

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 7 OF 2018

VILISILA KANINI WILLIAM.....APPLICANT

VERSUS

MBITHI NTHUKA.....RESPONDENT

RULING

1. This Ruling is in respect to the Respondent's Notice of Preliminary Objection dated 12th March, 2018 in which he averred that there is no suit property before the court for determination; that the suit has been commenced through unprocedural means and that the same should be struck out.
2. In his oral submissions, the Respondent's counsel submitted that there is no suit before the court for determination; that the Miscellaneous Application seeks the court to determine the rights of parties and that Applications are governed under Order 51 of the Civil Procedure Rules.
3. Counsel submitted that the matter before the court raises complex issues; that Order 37 Rule 8 of the Civil Procedure Rules prescribes the circumstances under which an Originating Summons may be commenced and that the current suit should be dismissed.
4. In response, the Respondent's counsel submitted that there are no rights of the parties in this matter that need to be determined; that the issues herein were settled in Succession Cause No. 389 of 1999 and that the only remaining aspect is the signing of Mutation forms.
5. This matter was commenced by the Applicant vide a Miscellaneous Application titled "*Notice of Motion*" dated 2nd February, 2018. In the said Notice of Motion, the Applicant is seeking for an order directing the Executive Officer, Machakos Law Courts, to sign the land transfer forms of parcels of land known as Iveti/Mung'ala/155, 7, 150 and 1142 (*the suit properties*).
6. The Notice of Motion is premised on the ground that the Applicant and the Respondent are jointly registered as proprietors of the suit properties; that the Certificate of Confirmation of Grant provided for the sharing of the suit properties equally and that the suit properties have been divided equally on the ground between the Applicant and the Respondent.
7. The Applicant deponed that even after agreeing, the Respondent has declined to sign the Mutation forms and that he is entitled to half share of the suit properties.
8. Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by the rules. Order 3 Rule 1 of the Civil Procedure Rules on the other hand provides that every suit shall be instituted by presenting a *Plaint* to the court or in such manner as may be prescribed.
9. The above provisions of the Civil Procedure Act and Rules mean that all suits must commence by way of a *Plaint* unless the rules prescribe otherwise. As was held by Munyao J. in *Joseph Kibowen Chemjor vs. William C. Kisera (2013) eKLR*, where there is a call to adjudicate on rights of parties, then it must be said that there is a civil action which must be commenced in the manner prescribed by the Rules.
10. The Applicant has stated that the Respondent has declined to sign Mutation forms to sub-divide the suit properties into half as directed by the Succession Court in Machakos Succession Cause No. 389 of 1999. The refusal by the Respondent to sign the Mutation forms in itself amounts to a dispute between the parties.
11. As was held in *Joseph Kibowen* case (*supra*), parties are advised to always commence an action by way of a *Plaint* unless there is an alternative procedure provided for in the statute. The Applicant in this case has not shown the court the provision of the law that mandates him to commence the current action by way of a *Notice of Motion* instead of a *Plaint*.
12. Having not filed a *Plaint*, the current suit is a non-starter. If the Applicant believes that the Succession Court settled the issue of ownership of the suit properties, then he should have moved that court in the same matter to have the orders he is now seeking to issue in that matter. He cannot otherwise commence a suit in this court in the manner he has done, on the ground that the issues were settled by the Succession Court.
13. Consequently, and for the reasons I have given above, I allow the Respondent's Notice of Preliminary Objection dated 12th March, 2018. The suit is hereby struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE