



Hamad v Wambuto; Hamad (Applicant); Hamisi (Deceased) & another (Respondent) (Environment and Land Appeal 35 of 1998) [2024] KEELC 13936 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13936 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 35 OF 1998
EC CHERONO, J
DECEMBER 17, 2024**

BETWEEN

ASHA CHARIK HAMAD APPELLANT

AND

ISMAEL LUNANI WAMBUTO DEFENDANT

AND

ASHA CHARIK HAMAD APPLICANT

AND

FATUMA NJOA HAMISI (DECEASED) RESPONDENT

MWANARAMBU SHISIA HAMISI RESPONDENT

RULING

1. This ruling is in respect of the Applicant’s Notice of Motion application dated 30/11/2024 and seeking the following orders;
 - a. That this application be certified urgent for the hearing hereof and the application be heard ex-parte in the first instance and service be dispensed with in the first instance.
 - b. That this honourable court be pleased to issue eviction orders against the respondents, themselves, their agents, workers and whoever stays and or occupy on L.R NO. E.Bukusu/S.Kanduyi/450 which is the applicants parcel of land.
 - c. That this honourable court be pleased to issue an eviction order against the respondents, themselves, their agents, workers, servants and or whoever stays and or occupy on L.R NO. E.Bukusu/S.Kanduyi/450 which is the applicants parcel of land.



- d. That costs of this application be provided for.
2. The application is premised on the grounds on the face of the said application supported by the affidavit of Asha Charik Hamad sworn on 30/07/2024.
 3. The Applicant deposed that she is the registered proprietor of the land parcel no. E.Bukusu/S.Kanduyi/450 and that the Respondents are on the suit property illegally and without her consent and sought to have them evicted.
 4. The application is opposed with a Replying affidavit sworn by Zainab Ombikhwa Makokha on 27/08/2024 where it was deposed that she is the niece of Fatuma Njoa Hassan, Mwanarambu Shisia Hamisi and Asha Charik Hamad -the parties herein who are daughters of the late Amina Abdala Hamisi who died on 31/01/2009 while she lived in land parcel no. E.Bukusu/S.Kanduyi/10871. That after the said Amina Abdala Hamisi died, she went to the land as a caretaker. That land parcel no. E.Bukusu/S.Kanduyi/10871 is derived from land parcel no. E.Bukusu/S.Kanduyi/450 (hereinafter referred to as 'the suit land') which was purchased by the late Amina Abdala Hamisi in 1962 and first registered in the name of Ismael Musa (Amina Abdala Hamisi's husband) in 1969.
 5. That in 1996, the Applicant herein filed a claim before Kanduyi Land Disputes Tribunal claiming the suit land which was awarded in her favour. In 1998, Ismael Musa preferred an appeal to the Wester Land Appeals Committee who ordered for the joint registration of the land in the name of Amina Abdala Hamisi and the Applicant. However, the Applicant herein appealed against the said decision to this court. On 20/09/1999, the appeal was allowed but later the court reviewed and set aside on the decisions by the tribunals on 27/01/2000.
 6. Following the said judgment, the land was transferred to Amina Abdala Hamisi and later sub-divided into land parcel no. E.Bukusu/S.Kanduyi/10871 and 10872 wherein E.Bukusu/S.Kanduyi/10872 was transferred to Fred M. Opilo. On 17/09/2013 the new titles were cancelled and the registration was reinstated to E.Bukusu/S.Kanduyi/450 and registered in the applicant's name after she obtained an order issued by Omollo J. That later on, the Respondents filed an application seeking to review and set aside the orders by Omollo J. On 13/03/2013 the said application was allowed by Mukunya J. The Applicant however, used the orders by Omollo J and had the said orders effected by the Land Registrar on 20/09/2016 despite there being fresh orders to the contrary. It was argued that the said title deed was therefore obtained fraudulently and cannot suffice.
 7. The Respondents filed grounds of opposition dated 27/08/2024 asking the court not to grant the orders sought arguing that the same would be tantamount to sanitizing an illegality.
 8. The Applicant further filed an undated affidavit in response to the Respondents' replying affidavit. She stated that the deponent of the said affidavit was a stranger to this case and that she had obtained an order to have the Respondents removed from the suit land.

Legal Analysis And Decision

9. I have considered the matter before me and the application by the Applicant which essentially is seeking for the eviction of the Respondents from land parcel no. E.Bukusu/S.Kanduyi/450. The single issue for determination is whether the application is merited.
10. Before I proceed to the merits of the application, it is important to point out that indeed and as noted by the Applicant, the deponent of the Replying affidavit sworn on 27/08/2024 is not properly enjoined either as a legal representative or donee by way of a power of Attorney in this matter and lacks the



legal capacity to represent any of the Respondents. Therefore, the said Replying affidavit is not proper before this court.

11. Having said that, I now proceed to determine the merits or otherwise of the application. Although the Replying affidavit sworn on 27/08/2024 is improper and cannot be considered, the history of this suit has been captured in the summary above and for the purposes of this ruling, I shall not re-state the same. Indeed, the root of this matter can be traced to Kanduyi Land Disputes Tribunal and the Western Provincial Appeals Committee. The Applicant herein who was aggrieved by the award by the Western Provincial Appeals Committee preferred an Appeal to this court and various judgments and rulings were issued thereafter by this Honourable Court. The latest ruling was by S.Mukunya J. (as he then was) issued on 16/03/2015 which reviewed and set aside the earlier orders that cancelled all title deeds for Land Parcel No. E.Bukusu/S.Kanduyi/10872 and 10871 and ordered that the same reverts back to the original Land Parcel No. E.Bukusu/S.Kanduyi/450 and be registered in the name of Asha Charik Hamas, the Applicant herein reverting the position to that of the ruling dated 27/1/2000.
12. At this juncture, it is important to note that the Applicant is seeking eviction orders against the Respondents and their representatives from the suit land. As previously mentioned, this matter arises from an appeal against the decisions by Kanduyi Land Disputes Tribunal and the Western Provincial Appeals Committee. Based on the history of the case, the appeal was concluded following the ruling dated 15/03/2015, which maintained the position established in the earlier ruling dated 27/01/2000 where the court directed that parties can ventilate their disputes in normal courts. Therefore, the Applicant ought to have filed a fresh suit to ventilate her grievances.
13. Further, in *Witmore Investment Ltd-vs- County Government of Kirinyaga & 3 others* (2016) eKLR Limo J stated as follows;

“.....where a party such as an applicant herein seeks an order that in effect appears to resolve with a finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy, raised in the application, it should have moved this court properly in the manner provided by the law.”
14. The general rule is that suits are instituted by way of a Plaint unless the rules prescribe any other form. Section 19 of the *Civil Procedure Act* and Order 3 Rule 1 of the *Civil Procedure Rules* provides as follows: “Every suit shall be instituted in such manner as may be prescribed by the rules.”
15. In the case of *Scope Telematics International Sales Ltd -vs- Stoic Company Ltd & Another* [2017] eKLR, the Court of Appeal held that:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction.
16. As already observed earlier, the Applicant herein seeks to evict the Respondents from the suit property. The application as it is does not afford the parties the opportunity to canvass those issues as the nature of the orders sought requires more than just affidavit evidence to be presented by both sides and the court be allowed to examine the merits of each case based on evidence presented before granting such final orders. Further, the application is not grounded on any suit as the appeal has already been determined. If at all the Applicant wishes to enforce her rights (if any), then she ought to file a fresh suit.
17. Consequently, I make a finding that the substantive and final orders sought by the Applicant in this matter cannot be issued in the form and manner it has been presented.



18. Consequently, the Notice of Motion application dated 30/11/2023 is devoid of merit and the same is hereby dismissed with each party to bear their costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF DECEMBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of

Asha Charik Hamas, Applicant-present.

Mr Alovi for the Respondent.

Bett C/A.

