



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 25 OF 2020 (OS)

PAUL MIYUMO OJENGU.....PLAINTIFF/APPLICANT

VERSUS

DORICE ESHIWANI.....1ST DEFENDANT/RESPONDENT

(Sued as administratrix of the estate of GEORGE SAMMY ESHIWANI – Deceased)

THE KENYA ELECTRICITY TRANSMISSION COMPANY

LIMITED (KETRACO).....2ND DEFENDANT/RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff filed a Notice of Motion date 15th April 2020 seeking a temporary injunction restraining the 2nd Respondent from paying compensation payment to the 1st Respondent with regard to the value of the land reference No. 15352 in so far as the construction of Power Transmission is concerned, pending the hearing and determination of this suit.

The 1st Respondent replied with a Notice of Preliminary Objection dated 26th April 2020 opposing the Notice of Motion on the ground that the Notice of Motion is neither a pleading nor a suit as defined by Section 2 of the Civil Procedure Act and therefore it ought to be struck out.

In its written submissions Counsel for the 1st Respondent submitted that a Notice of Motion can only be filed under circumstances where there is already a substantive suit in place. That since the Plaintiff seeks to be declared the owner of the suit parcel by way of adverse possession, the law required the Plaintiff to file an Originating Summons as provided under Section 38 of the Limitation of Actions Act and Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules. That, as no substantive suit has been filed, the motion must fall. Counsel relied upon several cases including *Fidelity Bank v John Joel Kanyali Misc. Application No. 8 of 2014* in which Kasango J held that a suit cannot be commenced by way of a Notice of Motion, and *Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others [2018] eKLR* which struck out a Notice of Motion brought without an underlying suit.

The Plaintiff did not file any response to the Preliminary Objection.

Whether the Notice of Motion is fatally defective

Section 2 of the Civil Procedure Act defines a “suit” as civil proceedings commenced in any manner prescribed. Section 19 further provides that “every suit shall be instituted in such manner as may be prescribed by rules.”

The supporting affidavit of the Plaintiff indicates that the Plaintiff is claiming ownership of the suit parcel by virtue of prescription, claiming to have inherited the land from his late father and been in occupation for over 30 years.

Order 3 Rule 1 (1) provides that every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed. Order 37 Rule 7 provides that where a person claims to have become entitled by adverse possession to land are instituted through an originating summons application.

Having filed the Notice of Motion on its own without being based upon an Originating Summons, the Plaintiff herein cannot be said to have commenced a suit. The holding of Wendoh J in *Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others [2018] eKLR* is instructive:

“...a Notice of Motion is not the manner prescribed by the Rules to commence a suit and it is not a pleading as defined by Section 2 of Civil Procedure Act and Rules. A Notice of Motion has to be filed within a suit but has no legs to stand on, on its own... The Notice of Motion cannot be transformed into a suit. I agree with the respondent’s counsel that this application was filed by counsel who is presumed to know the law and procedure and cannot innovate his own manner of commencing a suit contrary to the set rules.

I wish to echo the decision of *Speaker of National Assembly v Karume (Supra)* that where there is a clear procedure for seeking redress of a grievance sought to be addressed in an Act of Parliament i.e. Civil Procedure Act, that procedure should be strictly adhered to.”

Therefore, the Notice of Motion as filed is incompetent and fatally defective. The Preliminary Objection ought to succeed as the Notice of Motion is neither a pleading nor a suit as defined by Section 2 of the Civil Procedure Act and therefore it ought to be, and is hereby struck out.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE