

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

MISC ELC APPLICATION NO. 51 OF 2019

FRANCIS SHIUNDU OMONDI.....APPLICANT

VERSUS

LAND REGISTRAR KAKAMEGA COUNTY.....RESPONDENT

RULING

The application is dated 21st August 2019 and seeks the following orders;

1. That this application be certified as urgent and be placed before the duty judge to be heard on priority basis.
2. That the hon. Court be pleased to issue an order directing the respondent to discharge the caution lodged on L.R. No. S. Wanga/Lureko/695 on 9th October 2009.
3. That costs be in the cause.

It is based on the grounds that, the respondent is the sole owner of L.R. South Wanga/Lureko/695 measuring 4.5 acres or thereabout cautioned vide kakamega ELC No. 224/2014. That the lodged caution of 9th October 2009 has hindered the applicant from sub dividing the suit land and passing title deeds to his children.

That ELC case no. 224 of 2014 was on 7th May 2019 dismissed in favour of the applicant and no appeal has been preferred. That the applicant has openly, peaceful and without any interruption in use and occupation since land adjudication in 1967. That it is in the interest of justice that the orders sought be granted as no prejudice shall be caused to the respondents.

This court has considered the application and the submissions therein. It is clear this application is seeking to enforce a right. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that *“every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”* Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

“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. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings”.

I concur with the authority above that a party cannot seek to enforce a right through a miscellaneous application like this one. It is my considered view that seeking an order directing the Kakamega Land Registrar to discharge the caution registered to the land parcel L.R. No. S. Wanga/Lureko/695 is an enforcement of a right. The facts are not before this court and there is no suit before me. I find this application has no merit and I dismiss the same with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DECEMBER 2019.

N.A. MATHEKA

JUDGE