



REPUBLIC OF KENYA



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Agata v County Land Surveyor, Nyamira (Environment and Land Appeal E005 of 2021) [2023] KEELC 15984 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E005 OF 2021**

JM KAMAU, J

MARCH 8, 2023

BETWEEN

ZEDEKIAH NYANDIEKA AGATA APPELLANT

AND

COUNTY LAND SURVEYOR, NYAMIRA RESPONDENT

(Being an Appeal from the Ruling/Decree of the Magistrate's Court at Nyamira by Hon. M.C. Nyigei – PM delivered on the 22nd day of June, 2022 in Nyamira CMC MISC. ELC Case No. 1 of 2021)

JUDGMENT

SUMMARY:

- Suit commenced by way of miscellaneous application seeking substantive Orders of a mandatory nature.
- The suit is incompetent;
- Such Orders cannot in the circumstances of this case be sought through a miscellaneous application.
- Appeal dismissed.

1. The decree appealed against emanates from an alleged cause of action that was commenced by way of a miscellaneous application in Kisii High Court No 14 of 2018 before it was transferred to Nyamira CMCC and given Case No. CMCC ELC miscellaneous application No 1 of 2021. The transfer order was made by the Honourable Mr Justice Mutungi sitting in Kisii on March 5, 2021. The orders sought in the “suit” are as follows:

- a. That this matter be certified as urgent and be heard *ex-parte* in the first instance.



- b. That the respondent be ordered to assign new numbers on the duly completed mutation form R.L 29 after the sub division of land parcel No West Mugirango/Nyamaiya/1296 at once without any further delay.
 - c. That costs of this application be provided for.
2. The application was buttressed on the grounds: -
1. That the respondent is duty bound to assign new members on the duly completed mutation form R.L. 29 after the applicant makes payment of the requisite fees.
 2. That the applicant has made such payment and the mutation form is duly registered at the lands registry.
 3. That the respondent without any reason has refused, failed and/or neglected to assign the new numbers since May 24, 2018 when the mutation form was received in the office.
 4. That the applicant wants to have the portion assigned to him registered in his name as per the grant.
 5. That the respondent will not suffer any loss or prejudice by assigning the numbers to enable the applicant and others to have their portions of land registered in their respective names.
 6. That the ends of justice demand that the numbers be assigned.
3. And further on the applicant's (Zedekiah Nyandieka Agata's) supporting affidavit sworn on December 17, 2018 in which he deponed that the suit land is registered in the name of Peter Onyancha Nyamboania, Enock Atei Nyamboania, Florence Kwamboka, Zedekiah Nyandieka Agata and Donald Okoyo Onchiri vide a certificate of confirmation of grant obtained by himself on March 17, 2016 from High Court of Kenya at Kisii and that all the necessary requisite forms to assign the new numbers for purposes of partition of LR No West Mugirango/Nyamaiya/1296 were prepared but that the respondent refused to register the new numbers without assigning any reasons for the failure to do so in spite of the requisite payments having been made and despite having made several promises to do so. The applicant did attach to his affidavit documents to support his case.
4. On December 7, 2021, the respondent filed a replying affidavit in his personal name, Henry Abuga where he deponed that he had failed to act because the surveyor in whose names the documents for registration were prepared, J.O.O K'obado had disowned the papers and that 0.068 hectares of the parcel of land had not been accounted for. Further, one of the beneficiaries, Florence Kwamboka Matunda had objected to the process and had even reported the matter to Nyamira Police Station.
5. On June 22, 2022 the honourable principal magistrate Ms Nyigei dismissed the applicant's application dated December 17, 2018 on the ground that the mutation forms were not authored by the surveyor who it is alleged had prepared them and also observed that the applicant had declined the invitation of the respondent to the latter's office for a survey of the suit land by his office and further that the applicant, for reasons not disclosed, had insisted that the survey be conducted in the presence of a surveyor by the name of Samwel Koech. She finally observed that there would be no harm if the parcel of land can be "surveyed afresh after all parties have agreed and maybe invite the respondent to the ground."
6. Being aggrieved by the above order, the applicant appealed to this court with the following as his grounds of appeal: -



1. That the learned magistrate misdirected herself in finding the mutation forms in this case a forgery when they were actually signed by a licenced surveyor.
 2. That the learned trial magistrate misdirected herself when she failed to make a finding that the mutation forms had been accepted by the respondent and registered only for the respondent to fail to carry out his duties.
 3. That the learned trial magistrate erred in law and in fact in not finding that the respondent had turned himself as an appellate court over who should administer the estate, a matter that had been settled.
 4. That the learned trial magistrate decided the application against the weight of the evidence on record.
7. The respondent did not file any submissions in this appeal and having waited for him to do so in vain, I had the singular option of considering the appellant’s memorandum of appeal and submissions thereon and I now wish to address myself on the appeal but I approach it from 2 facets.
1. Whether there was really a suit before the trial magistrate.
 2. On the merits of the case.
8. 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 filed within a properly instituted suit.
9. Section 2 of the *Civil Procedure Act* defines “suit” as all civil proceedings commenced in any manner prescribed”.
10. Under section 19 of the *Civil Procedure Act*,
- “Every suit shall be instituted in such manner as may be prescribed by the rules.”
11. However, this rule does not apply to an application made in pending proceedings.
12. Proceedings may be begun by any other way only if, by these rules or by or under any statutory provision the proceedings in question are required or authorised to be so begun. A notice of motion is not one of them.
13. It will be observed that section 19 does not provide that the *Civil Procedure Rules* have a monopoly on how suits may be instituted. It provides that suits may be instituted in the manner prescribed by the rules. Under order 37 of the *Civil Procedure Rules* there are suits that are commenced by way of originating summons. This is mainly in relation to proceedings in which there is unlikely to be any substantial dispute of facts. And even then, should need arise, it may necessitate the court to convert the pleadings in the case to plaint and defence respectively. Unfortunately, the case before the honourable trial magistrate and against which this appeal is preferred is not one of those contemplated to be commenced by way of an originating summons.
14. There could be rules in other statutes on how proceedings may be commenced. For example, *Probate & Administration Rules* under the *Law of Succession Act* (cap 160 Laws of Kenya) prescribe how matters touching on succession of estates of deceased persons need to be instituted. In the Employment and Labour Relations Court, suits are mainly commenced by way of a statement of claim.
15. In some jurisdictions an originating motion is also permitted in some instances as a way of commencing a suit.



16. But specifically, and ordinarily for civil matters, as a general rule order 3 rule 1 of the *Civil Procedure Rules* provides that suits are instituted by way of a plaint unless any other manner is prescribed:

"Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed."

17. In *Tatecob Housing and Co-op Sacco Ltd v Qwetu Sacco Ltd* (2021) eKLR Justice Munyao Sila 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."

18. It means therefore that where a person is commencing a civil suit to enforce a civil action, he needs to follow the prescribed rules. The implication of this rule is that if a litigant wants to avoid commencing a suit by way of a plaint, then the burden is upon him to place before the court the law that permits him to deviate from the general rule. The appellant never discharged this obligation and the court has found none.

19. In the end I find that the suit before the magistrate's court was incompetent and the suit as commenced was therefore a non-starter and I would not have seen any useful purpose to interrogate the merits or otherwise of the ruling of the trial magistrate who was duty bound to save the court's precious time and strike out the same with costs to the respondent as there is absolutely no room for commencement of a suit by way of a notice of motion.

20. However, now that parties had their day in court and a decision was made which has been challenged, I wish to state that no cogent evidence was availed in court to convince the court to find in favour of the appellant. There is no way the respondent would have acted on the request thoughtlessly. Why do I say so? The acreage of the suit land having been questioned by the respondent, the said county surveyor did what was most prudent by asking the parties to appear before him on the suit land for purposes of ascertaining the acreage. But the appellant refused to cooperate. secondly, the alleged author of the mutation forms that were supposed to be acted upon, Juliko Geospatial Consultants, having disowned the said documents there is no way the respondent would have acted on them. Finally, one of the beneficiaries of the Estate, Florence Kwamboka Matunda, complained of some malpractices in the process and said that she had not signed any documents for this purpose and that the signatures appearing in the registration documents purporting to be hers were all forged. On account of the above, the appellant never discharged the burden of proof placed on him by law. I would therefore not fault the trial magistrate's decision.

21. Consequently, the appeal cannot see the light of day and the same is fit for dismissal. Of course with the attendant costs.

I so order.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF MARCH 2023.

MUGO KAMAU

JUDGE



In the Presence of: -

Court Assistant: Sibota

Appellant: In person.

Respondent: N/A.

