Muiruri Doge v Kenya Cannery Ltd* [1988] eKLR; *Olympic Company Trading Ltd & another v Said Mohamed & 4 others* [2014] eKLR and *Macharia Murangi Muna & 87 others v Davidson Mwangi Kagiri* [2014] eKLR.
24. The 1st respondent submits that the 1st and 2nd respondents religiously adhered to the legal guidelines surrounding the exercise of the statutory power of sale and relied on the case of *Susan Adoyo v Equity Bank (k) Limited* [2021] eKLR. The 1st respondent submits that there are no good grounds to warrant an inhibition and injunction order and cited section 68(1) of the *Land Registration Act* and relied on the case of *Dorcas Muthoni & 2 others v Michael Ileri Ngari* [2016] eKLR, and *Giela -vs- Cassam Brown* (1973) EA EA 358.

Analysis And Determination

25. I have considered the application, the responses and the submissions filed. The main issue for determination is whether the orders of temporary injunction and inhibition can issue in the absence of any substantive suit filed.
26. The 4th respondent raised a preliminary objection on the grounds that the application herein offends the clear provisions order 3 rule 1 and 2 of the *Civil Procedure Rules* which states that every suit shall be instituted by way of a plaint, petition or an originating summons. The 1st respondent and 4th respondent submitted that the current suit was instituted as a Miscellaneous Application and that the omission to file a substantive suit together with the application renders the suit a candidate for dismissal for being defective and incompetent.
27. In their submissions, the applicants argue that there is a plaint duly filed as ELC Case No. E003 of 2022. That the prayers sought in this application are prayers for temporary injunction to stop the sale of the suit land pending the hearing of the suit in the plaint.
28. Section 19 of the *Civil Procedure Act* provides that every suit shall be instituted in such manner as may be prescribed by the rules.



29. In the case of *Joseph Kibowen Chemior v William C. Kisera* [2013] eKLR the court extensively discussed 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 (7) suit of 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” under section 2 means prescribed by rules.

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

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 and Administration Rules under the Succession Act (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.”

30. Going by the above decision, it therefore means that a person commencing a civil suit (in this instance to enforce a civil action) needs to follow the prescribed rules.

31. In the present case, the applicants have a notice of motion miscellaneous application seeking orders of injunction and inhibition. There is no substantive suit that the application is predicated, grounded and or premised. In my view, the miscellaneous application by way of notice of motion has been made in a vacuum and is not a suit properly so called. The failure to follow the laid down procedure goes to the root of litigation and therefore cannot be salvaged by article 159 of the *constitution* or sections 1A; 1B and 3A of the *Civil Procedure Rules* as pleaded and submitted by the Applicants.

32. In the case of *Salim Tunja Gambo v Commissioner of Lands*, Waki J (as he was then) held as follows:

“section 3A of the *Civil Procedure Act* is not a panacea for all wrongs. The inherent powers of the court ought not to be used indiscriminately when there are specific provisions of law which can be invoked.”

33. In the case of *Raila Odinga v IEBC & others* [2013] eKLR the court observed that:

“Article 159 (2) (d) of the *Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was



never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”

34. In the case of *Board of Governors Nairobi School v Jackson Irevi Geta* (1999) KLR cited with approval in *Fidelity Bank Ltd v John Joel Kanyali* Miscellaneous Application 8/2014 clarified how a suit can be commenced when it said:

“pleading is defined in section 2 of the *Civil Procedure Act* to:

Include a petition or summons and the statements in writing of the claim or demand of any Plaintiff, and the defence of any Defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a Defendant; this definition is couched in such a way as to accord with order IV Rule 1 (now order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as maybe prescribed...”

35. The applicants in this matter must have been alive to this requirement and that explains why they referred the court to a plaint allegedly filed in ELC Case No. 003 of 2022. In my view, the filing of a plaint in a totally different case cannot cure the instant application which to me is defective and incompetent.
36. Consequently, it is the finding of this court that the application herein is incompetent, bad in law, and fundamentally defective. The same is devoid of merit and must fail.
37. Accordingly, the notice of motion dated June 29, 2022 is hereby struck out with costs to the 1st and 4th respondents. The interim orders which were issued on June 30, 2022 are hereby vacated and/or discharged.
38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF NOVEMBER, 2022 IN THE PRESENCE OF:

C/A – Martha

Ms. Kijaru for 4th Respondent

N/A for 2nd & 3rd Respondents

Ms. David h/b for Ms. Wangeci for Applicants

Ms. Masamba for 1st Respondent

C. K. YANO,

JUDGE.

