



REPUBLIC OF KENYA



**Mwangi & 2 others v Migwi (Environment & Land Case 149 of 2014)
[2024] KEELC 1816 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 149 OF 2014
A KANIARU, J
FEBRUARY 14, 2024**

BETWEEN

NANCY NJOKI MWANGI 1ST APPLICANT

ALICE MWAKERA THUMI 2ND APPLICANT

NJERU M'UTHI 3RD APPLICANT

AND

MARTIN MUGO MIGWI RESPONDENT

RULING

1. A Preliminary objection dated 20.09.2023 and filed on 22.09.2023 is before me for determination. The objection has been brought by the Respondent – MARTIN MUGO MIGWI - on the grounds that the Defendants Notice of Motion Application dated 25.04.2022:
 - i. Is premised on the wrong provisions of law and/or unknown provisions of law to wit, Order 51 Rule 1A,1B, 3A of the Civil Procedure Rules and Sections 1AA of the Civil Procedure Act, which legal provisions do not exist.
 - ii. The application wantonly offends the provisions of Order 3 rule 1(1) of the Civil Procedure Rules, 2010 which in mandatory terms requires suits to be instituted by way of a plaint and particularly in instances where a party is seeking for substantive prayers as the ones sought in the instant application.
2. It was agreed that the Preliminary Objection be disposed of by way of written submissions. The Applicants filed their submissions on 23.10.2023 whereas the Respondents filed their submissions on 21.11.2023.
3. The Respondents gave a chronology of events leading to the Preliminary Objection and submitted that, though the Applicants are the Registered owners of the suit lands, orders of eviction and



injunction can only be granted in a substantive suit and or counter claim. That since the Applicants are admitting that the Respondent is in possession of the suit lands, they can only seek for his eviction by way of a substantive suit. That the orders sought in the Notice of motion application can only be sought by way of substantive suit as provided by Order 3 Rule 1(1) which provides that “every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

4. That it is on this basis that they are arguing that the remedy open to the Applicants is to institute a fresh suit since they did not raise any counterclaim from the very beginning. They further submit that the Applicants argument that citing the wrong provisions of law was a typographical error, even if this was to be accepted, it cannot remedy the fact that eviction can only be sought by way of substantive suit. They further submitted that the applicants claim that no appeal was filed is wrong because the Respondent filed appeal No. E153 of 2022 which is pending hearing.
5. The Applicants on the other hand submitted that citing the wrong provisions of the law was a typing error. That the Applicants intended that the application be brought under Section 1A and not 1AA of the *Civil Procedure Act* and Order 51 not Order 51 rule 1A, 1B and 3A of the Civil procedure rules. They apologized for the same and submitted that the citing of wrong provisions of law does not render their application defective. That the said errors are mere technicalities that do not render the substance of the application defective. They sought to rely on the Provisions of Order 51 rule 10 of the Civil Procedure Rules which states that:
 - (1) 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.
 - (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.
6. They further cited the case of Pamela Onyango Osano v Geoffrey Momanyi (2021) Eklr where it is said that the court in dismissing a preliminary objection brought on grounds that the application had been premised on the wrong provisions of law held that the objection was based on a technicality. They also further cited the case of Joseph Kiplagat Chebore & Anor v Kenya Women Microfinance Bank Ltd & Anor (2020) Eklr to support the same position. They urged that the court finds the first ground of objection is based on a mere technicality and proceed to dismiss the said ground.
7. On the second ground of objection, they submitted that the Applicant’s application is properly before the court. That the issue of ownership of the suit land was settled by the court vide the judgement delivered on 16.01.2020 where the Respondent’s claim for adverse possession was dismissed. That the instant application only seeks to enforce the said judgment. That it would be unfair for the Applicants to institute a fresh suit to evict the applicant when a determination of the parties rights over the suit land has already been made by the court in a suit that has stayed in court for 35 years. They cited the case of Cheruiyot Chepkwony v Sarah Chesiele Barta & Another (2016) Eklr to support this position.
8. They further submitted that the Respondent against whom eviction orders are being sought was a party in the suit and failed to prove his case against the applicants and therefore the Applicants are entitled to seek eviction through the avenue of this suit. They cited the case of Augustin Kipkoechy Cheruiyot & Another v Haron Ochanda Kaburi (2018) Eklr to support this position. They further urged this court to dismiss the preliminary objection.
9. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.



10. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, as follows:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court redundant or unnecessary. Thus a preliminary objection may only be raised on a point or points of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record. A contention relating to facts deals a fatal blow to the validity of any preliminary objection.

11. The Respondents have raised an objection on the ground that the Applicant’s notice of motion dated 25.04.2024 has been brought on unknown or on the wrong provisions of law. The Applicants on the other hand explained that this was a typing error and a technicality that does not affect the substance of the application. They asked the court to be guided by the provisions of Order 51 Rule 10 which directs that applications should not be defeated on a technicality or for want of form that does not affect the substance of the application. I am of a similar view and I am guided by the case of Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione [2013] eKLR, where the Supreme Court while addressing a similar issue stated as follows:

“ The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant’s cause.”

I find that the citing of wrong provisions of law does not render an application defective and for this reason, the first ground of objection must fail.

12. On the second ground of objection, the Respondents complain that the notice of motion dated 25.04.2022 offends the provisions of Order 3 Rule 1 (1) as the orders sought therein cannot be sought by way of application but only through a substantive suit. I have looked at the application complained of which application seeks for eviction of the Respondent from the suit lands; orders of permanent injunction against the Respondents from trespassing into the suit parcels of land; for the OCS, Nembure police station, to provide security during eviction; and for costs of the application.
13. The genesis of the suit was that the Respondent had filed an Originating summons seeking ownership of suit lands Gaturi/Nembure//2778 (Now Nos. 4439 & 4440) by way of adverse possession. His case was that he had purchased the same from the 1st Applicant and had been in possession of the same since 1969. The 1st Applicant on the other hand denied the same and said that he was the original owner of parcel no. 2778 and that he had a title deed. That he subdivided parcel no. 2778 into parcels 4439 and 4440 and thereafter transferred the same to the 2nd & 3rd Applicants respectively who are now the registered proprietors. The court upon hearing the parties found that the Respondent had



not proved his case for adverse possession and thereby dismissed the Originating Summons against the Respondents. It is on this basis that the Applicants filed the notice of motion application seeking to evict the Respondent who is said to be in possession of the suit lands and for orders of a permanent injunction against him.

14. The Respondent's argument is that the orders of eviction and permanent injunction are not orders that can sought for in an application. That since the Applicants did not file a counter claim in the original suit, the court did not give them any orders relating to the suit parcels of land because they did not ask for any orders at all. That they would have to file a fresh suit in order to seek the orders that they are seeking and such suit can only be filed through a plaint and not an application as provided for in Order 3 Rule 1(1) of the Civil Procedure Rules. The said Order provides that; "Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed"
15. I could not agree more with the Respondent. I am guided by the case of *Norah Ndunge Henry & another v Abednego Mutisya & another* [2022] eKLR where the court faced with similar circumstances as herein held that;

"For an action for injunction to succeed, the Applicant should adhere to the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provide that an application for restraining orders must be anchored in a suit. It is therefore clear that, for the Applicant to seek for the above orders, there must be in existence a suit upon which this application can be hinged on."

The court went on further to say;

"As regards an order for eviction, the Applicant should adhere to the provisions of Section 152 (A) to 152 (H) of the *Land Act*. Eviction orders are serious orders. They must be anchored in a suit as per the provisions of the Civil Procedure Rules and the *Land Act*. In so finding, In *Tatecoh Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd* (2021) eKLR the court held that;

"Without much ado, I will agree with the position of the respondentthat the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction. one will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and If successful, that an order of eviction would issue."

It is therefore clear that the court can only grant such orders upon hearing the case on merit. 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.

16. I wish to associate myself with the findings of this court in allowing the second ground of objection in the preliminary objection dated 20.09.2023. I hereby strike out the application dated 25.04.2022 for being incompetent. The costs for the same shall be borne by the Applicants.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

In the presence of Njiru Mbogo for respondent, Applicant and Court Assistant - Leadys



A. K. KANIARU
JUDGE ELC - EMBU

14.2.2024

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