



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. MISC APP. 5 OF 2013

IN THE MATTER OF PARCELS OF LAND KNOWN AS NGENDA/KIMUYU/1983,

NGENDA/KAHUGUINI/308 AND NGENDA/MUTOMO/T.83

BETWEEN

JOSEPH GITAU GITHONGO.....APPLICANT

AND

DISTRICT LAND REGISTRAR, THIKA & 2 OTHERS.....RESPONDENTS

RULING

1. The applicant filed a miscellaneous application against the respondent in which he sought orders of removal of cautions lodged against LR Numbers Ngenda/ Kamunyu/1983, Ngenda/Kahuguini/308 and Ngenda/Mutomo/T.83. Before the application could be heard a preliminary objection was raised on behalf of the 2nd and 3rd respondents on the ground that the application was fatally defective for want of form.
2. The parties were directed by Justice Mutungi to file written submissions in respect of the preliminary objection. The 2nd and 3rd respondents filed their submissions on 2nd September 2013. It would appear the applicant did not file any submissions as none are in the file. However be that as it may I will go on to decide the preliminary objection.
3. The respondents argue that as the applicant chose to come under a “*miscellaneous case*” it therefore means that his application is a civil suit which should have been instituted through one of the modes given under Order 3 Rule 1(1) of the Civil Procedure Rules. I do not find any merit in this preliminary objection. The mere fact that the applicant’s application is titled miscellaneous case No. 5 of 2013 does not mean that it ought to have been a suit to be commenced in accordance with the provisions of Order 3 Rule 1(1) of the Civil Procedure Rules. The applicant concedes that suits may be commenced by way of miscellaneous applications. What the applicant herein did was to title his case as miscellaneous case as opposed to miscellaneous application. There is absolutely nothing wrong in this. The applicant’s application is a simple application which can be brought through a miscellaneous application.
4. The concern of the Court is not to look at the form but at the substance. *Article 159 (2)* of the *Constitution* takes care of such minor procedural technicalities. The two cases cited by the 2nd and 3rd respondents are distinguishable. For instance in the case of **Wilson Evans Otieno Vs LSK & 2 others (2011) eKLR** the Court struck out the petition because what was raised went to the root of the matter and

pleadings had been filed by an incompetent person. This is not the case in this matter. I therefore find no merit in the preliminary objection which is hereby overruled with costs to the applicant.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 8th day of February, 2018.

E.O.OBAGA

JUDGE

In the presence of :

Mrs Kuria for Wamaitha Kangethe for defendants

Court Assistant : Hilda

E.O.OBAGA

JUDGE