



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

MISCELLANEOUS APPLICATION NO. 13 OF 2020

RAJAB KOSGEI MAGUT.....APPLICANT

VERSUS

NURU JEPLETING CHOGE.....RESPONDENT

RULING

This ruling is in respect of a preliminary objection dated 21st September 2020 raised by the respondent on the following grounds:

- a) That there is no suit properly filed before this Honourable Court for determination.
- b) That the present Miscellaneous ELC No. 13 of 2020 has been commenced through unprocedural means and thus it is fatally defective and incapable of obtaining the orders sought.
- c) That the application before this Honourable Court is a clear contravention of Article 159 of the Constitution of Kenya 2010, Sections 1A and 1B of the Civil Procedure Act and Civil Procedure Rules, 2010 for commencement of a suit and should therefore be rejected.
- d) That the Miscellaneous ELC No. 13 of 2020 is fatally defective, incompetent, bad in law and should be struck out with costs to the 1st Respondent.

The applicant filed this Miscellaneous application vide a Notice of Motion dated 19th May, 2020 seeking for orders that the Honourable Court be pleased to order the County Land Registrar to remove a restriction registered by the respondent in land parcel No. Uasin Gishu/Chepsaita Settlement Scheme/828 in the name of Rajab Kipskskei Magut. The application was based on the grounds that the registered owner of the parcel of land known Uasin Gishu/Chepsaita Settlement Scheme/828 and the respondent had lodged a restriction on the suit land.

Counsel agreed to canvas the application vide written submissions but before this could be done, the 1st Respondent filed a preliminary objection dated 21st September 2020 on the above mentioned grounds.

The 2nd respondent supported the preliminary objection therefore did not file submissions. The applicant also did not file submissions to the preliminary objection.

APPLICANT/RESPONDENT'S SUBMISSION

Counsel for the applicant/respondent submitted elaborately on the preliminary objection and stated that the prayers sought for removal of a restriction is a civil action and must be commenced in a manner prescribed by the Rules.

Counsel cited the provisions of Section 19 of the Civil Procedure Act states that

“Every suit shall be instituted in such manner as may be prescribed by Rules”

Order 3 rule 1 of the Civil Procedure Rules 2010 further provides that:

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”

Counsel relied on the case of **Peter Kwema Kahoro Vs Benson Maina Githethuki [2005]Eklr** where the court stated that :

...the only objection which has caused me anxiety is the one directed at the manner in which the applicants have originated these proceedings. Section 19 of the Civil Procedure Act provides as follows:-

“19. Every suit shall be instituted in such manner as may be prescribed by rules”.

And Order IV Rule 1 of the Civil Procedure Rules reads:-

“1. Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed”. The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under Advocates Act. In the light of the above, I am not persuaded that the Applicants were entitled to institute these proceedings by way of a Chamber Summons in a miscellaneous application. Being of this persuasion I find and hold that the application dated 2nd February, 2005 and filed on 4th February, 2005 is incompetent and it struck out with costs”.

Counsel also relied on the case of **Geoffrey Ndungu Theuri Vs Law Society of Kenya (1998) eKLR**, where the court considered a suit that which meets the definition in Section 2 of the Civil Procedure Act that is **“all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules”**

Mr Isiji submitted that this case cannot be salvaged by the provisions of Article 159 of the Constitution as the application is fatally defective.

Counsel further relied on the case of **ELDORET ELC MISC APPLICATION NO 26 OF 2017 In the matter of the Estate of Cheptoo Rotich alias Lotobiko Cheptoo Rotich(deceased) and in the estate of Constantina Kabon Komen(deceased) between Alois Yano Chebet, Joseph Yano Murkomen and Kaino Kanda Rotich Vs Keneth K. Komen** where this court upheld a preliminary objection and struck out the miscellaneous application for having not been instituted in a proper manner.

Counsel therefore urged the court to uphold the preliminary objection and strike out the applicant’s miscellaneous application with costs to the respondent.

ANALYSIS AND DETERMINATION

Preliminary objections can be raised at any time before judgement and the issue raised should be on a point of law. If an issue requires the court to look for facts or evidence to determine it then it does not qualify to be a preliminary objection.

The issue for the determination in this case is whether a party can seek to enforce a right through a miscellaneous application. The applicant filed this application dated 19th May 2020 seeking for an order that the County Land Registrar do remove a restriction registered by the respondent in land parcel No. UASIN GISHU/CHEPSAITA SETTLEMENT SCHEME/828 in the name of RAJAB KIPKOSKEI MAGUT.

In the case of **Joseph Kibowen Chemior V William C Kisera [2013] eKLR** the court extensively discussed filing of suits as follows:

The word "suit" has several meanings. Black's Law Dictionary defines "suit" as any proceedings by a party or parties against another in a court of law (7)"suit of a civil nature" is defined to be a civil action.

(8) "A civil action" is an action brought to enforce, redress, or protect a private or civil right.

(9) Section 2 of the Civil Procedure Act, defines "suit" as all civil proceedings commenced in any manner "prescribed" under Section 2 means prescribed by rules.

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

(12) "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.

Under Section 19 of the Civil Procedure Act, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example the Probate & Administration Rules under the Succession Act, (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.

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.

Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule a suit can only be instituted by way of a Plaint, 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.

Section 73 of the Land Registration Act makes provision for the removal or withdrawal of a caution. This section provides as follows;

73. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

Further in the case of **Joseph Kibowen Chemjor** case (supra) Munyao J. held that;

'It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of Plaintiff in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed''.

I am also of the view that an applicant cannot use short cuts to access justice where there are laid down procedures to be followed.

As much as the respondent has argued extensively on this issue, I notice that there is a habit of some counsel overloading lay applicants with information in affidavits not within their knowledge which are legalistic and can be handled in submissions. An affidavit is evidence within the deponent's knowledge and even if counsel have informed them of some legalistic jargon, it is not fair on the deponent to be informed of precedents and doctrines quoted in an affidavit. This makes the affidavit not to be different from the submissions by counsel. Let affidavits by deponents stick to facts and leave the precedents and doctrines for submissions.

Having considered the preliminary objection and the submissions therein, I find that the preliminary objection has merit and is therefore upheld. The applicant's application dated 19th May 2020 is hereby struck out with costs to the 1st respondent.

DATED and DELIVERED at ELDORET this 18TH DAY OF NOVEMBER, 2020

M. A. ODENY

JUDGE