

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 59 of 2014

BETWEEN

ISAAH ONCHONG'A PETITIONER

AND

ISAAC GODFREY ARERI RESPONDENT

RULING

1. The petition before the Court seeks to an order to set aside proceedings in Milimani *Chief Magistrate's Court Civil Application No. 19 of 2014 Isaac Godfrey Areri v Isaiah Nyabuti Onchong'a* where the court made the following order on 13th January 2013; ***“THAT an order be and is hereby issued against the respondent (Isaiah Nyabuti Onchong'a) who resides on the applicant's house on Land Reference Number 209/8343/94 and Zacharia Baraza trading as Siuma Auctioneers do evict the respondent.”*** The order was issued based on an application filed by way of Notice of Motion seeking the said orders and supported by the affidavit of Isaac Godfrey Areri who deponed that he is the registered owner of the premises and that the petitioner has failed to pay rent and that attempts to locate the petitioner or to get into the house had failed.
2. The petitioner is aggrieved by the order issued by the learned magistrate. Upon perusal of the petition and the respondent's deposition, I am constrained to exercise of this Court's supervisory jurisdiction under **Article 165(6) and (7)** of the Constitution to prevent what I consider to be an egregious abuse of the court process.
3. I find and hold that the proceedings before the Subordinate Court must be quashed for the following reasons; First, the suit before the subordinate court was commenced by a Notice of Motion which is not an originating procedure recognised under the ***Civil Procedure Rules***. Second, the relief sought is not permitted in law in the circumstances, i.e., the respondent claims that the petitioner was in arrears and failed to pay rent. The remedy for the landlord is to levy distress for rent and not to seek an order of eviction as was done in the application. He also has the option of claiming the rent as a civil debt. It is noteworthy that the application does not even state how much rent was owed to the applicant. Third, the order directed the use of the Officer In-charge Lang'ata Police Station to supervise the eviction. The use of the police to enforce civil claims is not permitted and at least not in the first instance without cause. Fourth, it is apparent that there is a case pending before the High Court regarding the suit property to wit; ***HCCC No. 575 of 2006*** concerning the parties which was not disclosed to the court.
4. In the circumstances, I make the following orders;
 1. **All the proceedings and orders in *Milimani Chief Magistrates Court Civil Application No. 19 of 2014* are hereby set aside and the application is struck out.**
 2. **The applicants goods removed out of the suit premises shall be released to him forthwith.**
 3. **The respondent shall bear the auctioneers costs and applicants costs of this application assessed at Ksh.15,000/=**

DATED and DELIVERED at NAIROBI this 7TH DAY OF FEBRUARY 2014.

D.S. MAJANJA

JUDGE