



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A

E.L.C MISC APPL. NO. 5 OF 2021

WILHAM (KENYA) LIMITED APPLICANT

VERSUS

JULIUS MIATU.....1ST RESPONDENT

JULIUS MIATU ALIAS KIBAKI2ND RESPONDENT

DANIEL MWAI3RD RESPONDENT

MOSES NGANGA.....4TH RESPONDENT

RULING

1. The Applicant filed the instant application seeking the following orders;

a. Spent

b. Spent

c. An order be issued directing the Officer Commanding Gituamba Police Station, to provide security to the Applicant's authorized agents, Court bailiff or auctioneer during their eviction and removal of crops planted by the Respondents, their agents and person's unknown who are unlawfully trespassing on the Applicant's Land Reference Number 8331/2 situated within Kimumu Village, Kimumu Sub-location, Murang'a County.

. The costs be awarded to the Applicant in any event.

2. The Application is premised on seven grounds and the dispositions by Mamta Mahajan, the Applicant's director. It is the Applicant's contention that it is the registered owner of all that parcel of land reference no. 8331/2 situated within Kimumu Village, Kimumu Sub-location, and Murang'a County. That without any color of right the Respondents gained illegal ingress into the suit property and begun subsistence farming thereon. In compliance with the Land Act, the Applicant did issue an eviction notice and caused the same to be served on the Respondents but have failed, neglected and/ or refused to vacate prompting the instant application. It is further their contention that there is no proprietary dispute between them and the Respondents and it is in their interest that the Respondents be evicted.

3. The Respondents were served vide substituted services and an Affidavit of Service filed dated 2/6/2021, no response was filed. The application is thus unopposed.

4. The Applicant holds title to the suit land and has averred that it is carrying out floriculture farming and as per the inspection report. That the Respondents have encroached the farm and planted crops along the wetland. There are two newspaper extracts indicating notices to vacate and a bundle of letters issuing notices and which have been said to have been served on various security offices. That despite the notice, there has been no compliance by the Respondents.

5. Section 26 of the Land Registration Act provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and

the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

There has been no order challenging the title held by the Applicant and based on the above extract the Certificate of Title attached by the Applicant is conclusive evidence of their ownership of the land. I rely on the decisions in **Kerugoya ELC No. 6 of 2016 Muringi Willy & another v Mercy Muthoni Njogu [2016] eKLR** the absence of evidence casting doubt on the title concludes the registered proprietor is the owner.

6. Section 152A of the Land Amendment Act 2016 prohibits illegal occupation of another person’s land be it private, public or community and it also gives the registered owner the right to evict such a person in accordance with the pro

7. The process of eviction is laid down under Section 153E as hereunder;

“(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 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, 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. The Act envisages that the aggrieved party must;

. Serve Notices.

b. Notice must be written.

c. Notice be published in a local daily with nationwide circulation, in case it is a large group.

. Notice be placed on five strategic places on the land.

e. Service of notice on relevant authorities.

9. Rule 65 of the Land Regulations 2017 (Part VII –Miscellaneous) requires that the land owner gives a notice in the prescribed form. The form contemplated is form LA 57. The Applicant has attached a bundle of letters in writing addressed to unknown person referenced “Notice to Vacate Land LR. No. 8331/2 WILHAM KENYA LIMITED”. The Applicant in paragraph 8 avers that it has been difficult to identify persons who have encroached the land for the reason that the trespassers do not live thereon. However, the Applicant goes ahead to state that their security manager was able to identify the persons. No reason was however given as to why there was no subsequent personal service. The notice as served is not as per the form prescribed above. It fails to identify the person served and his postal or physical address.

10. Paragraph 6 of the Supporting Affidavit gives a detailed chronology on how service of the notice was done. Some of the offices served going by the stamps on the notice are; Chiefs office at Mukeu Location and the Officer in Charge Ngati Police Station. That to enhance the notice, the same was placed on five strategic locations on the land however no evidence in support of this was presented.

11. Regulation 70 requires;

All notices required under these regulations may be served-

(a) By post, to any postal address in Kenya entered in the register as an address for service;

(b) By post, to any postal address outside Kenya entered in the register as an address for service;

(c) By leaving the notice at any postal address in Kenya entered in the register as an address for service;

(d) By electronic transmission to the electronic address entered in the register as an address for service;

(e) By hand delivery through the national or county government administration officers within the area of their jurisdiction;

(f) By any of the methods of service given in paragraph (l) (a), (b), (c), (d) and (e) to any other address where the person giving the notice believes the addressee is likely to receive it.

12. Section 152E as well as the provisions above envisages personal service of the Notice and service on the relevant administrative bodies. Paragraph 8 of the Supporting Affidavit indicates that the Applicant through their security manager was able to get the names of the Respondents but not their residence hence personal service was difficult. In my considered opinion there was need for the Applicant to attach an Affidavit of Service as the said Charles Odula is not a licensed process server. Noting the nature of the process commenced it was proper that a licensed process server be used. The contents of paragraph 6 are mere hearsay; the Applicant should have attached the averments

sworn by the said Odula for this Court to peruse.

13. Even if I was to adopt the contents of paragraph 6 to demonstrate service and borrowing from how summons are effected, I am not satisfied that it meets the criteria set under Order 5 Rule 13 of the Civil Produce Rules. The rule requires;

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons”.

14. The Court has not been told whether the said Odula was well known to the officers that he was able to identify them or who introduced him to them. The purpose of service of notice is to accord the trespasser an opportunity to be heard and seek redress to this Court it must therefore be done procedurally.

15. In the circumstance I am not satisfied that the Applicant has demonstrated adequate service on the Respondents. (**See Malindi ELC Misc No. 33 of 2019 Atik Mohamed Omar Atik & 3 others v Joseph Katana & another [2019] eKLR**).

16. By operation of section 152F of the Land Act this Court has the power to (a) confirm the notice and order the person to vacate; (b) cancel, alter or make additions to the notice on such terms as it deems equitable and just; (c) suspend the operation of the notice for any period which the Court shall determine; or (d) order for compensation.

17. The Applicant is seeking orders which are set out under Section 66 of the regulation which provides that the person taking part in the eviction needs to be identified. The Applicant has not given details of the person intending to carry out the eviction. The Court cannot give orders where there is no clarity as it may result in absurdity.

18. The evidence is uncontroverted but the Court must evaluate the evidence adduced to determine if the Applicant is entitled to the prayers sought. I am in agreement with the wordings of Justice Mulwa in **Nakuru Civ App No 110 of 2013 Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR** where she opined;

“I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a Court should not take it truthful without interrogation for the reason only that it is uncontroverted”.

Though the circumstances in the foregoing case were different, an issue for uncontroverted evidence was considered. It is the duty of the Applicant to demonstrate that the Respondents were served and being seized with the information opted to disregard the notice.

19. Even if the Court was to accepted that the Respondents were served by substituted service and taking cognizance of Order 5 Rule 17 (2) of Civil Procedure Rules which provides that substituted service under an order of the Court shall be as effectual as if it had been made on the Defendant personally, the Applicant has not complied with Section 152E (2)(d) of the Land Act makes the application fatal.

20. In the upshot application is unmerited and the same is ripe for striking out.

21. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 29TH DAY OF JUNE 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Wambui Mathenge HB for Alex Gichuhi for the Applicant

1st – 4th Respondents: Absent

Alex: Court Assistants