



**Kilonzo v Mutisya (Environment and Land Miscellaneous Application E040 of 2022) [2023] KEELC 20612 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20612 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E040 OF 2022  
CA OCHIENG, J  
OCTOBER 11, 2023**

**BETWEEN**

**GABRIEL MAITHA KILONZO ..... APPLICANT**

**AND**

**PHYLLIP MUTISYA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated the July 21, 2022 which was amended on October 24, 2022, the Applicant sought the following orders against the Respondent;
  - a. Spent
  - b. Spent
  - c. That this honorable court be pleased to issue eviction orders against the Respondent herein.
  - d. That this honorable court does issue M/s Icon Auctioneers the mandate to carry out the eviction.
  - e. That the OCS Mlolongo Police Station provide security to the Applicant in carrying out eviction.
  - f. That the costs of this application be in the cause.
  
2. The Application is premised on the grounds on the face of it and supported by the Affidavit of Gabriel Maitha Kilonzo where he deposes that he is the registered proprietor of LR Number 20320 hereinafter referred to as the 'suit land'. He states that the Respondent has trespassed and remained on the suit land without his consent. Further, that the continued occupation by the Respondent thereon was inhibiting any intended development or constructive utility of the suit land and hence interfering with his right to own property. He confirms having issued eviction notice dated the June 6, 2021 in



compliance with the law. He argues that unless the eviction orders are issued, the auctioneers will be incapacitated and that they will need the assistance and supervision of the OCS Mlolongo.

The Applicant filed submissions in support of his case.

### **Analysis and Determination**

3. I have considered the instant Notice of Motion Application including the Supporting Affidavit, annexures as well as submissions and the following are the issues for determination: Whether the Applicants have adhered to the proper legal process to seek orders of eviction as against the Respondent. Whether eviction Order should issue against the Respondent.
4. The Applicant in his submissions has referred to Section 152E of the [Land Act](#), 2012. He stated that he is the proprietor of the suit land and filed a copy of the Certificate of Title to that effect. He relied on Section 26(1) of the [Land Registration Act](#) to support this claim. He contended that the Respondent encroached and trespassed on his land and efforts to evict him were futile. He insisted that eviction orders should issue against the Respondent.
5. Order 3 Rule 1 of the [Civil Procedure Rules](#) prescribes the manner in which suits should be instituted and stipulates thus:

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

While Section 19 of the [Civil Procedure Act](#) provides that: -

“Every suit shall be instituted in such manner as may be prescribed by the rules.”

6. The Applicant has sought for eviction orders against the Respondent and relied on the Sections 152A, 152B, 152E, and 152 F of the [Land Act](#) to buttress his averments. The Respondent did not file a response to controvert this Application. I will hence proceed to make a determination as to whether the Applicant is entitled to the orders as sought. I note there is an Affidavit of Service dated October 26, 2022 wherein the court process server confirmed to have served the Respondent with the instant Application at his home.
7. On eviction from private land, Section 152E of the [Land Act](#) stipulates thus:

“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 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.”



8. On seeking substantive orders in a miscellaneous cause, Justice Sila Munyao in *Joseph Kibowen Chemjor vs William C. Kiseru* [2013] eKLR, stated that:

“I am alive to the provisions of Article 159(2) (d) of the Constitution which 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. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of “suit by a letter” which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party. If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.”

9. In the case of *Witmore Investment Limited V County Government of Kirinyaga & 3 Others* [2016] eKLR it was held that:

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

10. While in the case of *Nairobi West Hospital Limited V Joseph Kariba & Another* [2018] eKLR, the Learned Judge observed that:

“...In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard.”

11. In the current scenario, the Applicant has sought for eviction orders through this miscellaneous cause claiming the suit land belongs to him and confirmed that the Respondent had trespassed thereon. Insofar as this suit is undefended, I note the Applicant did not present any evidence before the court confirming his allegations of trespass and the period the Respondent has been thereon. I opine that Applicant should have presented vivo voce evidence proving ownership of the land as well as Respondent’s acts of trespass. Eviction orders are serious in nature and it is incumbent upon the litigant seeking them to prove the acts of trespass.



12. In the circumstances while associating myself with the decisions cited above as well as the facts as presented, I find that the dispute herein which revolves around ownership of suit land as well as acts of trespass are substantive in nature and it would be pertinent if this matter was instituted through a Plaintiff and not the miscellaneous cause.
13. I hence find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the Applicant to file a substantive suit.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

