



**Mutuku v Rukungu (Environment and Land Appeal E012 of 2024)
[2024] KEELC 13346 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**JM MUTUNGI, J
NOVEMBER 21, 2024**

BETWEEN

VICTORIA SYUMBUA MUTUKU APPELLANT

AND

GRACE WANGARI RUKUNGU RESPONDENT

(Being an appeal from the Ruling of the Honourable Martha Opanga (PM) in the Chief Magistrates' Court at Wang'uru MCCMISC Case No. E006 of 2023 in Grace Wangari Rukungu v Victoria Syumbua Mutuku, delivered on 27th February, 2024)

JUDGMENT

1. This Appeal arises from a Ruling delivered by Hon. Martha Opanga (PM) in Wang'uru MCCMISC Case No. E006 of 2023 on 27th March 2024, where the Learned Trial Magistrate dismissed a Preliminary Objection taken by the Appellant in the case.
2. The Respondent filed a Notice of Motion application dated 16th May, 2023 before the trial court where she sought for the following orders;
 - a. That the Appellant herein do deliver vacant possession of land parcel number Mbeere/Wachoro/896 to the Respondent herein forthwith.
 - b. That the Appellant herein be forcefully evicted from land parcel number Mbeere/Wachoro/896.
 - c. That the Officer Commanding Station, Makutano Police Station do provide security and supervise the eviction.
3. In the Notice of Preliminary Objection, the Appellant asserted that the Respondent's Notion of Motion, dated 16th May 2023, contravened Section 19 of the Civil Procedure Act, Order 3 Rule 1 of the



- Civil Procedure Rules, and Sections 152(A) through to (H) of the Land Act. The Appellant argued that these violations rendered the notice of motion fundamentally flawed and warranted its dismissal.
4. On 22nd August 2023, the Trial Court directed that the Notice of Motion and the Preliminary Objection be disposed of by way of written submissions.
 5. In the Ruling dated 27th February 2024, the Trial Court dismissed the Appellant's Notice of Preliminary Objection and allowed the Respondent's Motion as prayed.
 6. Dissatisfied and aggrieved by the said Ruling, the Appellant appealed to this Court on the grounds set out in the Memorandum as follows:-
 - a. The Learned Magistrate erred in Law and in fact in departing from the cardinal principle in law, that parties are bound by their pleadings.
 - b. The Learned Magistrate erred in Law and in fact in finding that the Respondent had demonstrated that she is the legal owner of land parcel number Mbeere/Wachoro/896 by production of a copy of a title deed, which title deed read that the same was issued on 11th January, 2023 whereas the Respondent's pleadings made reference to the issuance date as 8th January, 2021.
 - c. The Learned Magistrate erred in Law and in fact in departing from the principle that, a suit shall be instituted in a manner prescribed by the rules, and which rules do not prescribe the institution of suits by way of a Notice of Motion.
 - d. The Learned Magistrate erred in Law and in fact in failing to grant the Appellant a right to a fair hearing taking into consideration that the orders sought in the Notice of Motion were serious and drastic orders, as it related to grant of vacant possession and forceful eviction.
 - e. The Learned Magistrate erred in Law and in fact in failing to take into consideration the Appellant's submissions in the Ruling delivered on the 27th February, 2024.
 7. The Appellant sought the following orders;
 - a. That this Honourable Court do allow the Appeal herein, and an order be made setting aside the Senior Principal Magistrate's Court decision and/or order in Wang'uru MCCMISC APP. No. 6 of 2023 dated 27th February, 2024 dismissing the Appellant's Notice of Preliminary Objection, whilst allowing the Respondent's Notice of Motion Application dated 16th May, 2023, and substituting the same with an order upholding the Appellant's Notice of Preliminary Objection dated 14th July, 2023.
 - b. That costs of this appeal be awarded to the Appellant.
 8. The parties canvassed the Appeal by way of written submissions. The Appellant filed her submissions dated 10th July 2024 while the Respondent filed hers dated 7th September 2024. I have read and considered the submissions filed by the parties and the Record of the Appeal. The crucial issue that arises for determination in this Appeal is whether the Respondent's suit commenced by way of Miscellaneous application was appropriate in view of the orders prayed for in the application. The Appellant's position was that the commencement of the "suit" by the Respondent by way of a Miscellaneous application was not in accordance with prescribed manner of instituting suits under the Civil Procedure Act and the Rules and was therefore incompetent and should have been struck out.



9. The Appellant submitted that the action by the Respondent was commenced in a manner that was not in accord with Section 2 of the Civil Procedure Act, Order 3 Rule 1 and Section 19 of the Civil Procedure Act. It is essential to set out these provisions:

Section 2 of the Civil Procedure Act defines “suit” thus:-

"Suit" means all civil proceedings commenced in any manner prescribed.

"Rules" means rules and forms made by the Rules Committee to regulate the procedure of Courts.

"Prescribed" means prescribed by Rules.

Section 19 of the Civil Procedure Act provides as follows:-

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

Order 3 Rule (1) of the Civil Procedure Rules prescribes how a suit may be commenced and provides as follows:-

Order 3 (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

10. The Respondent for her part in her submissions contended the Learned Trial Magistrate properly dismissed the Preliminary Objection. The Respondent argued that she complied with the Law as she served the Appellant with the requisite Notice of eviction and that the Learned Magistrate found that the Appellant was in unlawful occupation of her land. The Respondent relied on the Case of Julius Ringera –vs- Charles Harrison Mwangi Muhindi (2022) KEELC, 2481 (KLR) where the Court in an action commenced by way of Miscellaneous application by the Applicant seeking an order of eviction predicated under Section 152 A, B, E and F of the Land Act allowed the application and issued an order of eviction.
11. The Appellant for her part in support of her position that the Respondent needed to file a substantive suit where the question whether the Respondent was entitled to an order of eviction would be determined, relied on the Case of Julius L. Marten –vs- Caleb Arap Rotich (2021)eKLR and Tatecoh Housing & Co-op Sacco Ltd –vs- Qwetu Sacco Ltd (2021) eKLR where the Courts took the position that an order of eviction could not be predicated on a miscellaneous application and that a substantive suit would need to be instituted.
12. In the Case of Julius L. Marten –vs- Caleb Arap Rotich (supra) this Court sitting at Nakuru was of the view that where ownership is contested a miscellaneous application to support an application for eviction would be inappropriate. In the case I rendered myself thus:-

“From a reading of Section 152C, 152D and 152E of the Land Act, 2012 it is not clear how a party ought to approach the Court for relief under Section 152F. Is it by way of a formal suit and/or miscellaneous application as in the instant suit? An 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 of 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. Section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. What is the situation where there is no dispute on ownership and the occupation is unlawful? What



is the situation where there is disputed ownership of the property? In my view where the ownership is disputed the summary procedure that Section 152F appears to contemplate would not be suitable and a formal suit would be advisable”.

13. In the Case of Tatecoh Housing & Co-op Ltd –vs- Qwetu Sacco Ltd (supra) Munyao, J also was of the view that an order of eviction would not be available on a miscellaneous application as parties need to be heard on their evidence. The Judge observed at Paragraph 7 of his Ruling as follows:-

Without much ado, I will agree with the position of the Respondent, as raised in the Preliminary Objection and buttressed by Mr. Muthami in his submissions, that the Applicant cannot seek the orders sought in its miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought in the motion are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of a case. What the Applicant needed to do was therefore to file a substantive suit for eviction through a Plaint. It is upon hearing of such suit, and if successful, that an order of eviction would issue. The other order sought, that is of distress for rent, is covered by the *Distress for Rent Act*, and I have not been pointed to any provision in that statute which requires the Court to issue orders before distress may be levied. The suit as commenced is therefore a non-starter and is hereby struck out. Having struck out this miscellaneous application, there is really no need for me to determine whether this was a dispute to be referred to the Cooperatives Tribunal under Section 76 of the Cooperative *Societies Act*.

14. In the instant matter the Appellant commenced her action by way of a Miscellaneous application and the Notice of Motion as is evident was not anchored on any suit. The application was seeking final orders. In the Replying Affidavit the Appellant filed, she claimed she was the beneficial owner of the suit property and hence ownership was disputed. How was the ownership issue to be determined in a Miscellaneous application? To determine the issue of ownership evidence would need to be taken. It is noteworthy that the Respondent acquired title that she exhibited on 11th January, 2023 and filed the application dated 16th May, 2023 in the Lower Court on 30th May 2023. The application did not explain how the Respondent acquired ownership. The application equally did not explain under what circumstances the Appellant came to be in occupation of the suit land and/or for how long she had been in occupation. These are issues that would only have become clear if a substantive suit had been filed and parties furnished their evidence that would be tested during the trial.
15. As I observed in the Case of Julius L Marten (supra) Section 152 A-F of the *Land Act*, 2012 (as amended) does not prescribe how a party ought to approach Court. Section 152F of the Act provides that a party served with a Notice to vacate may apply to Court for relief against the notice but does not indicate what form such application to Court ought to take. My view is that the *Civil Procedure Act* and the Rules thereof that regulate the institution of suits would apply and that the suit, unless it is predicated on *the Constitution* would be commenced either by Plaint or Originating Summons as the *Land Act* under Section 152A-F does not provide how such an action would be commenced.
16. The Court of Appeal in the case of Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR, addressed the issue of institution of suit thus:-

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the Learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the Appellant or and 2nd Respondent would suffer or what



purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the Appellant that the application was fatally and incurably defective.”

17. The Supreme Court in the Case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR also commenting on the issue of observance of Procedural Rules stated;

“(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

18. Having reviewed and considered the pleadings and the material that was placed before the Learned Trial Magistrate as I am required to do as an Appellate Court, I am satisfied the Learned Trial Magistrate fell in error in failing to uphold the Preliminary Objection taken by the Appellant. The Preliminary Objection had merit and ought to have been sustained.

19. In the result the Appeal has merit and I allow the same. I accordingly set aside the Ruling and orders of the Learned Trial Magistrate delivered on 27th February, 2024 and substitute thereof an order upholding the Respondent’s Preliminary Objection. The Appellant’s application before the Lower Court accordingly stands struck out. The Appellant is awarded the costs of the Appeal and of the Court below.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 21ST DAY OF NOVEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

