



**Child Welfare Society of Kenya Registered Trustees v Njubi (Environment and Land Miscellaneous Application 054 of 2021) [2022] KEELC 15489 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 054 OF 2021  
JG KEMEI, J  
DECEMBER 20, 2022**

**BETWEEN**

**CHILD WELFARE SOCIETY OF KENYA REGISTERED  
TRUSTEES ..... APPLICANT**

**AND**

**SAMUEL NGANGA NJUBI ..... RESPONDENT**

**RULING**

1. The applicant moved the court *vide* a motion filed on the December 20, 2021 under the provisions of section 152A, 152B, 152E, 152G and 152F of the Land Act in addition to the inherent power of the court and all other enabling provisions of the law. In the main the applicant averred that it is the registered owner of the suit land namely Komothai/1GI/134 and 371 (suit land). In addition, the applicant sought vacant possession, demolition of buildings and or other improvements on the suit lands.
2. While opposing the application, the respondent filed a notice of preliminary objection dated 30/5/2022 on grounds that;
  - a. The application is fatally and incurably defective and thereby incompetent *ab initio* in that a party cannot in law or equity commence a suit by way of a notice of motion.
  - b. This honorable court has no mandate to issue any orders as sought by the applicant in the absence of a substantive suit.
3. In addition, the respondent filed a replying affidavit dated the 30/5/2022 wherein he deponed that the application is frivolous, mischievous and an abuse of the process of the court. Firstly, that the deponent of the supporting affidavit accompanying the application has not tabled any evidence of authority allowing him to depone to the affidavit. He adverted a right of prescription arising from long



uninterrupted and exclusive occupation and possession of the suit lands since 1990. That title by way of adverse possession has accrued to him.

4. Further the respondent deponed that he was not served with the notice of motion contrary to the allegations of the applicant. To that end the respondent urges the court to strike out the application dated 3/12/2021 with costs.
5. On October 11, 2022 directions were taken and parties agreed to canvass the PO by way of written submissions. At the time of writing this ruling only the applicant had filed its submissions dated October 24, 2022 through the firm of Hamilton Harrison & Mathews Advocates.
6. Opposing the preliminary objection, the applicant argued that the application is rightly filed pursuant to sections 152A, 152B, 152E, 152G and 152F of the *Land Act* as was the case in *Margaret Karwira Mwongera v Francis Kofi* [2019] eKLR whereby Munyao J allowed a similar application seeking similar orders. That a contrary decision was arrived at in the case of *Julius L Marten v Caleb Arap Rotich* [2021] eKLR where the court appreciated that it is not clear how a party ought to approach the court for relief under section 152F whether by a formal suit and/or miscellaneous application. That where ownership is disputed, then the summary procedure under section 152F would not be advisable. Lastly, the applicant associated itself with the position in the case of *Margret Karwira supra* and urged the court to dismiss the preliminary objection. Further that should the court find the preliminary objection merited then the application be struck out with no orders as to costs since the *Land Act* is not clear on how a court should be moved.
7. The singular issue for determination is whether the preliminary objection is merited.
8. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
9. At page 701 Sir Charles Newbold, P added:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the 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 the exercise of judicial discretion...”
10. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.



11. The applicant’s motion is premised on sections 152A, 152B, 152E, 152G and 152F of the [Land Act](#) which *inter alia* provide;

“ 152A. Prohibition of unlawful occupation of land.

A person shall not unlawfully occupy private, community or public land

152B. Evictions to be undertaken in accordance with the Act.

An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

152E. Eviction notice to unlawful occupiers of private land.

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall –
  - (a) be in writing and in a national and official language;
  - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
  - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
  - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F. Application to court for relief.

- (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.”
12. The provisions of para 152F applies to a person who has been served with notice to vacate and not one whose claim is purely on eviction.
13. A glean of the application before court reveals that the applicant wishes to enforce its rights as a registered owner of the suit property. In my view whilst the above provision do not specify the manner in which an applicant should move the court in seeking eviction orders, i am of the view that that the applicant ought to have filed a plaint so that the matter can be heard on its merits. I say so because the



respondent in opposing the motion has sworn that he has acquired prescriptive rights of ownership over the suit land. The question to be answered is whether the claim of eviction vis a vis adverse possession can be determined in a miscellaneous application.

14. Order 3 rule (1) of the *Civil Procedure Rules* provides that: -

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

15. In the persuasive case of *Joseph Kibowen Chemjor Vs William C Kisera* [2013] eKLR Munyao Sila J observed thus:-

“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...”

16. The learned Judge went further to state:-

“.....I am alive to the provisions of article 159(2) (d) of the *Constitution* that 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....”

17. Since the applicant has approached the court seeking an eviction order, the respondent must be accorded a fair hearing by being served with the pleadings. Article 50 of the *Constitution* provides for the right to a fair hearing. This can only be possible by each party filing documents in support of his/her case. There being issues of controversy on the suit lands as to its ownership I find that this is the inappropriate method adopted by the applicant and the right route is to file a normal suit.

18. The upshot of the foregoing is that the preliminary objection is merited and the same is allowed. Consequently, the notice of motion dated 18/6/2021 is dismissed with no orders as to costs.

19. Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mwihuri for applicant

Ms. Fundi for Respondent

Court Assistant – Phyllis / Kevin

