



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 76 OF 2016

JOHNSON CHERUIYOT..... PLAINTIFF

VERSUS

JOHN KIPKORIR RONO.....DEFENDANT

RULING

By a Plaint dated 5th October 2016 the Plaintiff filed suit against the Defendant seeking a permanent injunction to restrain the defendant from evicting from, trespassing, alienating, disposing off or interfering with the plaintiff's parcel of land known KERICHO/KIPKELION/CHEPSOEN BLOCK 12 (NGATUMEK) 15 measuring 15 acres and KERICHO/KIPKELION/CHEPSOEN BLOCK 12 (NGATUMEK) 17 measuring 2.5 acres. In the Plaint he also seeks an order of specific performance compelling the defendant to transfer the suit land to him. His claim is based on the fact that he purchased the suit land from the defendant's father one Michael Kiprono Rop (Deceased) who passed away before the transfer was effected.

Together with the Plaint, the Plaintiff filed a Notice of Motion pursuant to Order 40 Rule 2 of the Civil Procedure Rules seeking a temporary injunction restraining the defendant/ respondent from entering into or disposing off land parcel number KERICHO/KIPKELION/CHEPSOEN BLOCK 12 (NGATUMEK) 15 measuring 15 acres and KERICHO/KIPKELION/CHEPSOEN BLOCK 12 (NGATUMEK) 17 measuring 2.5 acres. The application is based on the plaintiff/ applicant's affidavit in which he depones that the defendant/respondent has evicted him from the suit land and is demanding sum of Kshs. 262,500 in order to complete the transfer of the suit land to the plaintiff.

The application is opposed by the defendant through his Grounds of Opposition filed on 20th February 2017. One of the grounds raised by the defendant is that the application is without merit as the plaintiff commenced his suit by way of Plaint instead of an Originating Summons. He also states that there has been inordinate delay in filing the suit as the deceased passed away in 2011 while the suit was filed in 2016 after the succession process had been completed.

In his written submissions the plaintiff maintains that he is entitled to the suit land, having purchased it from Michael Kiprono Sang in 2009. He further states that he has been in occupation of the said land and the defendant has no right to interfere with his occupation thereof. He does not touch on the issue of want of form which is raised in the defendant's Grounds of opposition.

The main issue for determination is whether there is a valid suit upon which the applicant can base the instant application.

Order 19 of the Civil Procedure Act provides as follows:

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

Order 3 of the Civil Procedure Rules provides that suits be instituted by way of Plaint or in such manner as may be prescribed.

Order 37 provides for instances where a suit may be commenced by Originating Summons. In particular Rule 3 of the Civil Procedure Rules clearly sets out the procedure for commencing a suit such as the one filed by the Plaintiff herein in the following terms:

“A vendor or purchaser of immovable property or their representatives respectively may at any time or times take out an originating summons returnable before a judge sitting in chambers for the determination of question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract)”

There are several other statutes which prescribe the mode of filing particular suits. It therefore follows that the mode of instituting a suit has to be in accordance with the law for a proper and just determination of the issues raised therein. Where a party either intentionally or by mistake moves the court contrary to the provisions of the law, the court is enjoined to order such a party to move the court appropriately. In **Siasa Pasua and 32 Others V Mbaruk Khamis & Another (2012) eKLR** Justice Ojwang (as he then was) observed as follows:

“The obligation placed upon the courts by the Constitutional requirement of Article 159 (2) (d) that they render justice without due regard to procedural technicalities does not in my opinion negate the orderly scheme of litigation provided for by the Civil Procedure Rules and the law on Originating Summons is by no means nullified”

In any event, each case must be viewed on its own peculiar circumstances and the court should not be asked to invoke the provisions of sections 1A and 1B of the Civil Procedure Act or its inherent powers under section 3A of the Civil Procedure Act where there is blatant disregard of the prescribed procedure.

In the instant case the respondent has not given any explanation why he did not institute the suit in accordance with the provisions of Order 37 (3) of the Civil Procedure Rules and the court cannot speculate. Counsel for the applicant has cited to me the case of **Joseph Kibowen Chemjor V William C. Kiseru (2013)eKLR** where the court struck out a suit for removal of a caution that was instituted by a Miscellaneous Application instead of a Plaint. Similarly, in **Cyril J. Haroo & Another V Uchumi Services Ltd & 3 Others 2014 eKLR**, the court struck out a suit that was commenced by Originating Summons instead of Plaint. I have no reason to depart from these decisions.

In the circumstances I find and hold that the plaintiff/applicant’s suit is in violation of Order 37 Rule 3 of the Civil Procedure Rules and is hereby struck out with costs. In view of this finding the court cannot entertain the Notice of Motion as it has no legs to stand on. The plaintiff is at liberty to institute a fresh suit in the appropriate manner.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF SEPTEMBER, 2017

J.M ONYANGO

JUDGE

IN THE PRESENCE OF:

Nyadimo for Ngeno for the Applicant

No appearance for the Respondent

Court Assistant; Rotich