



**Onyango v Simiyu (Environment and Land Miscellaneous Application E025 of 2023) [2023] KEELC 20634 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20634 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E025 OF 2023**  
**JO MBOYA, J**  
**OCTOBER 12, 2023**

**BETWEEN**

**CONSOLATA NABWIRE ONYANGO ..... APPLICANT**

**AND**

**MERCY KAGENDO SIMIYU ..... RESPONDENT**

**RULING**

**Introduction and Background:**

1. The applicant herein contends to be the lawful and registered Proprietor of all that Property otherwise known as I.R No. 105905/1, situate within Syokimau Area, in Mavoko Municipality and within the County of Machakos. However, despite being the registered Proprietor thereof, the Applicant contends that the Respondent herein has since entered upon and trespassed onto the suit Property, albeit without her permission or otherwise.
2. Pursuant to and arising from the trespass, the Applicant herein contends that same proceeded to and issued an Eviction Notice, which was thereafter (sic) served on the Respondent on the 3<sup>rd</sup> May 2023. Nevertheless, the Applicant avers that despite service of the Eviction Notice, the Respondent has declined to vacate and/or hand over vacant possession of the Suit Property.
3. Arising from the foregoing, the Applicant has now approached this Honourable court *vide* Chamber Summons dated the 2<sup>nd</sup> August 2023; and in respect of which same has sought for the following Reliefs;
  - i. ....Spent.
  - ii. That this Honorable Court be pleased to dispense with service in the first instance and the Application be heard *ex-parte*.
  - iii. That this Court do grant Leave to the Applicant to file this Application during this court vacation on account of its urgency.



- iv. That this Honorable court be pleased to issue Eviction Orders against the Respondent from the Applicant's Parcel of Land known as I.R No. 105905/1.
  - v. That the OCS Syokimau Police Station do enforce compliance of the orders herein.
  - vi. That the costs of this Application be provided for.
4. The instant Application is premised and/or anchored on various Grounds which have been enumerated in the body of the Application. Furthermore, the Application is supported by the affidavit of the Applicant sworn on even dated and in respect of which the Applicant has annexed two document, *inter-alia*, a copy of the Certificate of title and the Eviction Notice.
  5. Though it is contended that the subject Application was served upon the Respondent herein, however, the Respondent has neither entered appearance nor filed any Responses to the Application. In this respect, the Application beforehand remains (sic) unopposed.
  6. Nevertheless and despite the fact that the instant Application has not been opposed, there is no gainsaying that even where a suit/application is not opposed, the proponent of the Application is still called upon to establish the requisite ingredients prior to and before same can be allowed.
  7. Consequently and arising from the foregoing, the court directed Learned counsel for the Applicant to proceed and ventilate the Application and more particular, to demonstrate that the orders of Eviction, which are substantive orders, can be issue on the basis of a Miscellaneous Application, like the one before the Court.

#### **Parties' Submissions:**

##### **A. Applicant's Submissions:**

8. The Applicant adopted and reiterated the grounds contained in the body of the Application and furthermore reiterated the averments contained in the supporting affidavit, together with the annexures thereto.
9. Having reiterated the contents of the supporting affidavit, Learned counsel for the Applicant thereafter raised, highlighted and canvassed three (3) salient issues for consideration by the Honourable court.
10. Firstly, Learned counsel for the Applicant contended that the Applicant herein is the lawful and registered proprietor of the suit property insofar as same was issued with the Certificate of title on the November 30, 2022. Instructively, a copy of the Certificate of Title has been annexed to the Supporting Affidavit availed to the Honourable Court.
11. Additionally, Learned counsel for the Applicant has submitted that by virtue of being the lawful proprietor of the suit property, the Applicant is entitled to absolute and exclusive rights thereto, including right to vacant possession.
12. Secondly, Learned counsel for the Applicant has submitted that despite being the lawful owner and proprietor of the suit property, the Respondent herein has remained in occupation and possession of the suit property, albeit without the Applicant's consent, permission and without any colour of Right, whatsoever.
13. Consequently and in the premises, Learned counsel for the Applicant has thus contended that the impugned actions by and/or on behalf of the Respondent therefore amounts to and/or constitutes trespass.



14. Thirdly, Learned counsel for the Applicant has submitted that the Applicant proceeded to and served the Respondent with an Eviction Notice dated the April 27, 2023. However, counsel has contended that despite service of the Eviction Notice, the Respondent has failed to vacate and/or hand over vacant possession of the suit property.
15. Based on the foregoing, Learned counsel for the Applicant has therefore implored the Honourable Court to find and hold that the Applicant is entitled to recover vacant possession of the suit property. In short, counsel has contended that the Application before the court is therefore meritorious and thus ought to be granted.
16. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on *inter-alia* the case of *Margaret Karira Mung'era v Francis Kofi* (2019)eKLR; and *Attique Muhamed Omar Hadi & 3 others v Joseph Kamana & another* (2019)eKLR, respectively.

#### **B. Respondent's Submissions:**

17. Though served with the application, the respondent herein neither entered appearance nor filed any response thereto. Furthermore, the respondent also did not participate during the hearing of the instant application.
18. In a nutshell, the only submissions which are on record are the ones ventilated and canvassed on behalf of the applicant. Consequently, the court shall proceed to craft the ruling taking into account the applicant's submissions.

#### **Issues For Determination:**

19. Having reviewed the chamber summons dated the August 2, 2023; together with the supporting affidavit thereto and upon consideration of the oral submissions highlighted by counsel for the Applicant, the following issues do emerge and are thus worthy of determination.
  - i. Whether the chamber summons application herein is an appropriate procedure for seeking for orders of Eviction or otherwise.
  - ii. Whether the notice to vacate dated the April 27, 2023; was lawful and or legitimate.

#### **Analysis And Determination**

##### **Issue Number 1 Whether the Chamber Summons Application herein is an appropriate procedure for seeking for orders of Eviction or otherwise.**

20. Before venturing to address the issue hereinbefore highlighted, it is appropriate to digress a little and thereby take cognizance of the background facts underpinning the dispute beforehand.
21. Notably, the applicant herein contends to have purchased and/or acquired the suit property from the previous registered owner, namely, Mark Ouma Wandera, culminating into the transfer and registration of the suit property in favor of the Applicant on the November 30, 2022. For good measure, the Applicant has exhibited a copy of certificate of title to that effect.
22. Other than the foregoing, the applicant has contended that the Respondent herein entered upon and has been in occupation of the suit property since the year 2021, albeit without any color of right and/or authority, whatsoever.
23. Arising from the foregoing, what comes to the fore is that the applicant herein appears to have procured and obtained title to the suit property during the occupancy of the respondent. Instructively, what



- emerges is that the respondent was already in occupation and possession of the suit property by the time the applicant purchased same from the previous registered owner.
24. Consequently and in the premises, the question that does arise is; why the Applicant herein did not impress upon the vendor and/or the previous registered owner, to evict the Respondent prior to and or before effecting the transfer and registration of the suit property in favor of the Applicant. However, the determination of this particular issue, may have to await the opportune time and/or moment. Certainly, not now and not in the current proceedings.
  25. Back to the issue at hand, it is imperative to note that the Application before the court has been made *vide* Chamber summons; and same primarily seeks for an order of Eviction as against the Respondent.
  26. Nevertheless, there is no gainsaying that an Eviction order is a substantive and precipitate order, which by its nature is bound to bring forth serious consequences and/or ramifications. Consequently, an Eviction order is one such order that can only issue upon a plenary hearing arising out of a substantive suit and not otherwise.
  27. Furthermore, even though the Applicant has invoked the provisions of section 152E of the [Land Act, 2012 \(2016\)](#), it is imperative to underscore that the provisions of the said section do not expressly prescribe and/ or provide for the manner of approaching the Jurisdiction of court, even after the issuance and service of the requisite eviction notice.
  28. Consequently and to the extent that the named provisions have remained silent; and do not prescribed the manner of approaching court, it then means that any litigant desirous of seeking an Eviction order, the applicant herein not excepted, must therefore revert to and invoke the provisions of order 3 rule 1 and 2 of the [Civil Procedure Rules, 2010](#), which prescribes the mode and/or mechanism of invoking the Jurisdiction of a court of law.
  29. Given the significance of the provisions of order 3 rule 1 and 2 of the [Civil Procedure Rules, 2010](#); in the determination of the competence or otherwise of the current Application, it is therefore appropriate to reproduce the named provisions.
  30. In the premises, the provisions of order 3 rule 1 and 2 of the [Civil Procedure Rules, 2010](#); are reproduced as hereunder;
    - (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.
    - (2) The claim shall indicate at the heading the choice of track; namely “small claims”, “fast track” or “multi-track”.
  31. My understanding of the foregoing provisions is to the effect that; Every suit ought to be presented by way of a Plaint, unless any other mechanism has been expressly stipulated and/or provided for under the law. In this regard, if the provisions of section 152E of the [Land Act, 2012 \(2016\)](#), had expressly provided for Chamber Summons, or better still, Notice of Motion Application, then the Applicant, would have been within her Right to file the instant Chamber Summons.
  32. For coherence, there is no gainsaying that there are several mechanisms for invoking the Jurisdiction of the court, including Constitutional Petitions; Originating Summons; Originating Notice of Motion; and even by way of Notices of Motion. However, it is imperative to underscore that such mechanisms must be expressly provided for/ prescribed under the law and not otherwise.
  33. Notably, the provisions of section 152E of the [Land Act, 2012 \(2016\)](#), which has been invoked by the Applicant herein does not expressly stipulate and/or prescribe the filing of a Chamber summons



Application, let alone the usage a Miscellaneous Application. In this regard, the Applicant's choice of Chamber Summons, is certainly alien.

34. Be that as it may and in the absence of express prescription by the law and the relevant Rules of Procedure, it behoved the Applicant herein to revert back to and apply the provisions of order 3 rule 1 of the [Civil Procedure Rules 2010](#); and not otherwise.
35. Arising from the foregoing, I come to the conclusion that the Application by and on behalf of the Applicant herein and which has been commenced *vide* Miscellaneous Application, is not only premature and misconceived, but legally untenable.
36. Furthermore, I beg to point out that the mechanism of approaching the Jurisdiction of a court is fundamental and/or important and therefore a failure to comply with the prescribed mechanism, cannot be termed to be a procedural and/or technical issue. Simply put, such an issue goes to the substance of the dispute and by extension the Jurisdiction of the court. Consequently, such a failure is not curable by dint and invocation of the provision of article 159(2)(d) of the [Constitution](#) 2010.
37. To buttress the foregoing holding, it is appropriate to adopt and reiterate the holding of the Court of Appeal in the case of [Scope Telematics International Sales Limited v Stoic Company Limited & another](#) [2017] eKLR, where the court held thus;

The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2<sup>nd</sup> respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision.

For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

38. Clearly, the honorable Court of Appeal stipulated that where there is a prescribed mechanism for approaching the Jurisdiction of a court, such mechanism must be followed and/or complied with. Furthermore, the court ventured forward and espoused the position that a failure to comply with the prescribed mechanism for approaching the Jurisdiction of the court renders the suit void and thus fatally incompetent.
39. Additionally, it is also important to underscore that where procedure is intertwined with the substance of the matter; or the determination of the substantive dispute, then breach of the Procedure is fundamental and thus goes to the root of the Jurisdiction of the court.
40. To this extent, I can do no better than to cite and adopt the exposition of the law, as articulated by the Supreme Court in the case of [Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others](#) [2016] eKLR, where the court held thus;
  - (65) This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.



41. Nevertheless and before departing from the subject issue, it is also appropriate to state that the issue as to whether or not an Eviction order premised on the provisions of section 152E of the Land Act, 2012 (2016), can be procured and/or obtained on the basis of a Miscellaneous Application, was also addressed by the court in the case of Tatecho Housing and Co-op Sacco Limited v Qwetu Sacco Limited (2021) eKLR.
42. For coherence, the Court observed and stated as hereunder;
7. Without much ado, I will agree with the position of the respondent, as raised in the preliminary objection and buttressed by Mr. Muthami in his submissions, that the applicant cannot seek the orders sought in its miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought in the motion are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of a case. What the applicant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon hearing of such suit, and if successful, that an order of eviction would issue.
- The other order sought, that is of distress for rent, is covered by the Distress for Rent Act, and I have not been pointed to any provision in that statute which requires the court to issue orders before distress may be levied. The suit as commenced is therefore a non-starter and is hereby struck out. Having struck out this miscellaneous application, there is really no need for me to determine whether this was a dispute to be referred to the Cooperatives Tribunal under section 76 of the Cooperative Societies Act.
43. Suffice it to point out that the position of the law as expounded by the Learned Judge in the decision (supra), accords with my thinking and appreciation of the law. Simply put, any litigant desirous of procuring and/or obtaining an order of Eviction, the Applicant herein not excepted, is obligated to mount a substantive suit in accordance with the prescription of the provision of order 3 rule 1 of the Civil Procedure Rules, 2010.
44. Consequently and in view of the foregoing, my answer to issue number one is to the effect that the current application seeking for orders of eviction *vide* a miscellaneous application, is not only premature, but same is stillborn.

**Issue Number 2 Whether the Notice to vacate dated the 27<sup>th</sup> April 2023 was Lawful and or Legitimate.**

45. Having found and held that the impugned Miscellaneous Application is premature and misconceived, it would have been appropriate to terminate the ruling at this juncture and to strike out the entire suit beforehand. However, because of the other issue that has been highlighted for determination, it is appropriate to venture forward and address same, albeit briefly.
46. The applicant herein generated and issued an eviction notice pursuant to section 152E of the Land Act, 2012(2016); and thereafter contended to have served same upon the Respondent. For good measure, it is the said eviction notice that anchors the request for issuance of an Eviction order herein.
47. Be that as it may, it is not lost on the court that the eviction notice which was issued and purportedly served on the respondent herein does not comply with the provisions of section 152E of the Land Act, 2012(2016). For clarity, the impugned notice does not show that same was served and/or was intended to be served upon the Deputy County Commissioner, as well as the Officer Commanding Police Division of the area. Clearly, where the law prescribes the necessary ingredients to be articulated in the notice, the Applicant is obliged to comply with the full terms of the law and not otherwise.



48. Notably, the provisions of section 152E of the Land Act, 2012(2016) stipulates and provides as hereunder;

152E if, with respect to private land the owner or the person in charge is of the opinion that a person (1) is in occupation of his or her land without consent, the owner or the person in charge may serve on that person 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

49. Without having made provision for service of the impugned Notice on the designated Offices/ Officers; clearly the impugned notice is incompetent and thus void.

50. Other than the foregoing observation, it is also imperative to state that though the impugned Notice was dated the April 27, 2023, same is however stated to have been served upon the respondent on the May 3, 2023. In this regard, the computation of the three-month duration, which is stipulated in section 152E of the Land Act, would then exempt and/or exclude the entire month of May when the notice is contended to have been served.

51. In my humble view, the named provisions of the law relates to months and therefore the connotation thereunder, means “Three calendar months”, which is not computed on the basis of days, but Calendar Months. In this regard, the Three calendar months would therefore have terminated on or about the September 1, 2023; and not otherwise. See article 260 (5) of the Constitution , 2010.

52. Premised on the foregoing observation, it is evident that by the time the current Application was being filed, namely, on the 2<sup>nd</sup> August 2023; the prescribed duration of not less than Three months before the date of the intended Eviction, had not lapsed and/or extinguished.

53. Consequently and in the premises, I would still have returned a verdict that the application beforehand was filed and/or lodged prematurely.

#### **Final Disposition:**

54. From the foregoing analysis, this court has come to the conclusion that the miscellaneous application seeking for orders of eviction herein, is not only incompetent and misconceived, but stillborn.

55. Further and in addition, the court has also come to the conclusion that the mechanism of approaching and invoking the jurisdiction of the court goes into the root of the jurisdiction; and thus an omission to comply with the express prescription of the law is fundamental and thus not remediable by the invocation and application of the provisions of article 159(d) of the Constitution 2010.

56. In a nutshell, the miscellaneous application dated the August 2, 2023; be and is hereby struck out, albeit, with no orders as to costs.



57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of:**

Benson - Court Assistant.

Ms. Ruth Rotich for the Applicant.

N/A for the Respondent.

