Kagembe v Kamwara (Environment & Land Miscellaneous Case E001 of 2023) [2024] KEELC 3408 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3408 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023

CK YANO, J

APRIL 25, 2024

BETWEEN

MWIKAMBA KAGEMBE ..... APPLICANT

AND

GEOFFREY KIANIA KAMWARA ..... RESPONDENT

RULING

1. This ruling relates to a Notice of Motion application dated 30th January, 2023 brought pursuant to Section 152A and 152B of the *Land Act*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 rules 2, 3 and 4 and Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. The applicant seeks orders to have the respondent evicted from land parcel L.R No. Tharaka/chiakariga 'A'/1485 and for the applicant to be given vacant possession. The applicant has also sought orders for him to be at liberty to appoint any court bailiff or any auctioneer to execute the eviction order and an order directing the OCS Chiakariga Police Station to provide security during the eviction exercise.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit sworn by the applicant on 30th January, 2023. The applicant has deposed inter alia that he is the legally registered owner of L.R No. Tharaka/chiakariga 'A'/1485 (hereinafter "The suit land") where he has been doing subsistence farming and even erected a residential house. He has stated that he has owned the land before adjudication and even when the process of adjudication was done, the land was allocated to him.

3. The applicant avers that the respondent has refused to vacate the suit land despite a demand to vacate/eviction notice issued to him by the applicant. That upon being issued with a demand notice dated 10th February, 2021 to vacate the land, on 17th February 2021 the respondent rushed to this court under certificate of urgency and filed an Originating Summons in ELC (OS) 001 OF 2021 seeking orders of

adverse possession over the suit land. That the said application was found to be without merit and the same dismissed with costs in favour of the applicant.

4. The applicant avers that it is unfair and unconscionable for the respondent to continue to deny him the possession and quiet enjoyment of his land. That if the respondent continues to occupy the suit land, the applicant will suffer irreparable loss that cannot be adequately compensated by an award of damages. The applicant has deposed that it is in the interest of justice that the respondent should be evicted forthwith, given that the applicant has already given him an eviction notice and the claim for adverse possession filed by the respondent having been found to be without merit and dismissed with costs to the applicant. The applicant states that the land belongs to him and this Honourable Court has already determined that and that his proprietary right must be upheld and protected. That it is just, fair and equitable that the orders sought and prayed for be granted to avert further injustice to the applicant. The applicant avers that the respondent will not be prejudiced in any way if the orders sought are granted given that he is unlawfully occupying the applicant's land. That the applicant is the one who stands prejudiced and the balance of convenience tilts in his favour.

5. To his affidavit, the applicant has annexed copies of the title deed, green card, allocation notification and official search for the suit land. He has also annexed a copy of the demand to vacate/eviction notice dated 10th February, 2021, copies of the judgment and decree dated 9th November, 2022 in Chuka ELC (OS) No. E001 of 2021.

6. In opposing the motion, the respondent filed a notice of Preliminary Objection dated 28th February 2023 and a replying affidavit sworn by the respondent on 6th October 2023. The said Preliminary Objection was the subject of the ruling delivered by this court on 26th July 2023, and therefore I will not revisit the same.

7. In his replying affidavit, the respondent has deposed inter alia, that he has occupied a portion of the suit land measuring 7 acres or thereabout since the year 1992 which portion he has always called home. That the applicant's occupation of the suit land is only on an area measuring 1.82 acres or thereabouts which the respondent states was confirmed when the court visited the suit land in Chuka ELC No. E001 of 2021 (OS). The respondent avers that his advocate filed a non-starter suit being Chuka ELC NO. E001 OF 2021 (OS) which led to its dismissal on 9th November, 2022 and argued that this court ought not condemn him on account of the mistakes of his former advocates. The respondent has also deposed that the applicant herein did not file any counter-claim for the respondent's eviction in Chuka ELC E001 OF 2021 (OS) and therefore his present application for the respondent's eviction from the suit land is an afterthought and should be dismissed with costs.

8. The application was canvassed by way of written submissions. The Applicant filed his submissions dated 20th November, 2023 through the firm of Kimakia Magara & Partners Advocates while the Respondent filed his dated 26th February 2024 through the firm of Waklaw Advocates.

Applicant's Submissions

9. The applicant's counsel gave a brief background of the case and identified three issues for determination. The first issue was whether the occupation of the suit property is lawful. It was submitted that evidenced by the decision made in ELC (OS) No. E001 of 2021, ownership of the suit property is not contested therefore, the Respondent is illegally in occupation of the Applicant's property. The Applicant cited the provisions of section 152 A of the *Land Act*. It is submitted that the respondent is still in possession of the suit property and has made it impossible for the Applicant to quietly enjoy his property and therefore his occupation, possession and/or utilization of the suit property is illegal and unlawful.

10. The second issue submitted by the applicant is whether the application should be allowed. The applicant cited Section 152B of the *Land Act* and submitted that having proven that the Respondent is unlawfully in possession and occupation of the suit property, it will be in the interest of justice and fairness if the honourable court grants him the order of eviction.

11. The Applicant also cited section 152E of the *Land Act* and relied on the case of *Margaret Karwirwa Mwongera –v- Francis Kofi* (2019)eKLR.

12. It is the Applicant's submission that despite the Respondent unlawfully being in occupation and having physical possession of the suit property, he is still the registered and lawful owner of the suit property and should be granted the eviction orders sought. The Applicant relied on the case of *Republic –v- Attorney General & Another Ex-parte James Alfred Koroso* (2013)eKLR.

13. Learned counsel for the applicant submitted that the court had fully considered ELC (OS) No. 001 OF 2021 involving the parties herein and had proceeded to render its judgment dated 9th November, 2022 and issued a decree dated 16th November, 2020 declaring that the Respondent's claim lacked merit and therefore dismissed it.

14. The Applicant submitted that based on the contents of the Notice to vacate dated 10th February, 2021 and the respondent having been served with this order, it is the Applicant's humble submission that adequate notice was issued against the respondent and that its contents and service was done in accordance with Section 152E of the *Land Act* 2012, hence the court should consider the said notice as appropriate and in conformity to the provisions of the Law.

15. The Applicant further cited Article 159 (2) (b) of *the Constitution* of Kenya, 2010 which mandates that justice ought not to be delayed. That the Respondent claimed adverse possession over the Applicant's property but failed to bring himself within the limits of the doctrine of adverse possession since his claim was unmerited and dismissed and therefore thee respondent automatically lost his bid to retain or claim the suit property.

16. The last issue identified by the applicant was who should bear costs. The applicant submitted that costs follow the event and a successful litigant has a right to recover his costs. The Applicant relied on the case of *Super marine Handling Services Ltd –v- Kenya Revenue Authority* (2010)eKLR and urged the court to allow the application and grant the orders of eviction with costs.

Respondent's Submissions

17. In his submissions, the Respondent also gave a background of the case and submitted that the Application dated 30th January, 2023 is not a suit to qualify issuance of substantive orders sought by the Applicant.

18. The respondent's counsel submitted that it is not contested that the Applicant did not file any counterclaim for eviction of the Respondent in Chuka ELC 001 of 2021 (OS) and which land parcel has been in occupation by the respondent all his lifetime with his family members. It is the respondent's submission the judgment in Chuka ELC 001 OF 2021 (OS) did not order tor the eviction of the Respondent but simply dismissed the respondent's suit.

19. The respondent submitted that no Law barred the Applicant from pleading a counterclaim for the Respondent's eviction in Chuka ELC 001 OF 2021 (OS). That the Applicant's submission to the contrary have no legal basis and therefore the instant Application is an afterthought.

20. The respondent submitted that the provisions of sections 152A, 152B and 152E of the *Land Act* are not applicable to evict the respondent in the present circumstances.

21. The respondent further submitted that the Applicant's application herein is not a competent suit to qualify the issuance of the substantive orders sought. It is the respondent's submission that his eviction from the suit land L.R Tharaka/Chiakariga 'A'/1485 and which land parcel he has occupied all his life time demands a substantive suit being filed and the Respondent given a chance to defend the suit to its logical conclusion and as per the law. The respondent cited section 2 and 19 of the *Civil Procedure Act* as read with orders 3 Rule 1 of the *Civil Procedure Rules* on how a suit is commenced. The respondent's counsel relied on the case of Chuka ELC MISC Application No. E014 of 2022 and submitted that a Miscellaneous Application is not a substantive suit and therefore the instant application is fundamentally defective and devoid of merit and ought to be dismissed for being gross abuse of the court process.

22. The respondent submitted that he has filed an appeal at the court of Appeal against some findings in ELC No. 001 of 2021 and submitted that it is in the interest of justice that the respondent ought not to be evicted before the Appeal is heard and determined.

23. It is the respondent's submission that the applicant is merely in occupation of 1.82 Acres of the suit land and stands to suffer no loss and damage if the instant application is dismissed.

24. The respondent submitted that despite the Applicant being registered proprietor of the suit land, the Applicant is not relieved of his duties or obligations as a trustee of the respondent under section 28 of the *Land Registration Act* No. 3 of 2012. It is the respondent's submission that the Applicant is holding the title of 7.00 Acres of L.R Tharaka/Chiakariga 'A'/1485 in trust for the respondent and that he will be filing a suit for his customary trust interests to be recognized by the court.

Analysis And Determination

25. I have considered the application, the response and the rival submissions. The issues for determination are whether the application has merit and whether the orders of eviction sought can be granted.

26. The application is brought pursuant to the provisions of Section 152A and 152B of the *Land Act*. The provisions of Section 152A and 152B respectively provide that a person shall not unlawfully occupy land and that evictions are to be undertaken as provided by the *land Act*. Section 152E of the *Land Act* provides as follows:

> " 152E. Eviction notice to unlawful occupiers of private land.
>
> 1. If with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice of not less than three months before the date of the intended eviction.
>
> 2. The notice under subsection (1) shall:
>
> a. Be in writing and in a national and official language;
>
> b. In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
>
> c. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

d. Be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area".

27. I have seen the notice marked "MK5" annexed to the affidavit in support of the application herein. It is dated 10th February, 2021 and is addressed to Geofferey Kiamia, the respondent herein. The notice required the respondent to leave the suit land and remove all structures put up by the applicant on the said land by 28th February, 2021. The said notice did not cite section 152A, 152B and 152E. It will be seen from Section 152E(d) that an eviction notice must be for a period of not less than three months and is supposed to be served upon the Deputy County Commissioner in charge of the area where the land is situated and also upon the officer commanding police Division of the area. In my view therefore, the said notice did not comply with the provisions of the law, namely, sections 152A to 152E of the *Land Act*. In as much as the respondent's suit Chuka ELC No. E001 of 2021 (OS) which sought orders of adverse possession over the suit property was dismissed, it was still incumbent upon the Applicant herein to issue a notice that fully complied with the law. It should be noted that no positive orders were issued in favour of the Applicant in the suit that was dismissed, save for costs. This is because the applicant never filed any suit or counterclaim for eviction against the respondent.

28. In the case of *Julius L. Marten –v- Caleb Arap Rotich* [2021]eKLR, Mutungi J. in a persuasive decision held as follows:

> " Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession for some time. Before such an order is given the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard."

29. Whereas there is no dispute over the ownership of the disputed property in my view the applicant ought to adhere to the clear provisions of the law and issue a proper notice as stipulated in Sections 152A to 152H of the *Land Act*.

30. Further, as a general rule, suits are instituted by way of a plaint unless the rules prescribe any other manner. Order 3 Rule 1 of the *Civil Procedure Rules* stipulates that:

> " every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed. Similarly, Section 19 of the *Civil Procedure Act* provides that "every suit shall be instituted in such manner as may be prescribed by the rules."

31. It will be observed that Section 19 of the *Civil Procedure Act* does not pretend that the *Civil Procedure Rules* gave a monopoly on how suits may be instituted. There could be rules in other statutes on how proceedings may be commenced. However, what is of importance is that where a person seeks to enforce a civil action, he/she needs to follow the prescribed provisions of the law to enable a court determine whether to grant the orders sought or not. In my view, the Applicant cannot seek the orders sought in the miscellaneous application without having adhered to the clear provisions of the law. In this case, the Applicant has not adhered to the provisions of the *Land Act*, and/or the *Civil Procedure Act*.

32. Consequently, I find that the application before the court is devoid of merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH APRIL, 2024

In the presence of:

Court Assistant – Martha

Nadiah for Applicant

No appearance for Kirimi Muturi for Respondent

C.K YANO,

JUDGE