



Kurgat v Land Registrar & 3 others (Environment and Land Miscellaneous Application E027 of 2024) [2024] KEELC 14195 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E027 OF 2024
JM ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

NANCY KURGAT APPLICANT

AND

LAND REGISTRAR 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

ESTHER WANJIKU CHIELA 3RD RESPONDENT

ELIJAH MOMANYI 4TH RESPONDENT

RULING

1. The Applicant herein was the 4th Defendant in Eldoret E&L Case No. 448 of 2012, where the 3rd Respondent sought to have the title deed to the Uasin Gishu/Kimumu/3762 [the suit property herein] cancelled or substituted to bear her names. The said suit was dismissed with costs, with the court making a finding that the Applicant was a bonafide purchaser. The 4th Respondent herein, had registered a caution on the suit property that was never removed. The Applicant thus filed a Notice of Motion dated 6th June, 2024 seeking removal of the Caution on Parcel No. Uasin Gishu/Kimumu/3762 to enable him effect the transfer of the land into his name and costs.
2. In response to the Application, the 3rd Respondent filed a Notice of Preliminary Objection dated 16th September, 2024 on grounds that:
 - a. That there is no suit properly filed before this court for determination.
 - b. That the Miscellaneous application offends the provisions of Order 3 Rule 1 and Order 37 Rule 5 of the Civil Procedure Rules 2010.



- c. That this Miscellaneous Application is fatally defective, incompetent, bad in law and should be struck out with costs to the 3rd Respondent.
3. This ruling is in respect of the aforesaid Notice of Preliminary Objection [PO]. On 25th September, 2024 the court directed that the PO will be canvassed by way of written submissions. The parties complied and filed their submissions as directed.

3rd Respondent's Submissions

4. The 3rd Respondent filed his submissions dated 1st October, 2024 in support of his PO. Counsel started by first relying on the case of Joseph Kibowen Chemjor v William C. Kibera [2013] eKLR for the discussion on filing of suits and the definition of the word suit. It was submitted on his behalf of the 3rd Respondent that Order 3 Rule 1[i] of the Civil Procedure Rules 2010 provides for the manner in which suits may be instituted. Counsel submitted that a Notice of Motion is not legally recognised as an originating process and can only be filed within a properly instituted suit. Counsel also submitted that Order 37 Rule 5 provides that an application under Section 116 of the Government Lands Act or Section 57 of the Registration of Titles Act shall be made by originating summons unless there is suit involving the land then the summons are to be made in that suit.
5. Counsel cited Section 109 of the *Land Registration Act* which repealed the Government Lands Act and argued that the Applicant ought to have filed an Originating Summons if she desired to remove the caution. Alternatively, she should have filed a Chamber Summons in Appeal case being Civil Appeal No. 27/2020 Esther Wanjiku Chiela v Lason Mayodi & 3 Others. Counsel also cited Section 73[1] of the *Land Registration Act* [LRA] on removal of cautions. He relied on the case of Joseph Kibowen Chemjor Case [Supra] in which it was held that a suit for removal of a caution is to be commenced by way of Plaint, where the Plaintiff would need to show on a balance of probabilities why the Defendant has no right to place a caution. Counsel submitted that the Applicant is trying to use shortcuts where there is a well laid procedure. He urged that the PO has merit and asked that the application be struck out with costs.

4th Respondent's Submissions

6. The 4th Respondent's submissions are dated 2nd October, 2024. Counsel argued that under Section 73 of the LRA, only the registered owner can apply to have a caution removed. Counsel pointed out that the Applicant herein is not the registered owner of the land, thus he has no locus standi to seek the orders herein. Counsel submitted that if the application for removal of caution is intended to enforce the judgment in Eldoret ELC No. 448 of 2012, it should have been filed in that suit. In addition, Counsel claimed that since there is a pending Appeal, the judgment is not final. Counsel also contended that, having failed to raise a counterclaim seeking removal of the caution, the Applicant is precluded by the doctrine of res judicata from filing the instant Motion. Further, the 4th Respondent who was the cautioner, was not a party to the suit.
7. Counsel for the 4th Respondent also submitted that a Miscellaneous Application is not a recognized manner of commencing proceedings, especially not for removal of a caution. Counsel contended that the application was thus incompetent and ought to be dismissed with costs. Counsel pointed out the fact that the registered owner of the land is not a party to the application herein. Counsel also argued that by virtue of the doctrine of exhaustion, the Applicant should have approached the Land Registrar first, which is the procedure at Section 73 and 78[1], and only file suit after exhausting that avenue. Counsel relied on the cases of Anna Chesaina Kenduiywa v Nandi County Land Registrar [2022]



eKLR, Joseph Kibowen Chemoir Case [Supra] and Rajab Kosgei v Nuru Jepleting Choge [2020] eKLR in support of his arguments.

Applicant's Submissions

8. In the Applicant's submissions hereto dated 11th October, 2024 Counsel submitted that Order 37 Rule 5 provides that an application under 71 of the LRA, is to be made by Originating Summons unless there is a pending suit involving the land, where the it is by summons in that suit. Counsel submitted that under Section 73[1] and [2] of the said Act, a caution may be withdrawn by the cautioner or removed by order of the court or the Registrar. That there is therefore nothing in this section that provides for how an application under the said Section 73 should be instituted. Counsel explained the instant application is premised on the finding of the trial court that she was a bona fide purchaser of the suit property.
9. Counsel also submitted that the 4th Respondent was aware of the suit having testified as a witness therein, therefore he cannot now claim to have interest in the suit property yet he did not ask to be enjoined. Further, that filing a fresh suit would be tasking the court with issues that had already been heard and a determination made. The issue of the caveat can thus entirely be heard and disposed of through this application. Counsel argued that Section 71 of the LRA does not apply to Order 37 Rule 5 of the Civil Procedure Rules, and Order 3 also does not apply. Counsel further submitted that if at all there is any technicality, it is not such that it cannot be cured by Section 3A of the Civil Procedure Rules. He relied on Jane Wanjiku Mwangi & Another v Nathan Ndegwa Njeru [2020] eKLR, urging the court to dismiss the PO and allow the application.

Analysis and Determination

10. The single issue for determination is whether the preliminary objection by the 3rd Respondent has merit, and should be allowed. A Preliminary Objection was defined in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969]EA 696, where at page 700 Pr. D-F Law JA as he then was had this to say:-

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

11. Sir Charles Newbold. P. on the other hand at pg.701 paragraph B-C added the following:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

12. From the above authority, the test to be applied in determining whether the a Preliminary Objection meets, the threshold or not is, as per Sir Charles Newbold that, first, the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.
13. I have applied the ingredients in the Mukisa Biscuits Case [supra] to the rival arguments herein. I first note that although the parties were directed to submit on the PO herein, they mostly ended up arguing



on the merits of the main application. I will nevertheless endeavour to restrict the determination hereto strictly to the PO, and avoid delving into the main application at this moment, because that is not the object of a PO. As explained in the Mukisa Biscuits Case [Supra], a PO must only raise a pure point of law. The 3rd Respondent raised three grounds of objection. The first ground of objection raised in the 3rd Respondent's PO is "That there is no suit properly filed before this court for determination". The 3rd Respondent also objected to the application for reason "THAT this Miscellaneous Application is fatally defective, incompetent, bad in law and should be struck out with costs to the 3rd Respondent".

14. From a cursory glance, these two cannot be said to raise pure points of law as they would require an investigation of the entire suit herein including the previous suit, by the Applicant to determine whether it is properly before the court. It is also through such an endeavour that the court would be able to determine whether the application is indeed fatally defective, incompetent and bad in law to warrant it being struck out at this preliminary stage.
15. The second ground is "THAT the Miscellaneous Application offends the provisions of Order 3 Rule 1 and Order 37 Rule 5 of the Civil Procedure Rules 2010". This in my opinion is the only point of law raised in this PO. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. Order 3 Rule 1 of the Civil Procedure Rules prescribes the manner in which suits should be instituted and stipulates thus:-

"Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed."

16. This position was applied in the case of Board of Governors Nairobi School v Jackson Ileri Geta [1999] eKLR, where the court clarified how a suit can be commenced when it said:-

“

“2. Pleading is defined in Section 2 of the *Civil Procedure Act* to: Include a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV Rule 1 [now Order 3 Rule 1] which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

3. The use of the term “summons” in the definition of the term “pleading” must be read to mean “originating summons” as that is a manner prescribed for instituting suits.

4. Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the *Civil Procedure Act* and Rules and made thereunder.”

17. The general rule therefore is that a Notice of Motion is not legally recognized as an originating process and can only be filed within a properly instituted suit. I have no doubt in my mind that a suit as defined under Section 2 of the *Civil Procedure Act*, refers to all civil proceedings commenced in any manner prescribed, which I am convinced refers to the means prescribed by rules as is provided under Section 19 of the said Act. However, as held by the court in the case of Joseph Kibowen Chejor v William C. Kisera [supra], which has been cited by the Respondents, Section 19 does not confine a monopoly of rules, to the Civil Procedure Rules on how a suit should be instituted.



18. The said Section 19 does not as of necessity grant a monopoly of the term “rules” to mean only the Civil Procedure Rules. It only provides that suits may be instituted in the manner prescribed by the rules and in the considered view of this Court, there could be rules in other Statutes on how proceedings therein may be commenced. In *Abdi Abdullahi Somo v Ben Chikamai, Ahmed Qureshi & Director of Public Prosecutions* [2016] KEHC 4283 [KLR], it was held that:-

“In my life as a judge, I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that, as a matter of general principle, a Notice of Motion is a competent way of initiating substantive proceedings in court. It will all depend on the particular statute governing the particular proceeding in question. Therefore, where the law provides for the manner of commencing a suit or proceedings in court, then that procedure applies. For instance, proceedings for appointment of inspectors under the *Companies Act* are commenced by way of Notice of Motion yet they are substantive proceedings. Close to the proceedings at hand, substantive judicial review proceedings under Order 53 rule 3 of the Civil Procedure Rules are commenced by a Notice of Motion. Before I conclude on this point, I should say that *the Constitution* seems to seek keeping of formalities especially on applications based on denial, or violation or infringement or threatening of fundamental rights and freedoms, to bear minimum. On this please see article 22[3] [b] of *the Constitution*. I need not say more about this objection. It fails flat.”

19. This position was reiterated in *Ngoah v Musolo & 2 others* [Environment and Land Appeal E023 of 2022] [2024] KEELC 836 [KLR], here the court held that:-

“Further, in exceptional cases, a suit can be commenced by a notice motion as the 1st respondent did on condition that there is a particular statute governing the procedure of moving the court in such a manner [see *Abdi Abdullahi Somo -v- Ben Chikamai & 2 Others* [2016] eKLR]. In addition, where a statute does not provide a procedure for a particular proceeding, the court can be moved by an originating motion. [See *Saint Benoist Plantations Ltd v Jean Emile Adrien Felix* [*CA No 25 of 1954*].”

20. There are therefore exceptional circumstances in which a party may be allowed to institute a particular matter by way of a notice of motion. In *Synergy Industrial Credit Limited v Mitchell Cotts Freight [K] Ltd* [2020] eKLR, the High Court at Mombasa gave an example of a situation where a party may file a Miscellaneous Application as follows:-

“24. Needless to say therefore, where a person is commencing a civil suit [in this instance to “enforce a civil action”], he needs to follow prescribed rules, to wit, the Civil Procedure Rules. Accordingly, Order 3 Rule 1 of the requires that:

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

25. Stated in simpler words, the above provisions of the Civil Procedure Rules mean that all suits must commence by way of a Plaint unless the rules prescribe otherwise. This Court is also alive to the argument that there are times when all that a person wants is an Order of court where the rights of the parties are not going to be determined. In such a case, it would be appropriate for such



a party to file a miscellaneous application because the court is not being asked to determine any other issues between the parties.”

21. Applying the above principles to the facts of this matter, this court has perused the Motion as filed and finds that it raises no obligations that anyone of the parties owes to the other. The distinction is that, where there is a call to adjudicate on rights of parties, then it must be said that there is a civil action and/or claim and this must be commenced in the manner prescribed by the Civil Procedure Rules. The issue of removal of the caution on the suit property is not a contentious issue that must be tried on merits. The Applicant’s only prayer in this matter is the removal of the caution, she has not sought any substantive orders. The substantive matters were already determined in Eldoret ELC No. 448 of 2012. Therefore, a miscellaneous application is the appropriate way to move the court. In the Synergy Industrial Credit Case [Supra].
22. That aside, the Respondents argued that the Applicant ought to have instituted the suit by way of Originating Summons. Order 37 of the Civil Procedure Rules deals with Originating Summons and sets out instances when a party may take out Originating Summons. Order 37 Rule 8 of the Civil Procedure Rules provides that:-
 - “ 8. Application under the Registered *Land Act* [Order 37, rule 8]
An application under the *Land Registration Act* [Cap. 300] other than under Part VII and Part VIII thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit.”
23. The said provision applies to applications under the LRA, other than those under Part VII and VIII thereof. The lodging and removal of cautions in the LRA is to be found at Part VII of the LRA which bears the heading “Restraints on Dispositions”, and is therefore one of the sections to which Order 37 does not apply. I find that since the issue raised in the main application herein does not revolve around ownership of the suit land, it is not substantive in nature. It is therefore not prudent that this matter be instituted by way of Plaintiff.
24. As to the fact that the registered owner of the suit property is not a party to this Miscellaneous Application, it must be noted that it is the 4th Respondent herein who is alleged to have lodged the Caution and not the Registered owner. The only requirement on removal of cautions is that the cautioner is given an opportunity to participate in the proceedings. See the case of Mwangi Rukwaro & Joseck Mwangi Macharia v Land Registrar, Nyeri [2019] KEELC 3985 [KLR], the court held that:-
 - “ 19. Whilst this court has power to order for removal of the caution/restriction herein, it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the applicants should invoke the process provided in Section 73[2] [3] [4] of the *Land Registration Act*, 2012 as it is only through that process that it may be determined that there is no person with an interest in maintenance of the caution.”
25. The Cautioner, being the 4th Respondent, in this matter is included in the proceedings herein. Having been included in this Application, he is being given the opportunity to participate in the proceedings as to whether the caution ought to be removed or not as required under Section 73 and & 78 of the LRA.



26. There is also the contention that the Applicant did not abide by the doctrine of exhaustion, this was only raised in the 4th Respondent's submissions. Be that as it may, Section 73 of the LRA provides three instances for the removal of a caution; it can either be withdrawn by the cautioner; or removed by the Registrar or by an order of the court. As the Applicant has rightfully submitted, Section 73 does not prescribe the manner in which such an application should be made/instituted. The Respondent's objection is that Order 37 Rule 5 provides that an application for removal of a caution ought to be by way of Originating Summons. Order 37 Rule 5 provides as follows:-

“An application under section 71 of the Land Registration Act [Cap. 300] shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made by summons in that suit.”

27. However, Section 71 mentioned above does not deal with the removal of cautions but instead, as stated in that section, the lodging of cautions. Therefore, the said Order 37 Rule 5 does not apply to such an application for removal of a caution.

28. Moreover, a preliminary Objection can only be proper where there is no fact that needs to be ascertained. A myriad of issues has been raised in the Respondents' submissions. These are that the registered owner of the suit property was not included in this application; that the 4th Respondent was not a party to the suit; that there is an appeal filed against the judgement of the trial court in which the Applicant ought to have lodged the Application for removal of the caveat. All these issues do not meet the requirements of a preliminary objection for the mere reason that to make a determination thereon, the court will need to ascertain the following facts:

- i. Who lodged the caution sought to be removed?
- ii. Whether or not the 4th Respondent herein was a party to Eldoret ELC No. 448 of 2012
- iii. Whether indeed there is a pending Appeal touching on the land, in which the Appellant ought to have filed the Application for removal of caution.

29. These are factual matters for which the court would have to refer to evidence in order to make its decision. For the reason that the court will have to delve into factual considerations, the said issues are automatically taken out of the realm of a preliminary objection.

30. My understanding of the principle set by the Mukisa Case [supra] is that all the three ingredients, I have identified above must be present before a Preliminary Objection can be sustained. In this situation, none of the three ingredients have been satisfied. Consequently, the 3rd Respondent's Notice of Preliminary Objection dated 16th September, 2024 lacks merit, the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF NOVEMBER 2024.

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Mathai for the 3rd Respondent

No appearance for the Applicant



No appearance for the 1st, 2nd and 4th Respondents

Court Assistant: Kuto

