



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISC. APP NO. E112 OF 2021

SHIRAZ JAN MOHAMMED.....APPLICANT

-VERSUS-

JOHN MUSWANYI.....RESPONDENT

RULING

INTRODUCTION

1. Vide the Notice of Motion Application dated the 28th of May 2021, the Applicant herein has sought for the following Reliefs;

i.(Spent)

ii. *The Honorable Court be pleased to grant an Eviction order against the Respondent who has trespassed onto the Applicant's property namely L.R.NO. 20280 (IR. NO. 65576), Nairobi.*

iii. *The Honorable Court be pleased to grant a Permanent Injunction restraining the Respondent by himself, his servants, employees, agents and/or any other person acting under his instructions or his interest from entering onto, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as L.R. NO. 20280 (IR. NO. 65576), Nairobi.*

iv. *The Honorable Court be pleased to grant an order directing the officer commanding the police station, Embakasi Police station, to provide adequate security during the eviction exercise by an auctioneer or court bailiff.*

v. *Cost of the Application be provided for.*

2. The subject Application is premised and/or anchored on the grounds enumerated at the foot thereof and same is further supported by the Affidavit of the Applicant herein sworn on the 28th of May 2021, to which the Applicant has annexed 6 documents, inter-alia a copy of the Certificate of Title in respect of the suit property.

3. Though the Application under reference is ex-parte by law, same was served upon the Respondent on the 17th of June 2021 and the Respondent acknowledged receipt of the Application by signing on the face thereof. In this regard, one would have expected the Respondent to enter appearance and/or respond to the Application beforehand.

4. Nevertheless, the Respondent herein neither entered appearance nor filed any response to the subject Application. Consequently, the Application by the Applicant has remained uncontroverted.

DEPOSITIONS BY THE PARTIES

THE APPLICANTS CASE:

5. The Applicant herein swore the Affidavit in support of the Application and same has averred as hereunder;

6. The Applicant is *the bonafide* and registered proprietor of all that parcel of land known as L.R. NO. 20280 (IR. NO. 65576), situate within the city of Nairobi.

7. By virtue of being the registered owner and/or proprietor of the suit property, the Applicant has averred that same is therefore entitled to exclusive possession, occupation and use of the suit property, to the exclusion of all and sundry.

8. Nevertheless, the Applicant has averred that despite being the lawful owner of the suit property, same has not been able to enter upon and take possession thereof, because of the unlawful and illegal entry by and/or at the instance of the Respondent.

9. It is the Applicant's further averment that various efforts to persuade the Respondent to vacate the suit property and grant vacant possession thereof have not been fruitful. Consequently, the Respondent remains in occupation of the suit property, albeit without any lawful basis and/or legal claim.

10. On the other hand, the Applicant has further averred that owing to the illegal occupation by the Respondent, same was constrained to and indeed issued an Eviction Notice pursuant to and in line with **Section 152E of the Land Act, 2012 (2016)**.

11. It is the Applicant's further averment that despite the issuance and service of the Eviction notice, which was similarly copied to the Deputy County Commissioner, Embakasi Sub-county, the Respondent has failed and/or neglected to comply with and/or adhere to the terms of the Eviction notice. Consequently, the Applicant has been compelled to file and/or lodge the subject Application.

12. Owing to the foregoing, the Applicant now implores the Court to grant the orders sought on the face of the Application herein, so as to enable same to appropriate and/or benefit from the ownership of the suit property.

RESPONDENT'S CASE:

13. It was pointed out that though the Respondent herein was duly served and same acknowledged receipt of the subject Application, same however has neither entered appearance nor filed any response.

14. In the premises, the Respondent has not controverted and/or denied the claims by the Applicant and particularly, the Respondent has not disputed that the Applicant herein is the lawful and Registered owner of the suit property.

15. Finally, in the absence of any response by the Respondent, no basis has been shown to underline the entry upon and/or continued occupation of the suit property by the Respondent.

SUBMISSIONS BY THE PARTIES

16. The matter herein came up for hearing of the subject Application on the 18th of October 2021, whereupon the Counsel for the Applicant pleaded with the Court to allow same to file written submissions.

17. Pursuant to the request by and/or at the instance of the Counsel for the Applicant, the Honorable Court ordered and/or directed that the Application be canvassed and/or disposed of by way of written submissions, which were to be filed within 14 days.

18. It is imperative to note that the Applicant herein proceeded to and indeed filed the written submissions on the 27th of October 2021. The written submissions by the Applicant are on record.

19. Needless to say, the Respondent herein, who had neither entered appearance nor filed any Response, did not file any Written submissions.

20. In view of the foregoing, I am now disposed to determine or adjudicate upon the subject Application based on the pleadings and the written submissions filed by the Applicant only.

ISSUES FOR DETERMINATION

21. Having evaluated the Notice of Motion Application dated the 28th of May 2021, the Affidavit in support thereof and the written submissions filed by and/or on behalf of the Applicant and there being no Response to the said Application, the issues that arise for determination are as hereunder;

i. Whether the Applicant is entitled to the orders of Eviction as against the Respondent.

ii. Whether the Applicant herein is entitled to an order for Permanent Injunction as prayed for and/r sought on the face of the subject Application.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the Applicant is entitled to the orders of eviction as against the Respondent.

22. Before endeavoring to determine whether or not the Applicant herein is entitled to the orders of Eviction in the manner sought or at all, it is appropriate to take cognizance of the provisions of **Section 152(E) of the Land Act, 2012 (2016)**, which provides as hereunder;

“152E

(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, the Mandatory procedures during eviction, 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.”

23. From the foregoing provisions, it is apparent that the Land owner who seeks to procure and/or obtain an order of Eviction, is obliged and/or compelled to issue and serve an eviction notice giving to and/or in favor of the unlawful occupant a period of 3 months from the date of service of the Eviction notice, to vacate and/or move out of the concerned property.

24. On the other hand, it is also a requirement of the law that the Eviction Notice to be served upon the unlawful occupant of the Land in question, must also be served upon the Deputy County Commissioner, in charge of the sub-county and/or area where the concerned parcel of land is located.

25. Similarly, it is also a requirement of the law that the same Eviction Notice must also be served upon the Officer Commanding Police Division of the area in question. However, it is worthy to note that the National Police Service Commission, which is the body responsible for managing the affairs of the National Police Service, has since reorganized the structure of the Police Service and pursuant to the re-organization, the office of the O.C.P.D has since been abolished and replaced by the Sub-county Police Commander.

26. Pursuant to and in line with the foregoing re-organization, the terminology O.C.P.D who was hitherto supposed to be served, has given way and thus the Eviction notice envisaged under Section 152E of the Land Act, 2012 [2016], is therefore supposed to be served on the Sub-county Police Commander of the area in question.

27. Be that as it may, I have glanced at the Eviction notice which was extracted and issued by and/or on behalf of the Applicant herein, and which is dated the 24th of February 2021. For clarity, the Eviction notice is addressed to the Respondent herein and same is copied to the following persons;

i. Office of the President, Ministry of Interior Coordination of National Government, Deputy County Commissioner, Embakasi.

ii. The Officer Commanding Station [OCS] Embakasi Police Station, Nairobi.

28. It is also apparent that the eviction notice dated the 24th of February 2021, was served upon and was acknowledged by the Respondents on the 25th of February 2021.

29. Taking into account the date when the Eviction notice was served upon the Respondent, that is, on the 25th of February 2021, the three months required by and/or at the foot of the provisions of **Section 152E of the Land Act, 2012 (2016)**, could only be reckoned and/or computed from March 2021 and not otherwise. For clarity, the duration provided alludes to Calendar month and must therefore be computed as such. **See the provisions of Article 259(7) of the Constitution of Kenya, 2010.**

30. Based on the computation of time, it thus means that the subject Application for Eviction of the Respondent ought and should have been filed at the very earliest, on or about the 1st of June 2021. Only then, would the statutory 3 months have lapsed and/or extinguished.

31. In the premises, it is evident that the Notice of Motion Application herein, which was filed and/or lodged on the 28th of May 2021, was filed albeit prematurely.

32. Notwithstanding the foregoing, it is also evident from the face of the Eviction notice that same was served on the Officer Commanding Police Station, Embakasi, as opposed to the Officer Commanding Police Division, Embakasi Sub-county, in line with the stipulation of the law.

33. Suffice it to say, that the Officer Commanding Police Station is different and distinct from the Officer Commanding Police Division, the latter who has since been restructured and is now known as the **sub-county Police Commander**.

34. In my humble view, Parliament had its own reasons why it chose and/or directed that the Eviction Notice be served on the designated officers and not any other. Consequently, it behooves all and sundry, the Applicant not excepted, to comply with and/or abide by the letter of the law.

35. Based on the foregoing, I would have been disposed to strike out the subject Application and direct the Applicant to re-issue and serve the compliant Eviction notice, afresh.

36. However, the foregoing issues have been raised and/or pointed out by the Court and given that the Respondent has not opposed the subject Application, I am minded to grant the Applicant a soft landing. In this regard, I am prepared to and do hereby take cognizance of the provisions of Article 159(2)(d) of the Constitution, 2010, which provides;

“159.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities.”

37. Owing to the foregoing, and despite the evident lapses, which I have pointed out herein before, I am minded to and do hereby decree that the Applicant is entitled to the Eviction orders sought.

Issue Number Two

Whether the Applicant herein is entitled to an order for permanent injunction as prayed for and/r sought on the face of the subject Application.

38. The Applicant herein has also sought for an order of Permanent Injunction against the Respondent from entering upon and/or remaining in occupation of the suit property.

39. However, it must be noted that the subject proceedings have been commenced by a Miscellaneous Application as opposed to a Plaint, the latter which would have accommodated a substantive prayer for Permanent injunction.

40. Suffice it to say, that an order of permanent injunction is a substantive and precipitate order that can only issue upon the filing of a substantive suit and after plenary hearing, with the exception of instances where summary judgment is sought for and granted in line with the provisions of **Order 36 of the Civil Procedure Rules, 2010**.

41. To the extent that there is no substantive suit that has been filed by and/or on behalf of the Applicant herein, I am afraid that no order of Permanent Injunction can issue to and/or in favor of the Applicant, either as sought or at all.

42. On the other hand, even though the Applicant herein had sought for the grant of an order of Permanent Injunction, same has however adverted to and rendered submissions on the issue of Mandatory injunction, which was neither pleaded nor captured in the body of the subject Application.

43. First and foremost, having not pleaded and/or alluded to the orders of Mandatory injunction in the body of the Notice of Motion Application dated 28th May 2021, and there being no Application for amendment of the said Motion, it is my finding and holding that the submissions by the Applicant's Counsel seeking orders of mandatory injunction are therefore misconceived and moot.

44. For clarity, the submissions as pertains to Mandatory Injunction constitute a violation of the Doctrine of Departure. **See Order 2 Rule 6 of the Civil Procedure Rules, 2010** which provides as hereunder;

“Departure [Order 2, rule 6.]

(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Sub-rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.”

45. Secondly, the orders of Mandatory Injunction are geared and/or calculated to removing, evicting and/or otherwise attracting vacant possession, as pertains to the suit property. If anything, the import and tenor of the orders of mandatory injunction sought, is the same as the orders of Eviction, which the Honorable Court has addressed herein before.

46. In the premises, the prayer and/or submissions pertaining to the grant of orders of Mandatory injunction, other than having been made in *vacuum*, are also bad for duplicity.

47. In a nutshell, I am neither disposed to grant the orders of Permanent Injunction nor Mandatory Injunction, the latter which was not pleaded in the Notice of Motion Application dated 28th May 2021.

FINAL DISPOSITION

48. Consequently and having considered the subject Application, I come to the conclusion as hereunder;

i. The Notice of Motion Application dated 28th of May 2021, be and is hereby allowed in terms of Prayer 2 thereof and in this regard, an Eviction order be and is hereby issued against the Respondent and same shall be forthwith Evicted from L.R. NO. 20280 (IR. NO. 65576), Nairobi.

ii. The Sub-county Police Commandant, Embakasi Sub-county, be and is hereby directed to provide reasonable security to the Applicant and/or the Applicant's nominated Auctioneer for purposes of enforcing and/or implementing the eviction order against the Respondent

iii. The Applicant herein shall pay and/or meet the statutory charges due and/or payable to the National Police Service for purposes of the provision of the requisite security

iv. The prayer for Permanent injunction be and is hereby declined.

v. Costs of the Application herein to be borne by the Respondent.

49. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Kibet Advocate for the Applicant.

N/A for the Respondent.