



REPUBLIC OF KENYA



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**Maaga v Obure (Civil Appeal E055 of 2023)
[2025] KEHC 3127 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E055 OF 2023
WA OKWANY, J
MARCH 13, 2025**

BETWEEN

MARGARET MORAA MAAGA APPELLANT

AND

COLLONELIUS NYANTABIGA OBURE RESPONDENT

*(Being an Appeal from the Ruling in Keroka Chief Magistrate's Court
in Miscellaneous Civil Application No. E008 of 2023 delivered by
Hon. C. Ombija, Senior Resident Magistrate on 1st November 2023)*

JUDGMENT

Background

1. The Respondent herein, who was the Applicant before the subordinate court, filed an Application dated 21st August 2023 seeking orders to compel the Appellant (the Respondent) to release the title deed in respect to land parcel No. East Kitutu/Kebirichi/2039 (herein "the suit land") and that the Respondent be summoned to show cause why she has forcefully taken and refused to hand over the said title deed. The Respondent also sought orders for a warrant of arrest to be issued against the Appellant if she failed to surrender the land title deed and further that investigations be initiated to determine how she came to be in possession of the said title deed.
2. On 22nd August 2023, the trial court certified the said Application as urgent and granted ex-parte orders directing the Appellant to surrender the title deed by 24th August 2023.
3. The Respondent/Appellant filed a Replying Affidavit dated 28th August 2023 in response to the Application wherein she averred that the Applicant was her husband and that the case ought to be treated as a matrimonial cause. She stated that the Respondent had no valid grounds for demanding for the title deed since the suit land in question is their family property on which he could not claim sole ownership.



4. The Appellant averred that they jointly purchased the suit land on 23rd September 2020 and that she obtained a loan of Kshs. 1,102,018.06 to finance the said purchase. She added that she later learnt that the Respondent had secretly registered the property in his name yet it was their joint property. She urged the trial court to dismiss the suit because the Applicant had acted maliciously by selling of the said land to a third party.
5. When parties appeared before the trial court on 24th August 2023, the Appellant informed the court that she had just been served with the court order that morning and that she would avail the title deed on 28th August 2023. The trial court however ordered for the Appellant's arrest and directed her to show cause why she should not be held in contempt of court.
6. On 25th August 2023, the trial court granted the Appellant cash bail of Kshs. 10,000 after which it heard the contempt proceedings and found her to be in contempt of the orders of 22nd August 2023. The Appellant was thereafter sentenced to pay a fine of Kshs. 50,000 or in default, to serve 5 days imprisonment.
7. The Appellant immediately challenged the trial court's jurisdiction and the validity of the Respondent's Application of 21st August 2023 which, she argued, was incurably defective for lack of a substantive suit. The Appellant also filed an Application dated 4th September 2023, under certificate of urgency, wherein she raised the same issues listed in the Notice of Preliminary Objection. She also sought for a refund of the sum of Kshs. 50,000/= fine that she had paid to secure her release upon her conviction for contempt of court.
8. The said Application was canvassed by way of written submissions and in a ruling delivered on 1st November 2023, the trial court urged the parties to pursue an Alternative Dispute Resolution (ADR) mechanism since they were still married. The court also directed the Respondent/Appellant to surrender the title deed to the suit land to the Respondent within 30 days.

The Appeal

9. Aggrieved by the ruling of the trial, the Appellant instituted the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal: -
 1. The Learned Trial Magistrate erred in law and fact in confusing (sic) jurisdiction to himself in land matter which was filed under miscellaneous civil application.
 2. The Learned Trial Magistrate erred in law and fact in giving an order to the Appellant to surrender the title without minding the Appellant had been fined Kshs. 50,000/= hence the court was functus official (sic).
 3. The Learned Trial Magistrate erred in law and fact in ignoring to make findings on the Application dated 4th September 2023.
 4. The Learned Trial Magistrate erred in law and fact in basing the Ruling on the preliminary objection which had been withdrawn that led to the erroneous ruling and travesty of justice.
 5. The Learned Trial Magistrate erred in law and fact in issuing substantive orders in a miscellaneous application instead of striking out for want of main suit.
10. The Appeal was canvassed by way of written submissions which I have considered. The Respondent did not file any submissions in the Appeal.
11. The main issue for my determination is whether the Appeal is merited.



12. A perusal of the Record of Appeal reveals that the Respondent commenced the proceedings before the lower court through a miscellaneous civil application vide Notice of Motion dated 21st August 2023. The *Civil Procedure Act* defines a suit under Section 2 thereof as follows: -

“suit” as all civil proceedings commenced in any manner prescribed.

“prescribed” under Section 2 means prescribed by rules.

“Rules” means rules and forms made by the Rules Committee to regulate the procedure of courts.

“pleadings” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

13. The Act further prescribes the manner in which a suit shall be instituted under Section 19 of the Act which states that: -

19. Every suit shall be instituted in such manner as may be prescribed by Rules.

14. Order 3 Rule 1 (1) of the Civil Procedure Rules 2010 provides that: -

(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

15. The above provisions were aptly illustrated in the case of Geoffrey Ndungu Theuri vs. Law Society of Kenya [1988] eKLR, where it was held thus: -

“..... the order specifically refers to a suit which is defined under section 2 of the *Civil Procedure Act* in these terms; ‘suit’ means all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 30 of the Civil Procure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the *Civil Procedure Act* does not give the court the power to act without jurisdiction.”

16. My understanding of the above provisions and decision is that a suit can only be brought before the court through a Plaint, Originating Summons or a Petition. In the instant case, however, the Respondent initiated the case through a Notice of Motion seeking, inter alia, the return of his alleged title deed. I find that the manner in which the case was initiated does not meet the legal requirement for the institution of a suit.

17. My view is that miscellaneous civil applications are best suited for matters that are not contested or where the rights of the parties are not the subject of determination. Miscellaneous applications are made where the discretion of the court is sought or a procedural issue sought to be endorsed. The court is in such matters not being asked to determine any rights of the parties. I find guidance in the decision in Fidelity Bank Limited vs. John Joel Kanyali (2014) eKLR where Kasango J. referred to the decision in Board of Governors, Nairobi School vs. Jackson Ileri Geta (1999) KLR I and held thus: -

“It is clear from the above that a Civil action can only be



commenced by filing a Petition, Summons and Plaintiff. This was made clear by the Court of Appeal in the case Board Of Governors, Nairobi School v Jackson Ireri Geta (1999) KLR. The Court stated in that as follows:-

“

- “2. Pleading is defined in Section 2 of the Civil Procedure Act to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.
3. The use of the term “summons” in the definition of the term “pleading” must be read to mean “originating summons” as that is a manner prescribed for instituting suits.
4. Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used the Civil Procedure Act and Rules and made thereunder.”

Similarly, as stated by the Court of Appeal, I say Notice of Motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in Cap 21 and its Rules. Accordingly, there is no suit before Court which suit can sustain the Notice of Motion. I do therefore uphold the objection raised by the Respondent.”

18. Similarly, in Photo Energy vs. Hashi Energy Limited, Misc 180 of 2018 the court held that;-

“Order 3 Rule (i) (ii) of the Civil Procedure Rules provides that every suit shall be instituted by way of a Plaintiff. As a general rule a suit can only be instituted by way of a Plaintiff, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.”

19. In Joseph Kibowen Chemjor vs. William C. Kisera [2013] eKLR Munyao J. succinctly explained the instances when a party may file a miscellaneous application as follows: -

“It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common



and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings.

At this level, the court is not adjudicating on any rights. Where there is a call to adjudicate on rights of parties then it must be said that there is a “civil action” and this must be commenced in the manner prescribed by the Rules.....”(Emphasis added)

20. I find that the manner in which the Respondent sought and obtained substantive orders, exparte, through a miscellaneous application, which orders gravely affected the Appellant’s rights, was strange and unknown in law. It is noteworthy that the Respondent did not file any substantive suit seeking to enforce his right or a civil action against the Appellant.
21. I find that the Respondent’s Application before the trial court was both incompetent and incurably defective because it was instituted through an unknown and unprocedural means. It therefore follows that even the proceedings that emanated from the defective pleadings were also defective and improper. My take is that the trial court should not have entertained the Respondent’s application in the first place.
22. I am alive to the fact that while Article 159 (2) (d) of the *Constitution* provides for the administration of justice without undue regard to technicalities, the failure to institute a suit in the proper manner goes to the root of the competence of the suit which the court cannot overlook. I anchor this position on the case of Scope Telmatics International Sales Limited vs. Stoic Company & Another [2017] eKLR, where it was held that: –

“Article 159 of the *Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure”
23. I further find that the manner in which the trial court conducted its proceedings left a lot to be desired. I say so because not only were substantive orders issued against the Appellant exparte when service of the Application had not been effected on her, but the said court also denied the Appellant the opportunity to respond to the Application and went ahead to lock her up for alleged contempt. It is clear to this court that the trial court grossly flouted the rules of natural justice which require that a party must be heard if the orders issued will adversely affect them.
24. It is trite that courts are the custodians of the rule of law and the defenders of the *Constitution*. Article 50 provides for the right to fair hearing and further provides inter alia that, a party must be afforded adequate time and facilities to prepare a defence and to adduce and challenge evidence brought against her. It is my finding that the trial court should have addressed itself to the manner in which the suit was instituted before it and gone an extra mile to conduct an inquiry on why the Appellant was not willing to release the title deed, before punishing her for contempt.
25. I also find that the contempt proceedings against the Appellant were unjustified and untenable as they emanated from incompetent pleadings.
26. For the reasons that I have stated in this judgement, I find that the proceedings before the trial court were a nullity and the orders issued therein untenable. Consequently, I allow the instant appeal in the following terms: -
 - i. The Orders of 22nd August 2023 are hereby vacated.
 - ii. The proceedings and Ruling in Keroka Miscellaneous Civil Application No. E008 of 2023 were void and null and are therefore quashed and set aside.



- iii. The Appellant shall be refunded the sum of Kshs. 50,000/= paid in respect of her conviction for contempt against the court's order of 22nd August 2023.
- iv. I grant the Appellant the costs of this appeal and the lower court case.

27. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH 2025.

W. A. OKWANY

JUDGE

