



REPUBLIC OF KENYA



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Ndung'u & 2 others v Mutisya (Environment and Land Miscellaneous Application E039 of 2022) [2023] KEELC 20573 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20573 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E039 OF 2022
CA OCHIENG, J
OCTOBER 11, 2023

BETWEEN

DAVID MUTA NDUNG'U 1ST APPLICANT

MICHAEL MUYA KILONZO 2ND APPLICANT

FRANCIS NDUNDA KILONZO 3RD APPLICANT

AND

PHYLLIP MUTISYA RESPONDENT

RULING

1. By a Notice of Motion dated July 21, 2022 which was amended on October 24, 2022, the Applicants jointly sought the following orders against the Respondent;
 - a. Spent.
 - b. That this Honorable Court be pleased to issue eviction orders against the Respondent herein.
 - c. That this Honorable Court does issue M/s Icon auctioneers the mandate to carry out the eviction.
 - d. That the O C S Mlolongu Police Station provide security to the Applicant in carrying out eviction.
 - e. 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 David Muita Ndung'u where he deposes that they are the registered owners of LR Number 20322 hereinafter referred to as the 'suit land'. He avers that the Respondent had entered, trespassed and remained on the suit land without their consent. He contends that the continued occupation by the Respondent was inhibiting any intended development or constructive utility of the suit land and hence interfering



with their right to own property. He explains that they had issued an eviction notice dated June 6, 2021 in compliance with the law but the continued occupation and trespass is causing loss and damage hence the recourse to court. He reiterates that they had equally issued copies of demand letters to the local offices but the authorities had insisted that they required court orders to enable them take up any action. 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 Applicants filed submissions in support of their case.

Analysis and Determination

3. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, annexures and submissions, 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 Applicants in their submissions referred to Section 152E of the *Land Act*, 2012. They stated that they are the legal owners of the suit land as they had Certificates of Title to that effect. They relied on Section 26(1) of the *Land Registration Act* to support this averment. They reiterated that the Respondent encroached and trespassed on their land and built structures thereon and efforts to evict him were futile. They insisted that eviction orders should issue against the Respondent, as they had adhered to all the procedures and served the requisite notice.
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 Applicants in this miscellaneous cause have sought for eviction orders against the Respondent and relied on the Sections 152A, 152B, 152E, and 152 F of the *Land Act*. The Respondent did not file a response to controvert this application. Be that as it may, I will proceed to make a determination as to whether the Applicants are entitled to the orders as sought. I note on record 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. The *Land Act*, 2012 makes provision for eviction of a person from private land at its Section 152E which states that:

“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. In the case of *Joseph Kibowen Chemjor vs William C. Kiseru* [2013] eKLR, Justice Munyao Sila observed as follows:

“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 *Norah Ndunge Henry & another v Abednego Mutisya & another* [2022] eKLR the Learned Judge stated that:

“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.”

10. See also the case of *Rockland Kenya Limited v Commissioner General of the Kenya Revenue Authority & another* [2020] eKLR.

11. In this instance, I note the Applicants have sought for eviction orders claiming the suit land belongs to them. They have confirmed that the Respondent has trespassed on the suit land and constructed thereon. Insofar as this suit is undefended, I note the Applicants have not presented to Court the type of structures on the suit land nor the period the Respondent has been thereon. It is my considered view that the Applicants ought to have commenced this suit properly and presented vivo voce evidence proving ownership of the land as well as Respondent’s acts of trespass, which they did not. I opine that



eviction orders are substantive in nature and it is incumbent upon the litigant seeking them to file an appropriate suit and not seeks the orders through a miscellaneous cause.

12. In the foregoing while associating myself with the decisions cited above as well as facts as presented, I find that since the dispute herein revolves around ownership of suit land as well as acts of trespass and are substantive in nature and it would be pertinent if this matter was instituted by way of Plaint and set down for hearing.
13. I hence find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the Applicants to file a substantive suit.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

