



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 25 OF 2017

ANDREW WASSWA ATETWE.....1ST
APPLICANT

-VERSUS-

THE REGISTERED TRUSTEE

THE GENERAL OF THE SALVATION ARMY.....1ST
RESPONDENT

THE DIVISIONAL COMMANDER

THE SALVATION ARMY COAST DIVISION

MAJOR TITUS CHENGO – DC.....2ND
RESPONDENT

RULING

1. The applicant moved this Court under the provisions of Section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act and Order 1, 40 & 51 of the Civil Procedure Rules seeking the following orders:

1. Spent

2. That the 1st, 2nd & 3rd Respondents by themselves, their servants and or agents or otherwise howsoever be restrained by temporary injunction from levying distress on the Applicants household goods or otherwise howsoever interfering with the Applicants peaceful and quiet possession and enjoyment of the suit premises on plot No. MSA/MS/1/152 Likoni housing The Salvation Army DHQ pending hearing and determination of this application.

3. That the Honourable Court do lift the distress levied herein as the Applicant shall put a successful counter-claim upon the 1st and 2nd Respondents.

4. That cost of this application be provided for.

2. The application is premised on the several grounds on the face of it and the supporting affidavit of the applicant together with the annexed documents in support thereof.

3. The application is opposed by the grounds of opposition dated 26th April 2017. Before the application was argued, the 1st & 2nd Respondents took up a point of Preliminary Objection dated 19th May 2017 which was heard first and proceeded by way of written submissions. The gist of the Preliminary Objection is that the application is bad in law not having been predicated upon a suit and two; that this Court lacks jurisdiction to entertain the dispute as it relates to landlord & tenant relationship (controlled).

4. The applicant in opposing the Preliminary Objection submitted that there is another suit he filed where he has sought substantive orders. Secondly that there is no law which bars the procedure followed by the applicant and he buttressed this argument by quoting the case of **Joseph Kibowen vs William C. Kisera (2013) eKLR**. The applicant has also submitted that there is no action to sustain a suit in this miscellaneous application. On jurisdiction, he answered that he is a licensee to the Respondent by virtue of the power of attorney referred to and not a tenant as alleged.

5. The application herein is brought under the provisions of the Civil Procedure Act & Rules. Section 19 of the Civil Procedure Act provides that ***“every suit shall be instituted in such manner as may be prescribed by the rules.”*** In the case of **Joseph Kibowen Supra** cited by the applicant herein, Munyao J at page 4 & 5 stated thus; ***“it means therefore that where a person is commencing a civil suit (in the instance to enforce a civil action), he needs to follow the prescribed rules.”*** In reference to the paragraph quoted by the applicant, the Judge observed that where there is no ***“action”***, being enforced or being tried then the Court can allow such a permission to come by way of a miscellaneous application. In the Kibowen case, the subject matter of the dispute was the removal of a caution registered on a title.

6. In the dispute before this Court, the pleadings filed reveal that there are issues to be determined i.e. whether there is a landlord/tenancy relationship between the applicant & the 1st & 2nd Respondents. Secondly whether there is any money due and owing from the applicant whether as rent or whatever it is called. The applicant also claims that he has rights accruing to him being 1/3 of the suit property by virtue of the power of attorney he held and which he intends to ***“counter – claim”*** for. It means that upon the Court granting the temporary orders sought herein, the dispute will remain unresolved and since there is no suit upon which the application was pegged on, there is nothing to go for trial to allow for the determination of the issues in dispute. For this reason I do find merit in the argument that the applicant has not commenced the suit as prescribed by the rules as the matters pending before the Court cannot be resolved by way of an interlocutory application. Further the applicant did not disclose the other pending suit or why he did not file the present application in that suit where he has sought the substantive orders.

7. On the second limb on whether this Court has jurisdiction to determine this dispute, I am unable to reach any conclusion on this because there is no claim filed before the Court. This Court can only decipher whether it has jurisdiction or not on account of pleadings and responses made thereto. Consequently I will not make any conclusions on this limb of the objection. The preliminary objection succeeds in terms of ground one that

“The application is bad in law not having been predicated upon a suit.”

The application is hereby struck out with costs to the 1st & 2nd Respondents.

Dated, signed & delivered at Mombasa this 13th December 2017.

A. OMOLLO

JUDGE