



**Obuya v Ogoye (Environment and Land Miscellaneous Application
E007 of 2022) [2022] KEELC 15230 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2022
AY KOROSS, J
DECEMBER 8, 2022**

BETWEEN

ROBERT OUKO OBUYA APPLICANT

AND

JOAN OGOYE RESPONDENT

RULING

Parties' Case

1. Without citing any provision of law, the plaintiff filed a notice of motion dated May 23, 2022 against the respondent in which he sought the following reliefs:
 - a. That the honourable court be pleased to extend the period of filing this application so as to be deemed to have been filed within time;
 - b. That the honourable court do issue an injunction restraining the respondent, her agents, servants and all employees or other party from selling, alienating, transferring, subdividing or in any way dealing with land parcel No South Gem/Kambare/540 pending hearing and determination of the suit;
 - c. That the honourable court do order that the arbitral award dated April 7, 2014 be adopted as a judgment of this court;
 - d. That the honourable court do declare that land parcel No. South Gem/Kambare/540 be transferred to the applicant; and
 - e. That the costs of the application be in the cause.
2. The motion is supported by grounds set out on its face and on the supporting affidavit of the applicant Robert Ouko Obuya dated May 23, 2022.



3. The applicant deposed *inter alia*; by a resolution that ensued from a meeting held on April 6, 2014, it was determined that land parcel number South Gem/Kambare/540 (hereinafter referred to as ‘the suit property’) belonged to the deceased Bonface Obuya Orek who was the applicant’s father; the respondent had continued to utilise the suit property to his detriment; the respondent intended to dispose of the suit property and the actions of the respondent had rendered him destitute.
4. The respondent did not file any documents in opposition to the motion.

Parties Written Submissions

5. As directed by the court, the parties disposed of the motion by way of rival written submissions. Mr Agina counsel for the plaintiff filed his submissions dated August 16, 2022.
6. Counsel identified two issues for this court’s determination;
 - (i) whether the arbitral award dated April 7, 2014 met the threshold to warrant an adoption by this court; and
 - (ii) whether this honourable court had power to extend time for filing the instant motion.
7. On the 1st issue, counsel submitted that according to section 1 of the [Arbitration Act](#), the definition of an arbitral award was made and that section 35 gave certain exceptions to the recognition and enforcement of such an award. Counsel relied on RLC Hunter on [The Law of Arbitration in Scotland](#) 2nd edition Butterworths UK 2007 277-278 which defined an arbitral award as follows;

‘A decree or award is a decision reached by qualified and properly appointed arbiter or arbiters or oversmen...’
8. Counsel also placed reliance on the decision of [Anne Mumbi Hanga v Victoria Njoki Gathara](#) however, he did not provide a proper citation of this case. In this case, the court held that it did not have jurisdiction to interfere with an arbitral process or award.
9. On the 2nd issue, counsel submitted that this court had jurisdiction to extend the time for filing of the alleged arbitral award.
10. The respondent who acted in person filed written submissions dated October 26, 2022. She addressed the court on grounds of law;
 - (i) procedural impropriety and
 - (ii) capacity of the respondent to be sued.
11. On the 1st ground, she submitted that the miscellaneous case ran against the grain of order 3 rule 1 of the [Civil Procedure Rules](#) which provided that a suit should be instituted by means of a suit. She placed reliance on the case of [Joseph Kibowen Chemjor v William C Kiseru](#) [2013] eKLR where Munyao Sila J stated thus;

it is always advisable for a claimant to commence action by way of plaint unless there is an alternative provided by statute or the rules thereunder...’
12. She submitted that the motion did not adhere to the provisions of order 40 rule 1 of the [Civil Procedure Rules](#) for the reason that such a motion ought to have been anchored on a suit. She relied on the case



of [Norah Ndunge Henry & another v Abednego Mutisya & another](#) [2022] eKLR where the court expressed itself as follows;

‘as a general rule, a suit can only be instituted by way of a plaint, petition or an originating summons. A notice of motion is not legally recognised as an originating process. A notice of motion can only be within a properly instituted suit.’

13. On the 2nd issue, she submitted that the applicant did not disclose in what capacity he had instituted the suit and she was not the administrator of the estate of James Ogoye Ogolah who was the alleged registered owner of the suit property. She submitted the motion was incompetent and prayed for it to be struck out with costs.

Analysis And Determination

14. I have carefully considered the motion, its grounds, affidavits and respective parties’ submissions and the issues falling for determination are;
- (i) whether the motion is competent
 - (ii) if (i) is in the affirmative, whether the motion is merited and
 - (iii) who shall bear costs. I will sequentially analyse the legal and jurisprudential frameworks on these issues.
15. Before considering the issues, I wish to deal with a preliminary issue. The application was filed without stipulating the provisions under which the court was moved. Order 51 rule 10 (1) of the [Civil Procedure Rules](#) states as follows;

‘every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.’

The application in the instant case will not be defeated on this ground.

I. Whether The Motion Is Competent

16. Section 19 of the [Civil Procedure Act](#) provides as follows;

‘Every suit shall be instituted in such manner as may be prescribed by rules.’

17. The significance of this provision of law is that a suit must be instituted within the stipulated provisions of law. Ordinarily a suit is instituted by a plaint (see order 3 rule 1 (1) of the [Civil Procedure Rules](#)). In instances of special circumstances such as a constitutional petition, the [Constitution of Kenya Protection of Rights and Fundamental Freedom Practice and Procedure Rules](#) 2013 governs it or in the case of an originating summons one institutes suit by way of an originating summons (see order 37 of the [Civil Procedure Rules](#)).
18. In the instant case, the applicant ought to have instituted a suit by way of a plaint. Basically, what he filed was supplementary proceedings which have been described by [Black’s Law Dictionary](#), 11th edition, p 1458 as follows;

“A proceeding held in enforcement of a judgment...a proceeding that in some way supplements another.”



19. Though the applicant's counsel did not address me on this, my understanding of his submissions is that he instituted the suit with the preconception that the decision of the panel of elders was an arbitration award. Nay, far from it. Arbitrations in Kenya are governed by the Arbitration Act and parties have to enter into an arbitration agreement prior to submitting themselves to the arbitral process. Thereafter, an award is rendered and adopted as a judgment of the court.
20. The decision of the elders was akin to negotiations but whichever the outcome of such a panel, the decision was not binding on this court and it behooved upon the applicant to file a plaint for the dispute to be resolved on merit; which he did not.
21. The main issues in dispute are on ownership of the suit property and in my humble opinion, these issues are so weighty and they have to be subjected to a full hearing. In agreeing with the decisions of Joseph Kibowen Chemjor v William C Kiseru (supra) and Norah Ndunge Henry & another v Abednego Mutisya & another (supra), I place reliance on the Court of Appeal decision of Board of Governors, Nairobi School v Jackson Ireri Geta [1999] KLR which cited with approval the decision of Fidelity Bank Limited v John Joel Kanyali [2014] eKLR which held as follows:
- ‘...Similarly, as stated by the Court of Appeal, I say a notice of motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in cap 21 and its Rules. Accordingly, there is no suit before court which suit can sustain the notice of motion. I do therefore uphold the objections raised by the respondent.’
22. In need not say more, in agreeing with the respondent, it is my finding that the orders sought in the motion require substantive interrogation and cannot be dealt with by the nature of a miscellaneous application. In the absence of such substantive proceedings, it is my ultimate finding that the motion was incurably defective and incompetent. I hereby strike out the motion with costs to the respondent.

DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF DECEMBER, 2022.

HON AY KOROSS

JUDGE

December 8, 2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

N/A for the applicant

N/A for the respondent

Court assistant: Ishmael Orwa

