



Kenya Assemblies of God Trustees & another v Obuya & 4 others (Miscellaneous Application E014 of 2023) [2023] KEELC 15817 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E014 OF 2023
MD MWANGI, J
FEBRUARY 23, 2023**

BETWEEN

**KENYA ASSEMBLIES OF GOD TRUSTEES 1ST APPLICANT
CHARLES OWUOR 2ND APPLICANT**

AND

**DANIEL OBUYA 1ST RESPONDENT
ALLAN OYUGI 2ND RESPONDENT
TITUS AMUKUNE 3RD RESPONDENT
JAMES OKOTH 4TH RESPONDENT
BONIFAS OKUMU 5TH RESPONDENT**

(In respect of the application by the Applicants seeking eviction orders)

RULING

1. What is before me for determination is the Notice of Motion Application dated 17th January, 2023. It is brought under the provisions of Sections 3A and 99 of the Civil Procedure Act, Cap 21 Laws of Kenya and Section 152e of the Land Act.
2. The Applicants seek 2 main orders namely;
 - a. That this court be pleased to issue and order in favour of the Applicant evicting the Respondents, their agents, servants, cronies or anyone claiming through or under them to by way of removing their materials, move from, stop interfering with the stretch, frontage, space along the premises L.R. no 77/387 Burn Burn.



- b. That in the alternative of order 1 above the Applicants herein be granted authority through their agents, servants, cronies to remove the materials, move from, end interfering of the stretch, frontage, space along of the premises LR No 77/387 Burn Burn by the Respondents herein.
 - c. That the OCS at Burn Burn Police Station DCIO station or Officer in charge of the said nearest jurisdiction or the nearest Administration Police Commandant to ensure compliance of the above order.
 - d. THAT the costs of the application be provided for.
3. The application is supported by the affidavit of Bishop Charles Owuor, the Secretary General of Kenya Assemblies of God Trustees, the 1st Applicant. The deponent is the 2nd Applicant in this matter.
 4. The deponent deposes that they are the registered proprietors of Nairobi block 77/387 situated at Buru Buru, Nairobi (hereinafter referred to as 'the suit property'). They have been in possession and ownership of the suit property for more than a decade.
 5. The Deponent further avers that they have been authorized by the Nairobi City County to landscape and beautify the space fronting the suit property along the Mumias South Road. He exhibited the letter dated 28th July 2022 issued by the defunct Nairobi Metropolitan Services being the letter that authorized their request.
 6. The deponent deposes that it is therefore necessary to evict the Respondents from the space they occupy to enable the Applicants maintain the foot path, entrance and land immediately fronting their gate and put up a perimeter wall.
 7. The deponent asserts that the Respondents have been squatters on the frontage, stretch in front of their property and have refused to move despite notice to vacate. This according to the deponent has delayed the landscaping and erection of the stone wall. The Applicants are unable to proceed with the proposed project hence the application before the court.
 8. The Applicants urge the court to grant them the orders sought to enable them carry out the proposed project.

Submissions by the Applicant's Advocate.

9. The application was canvassed orally. The Respondents were not present in court despite having been served.
10. The Advocate for the Applicants, Mr. Odhiambo reiterated the grounds in support of the application as deposed in the supporting affidavit by Bishop Charles Owuor.
11. The Advocate argued that the Applicants had issued a proper notice to the Respondents dated 9th August 2022 and were therefore entitled to the orders sought.
12. On the reason for moving the court through a Miscellaneous application rather than a plaint, the Advocate argued that the ownership of the suit property is not contested and further that the Applicants are not seeking any damages from the Respondents. The Advocate submitted that the application was also premised on section 152e of the *Land Act*.



Issues for determination.

13. Considering the substantive and final orders sought by the Applicants in this matter, the first issue that this court must decide even before going into the merits of the application is whether a miscellaneous application is the proper way of moving the court for such kind of orders.
14. I have conscientiously considered this issue in my mind for a long time. In making my determination on this issue, two important considerations are at the top of my mind.
15. The first consideration is that this is a court of record. I must be conscious of the repercussions of what I decide and the precedent that I will be setting.
16. Secondly, I am conscious that courts operate within a system of precedents. As John Roberts, the Chief Justice of the U.S put it:

“Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.”
17. In the case of *Rockland Kenya Ltd –Vs- Commissioner General of KRA & another* (2020) eKLR, the court held that substantive orders cannot be issued in miscellaneous applications.
18. The court cited with approval the decision in *Witmore Investment Ltd-Vs- County Government of Kirinyaga & 3 others* (2016) eKLR. In the said case, Limo J had stated that,

“.....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.”
19. In the case of *Nairobi West Hospital Ltd –Vs- Joseph Karina & Another* (2018) eKLR, the court made a similar finding that a substantive order cannot be issued through a miscellaneous application.
20. In the matter before me, the Applicants seek to evict the Respondents from the ground/land where they have been running their business. The Applicants termed the Respondents as ‘squatters’. The Advocate for the Applicants in his oral submissions informed the court that the application is premised on Section 152e of the *Land Act*.
21. Eviction of people, be they squatters or not, is a weighty matter that actually touches on their human rights. Indeed, section 152e of the *Land Act* spells out the conditions/terms that must be met by a Land owner who intends to issue a Notice to evict an ‘unlawful occupier’ from private land.
22. The court, before issuing any such orders as sought by the Applicants, needs to make an elaborate enquiry whether the Applicants have met the conditions spelt out in section 152e of the *Land Act*. Whether indeed the so called squatters are actually occupying the land and whether indeed they are unlawful occupants, if at all. The miscellaneous application does not afford the court such an opportunity neither does it allow the parties the chance to canvass those issues and exercise their rights to a fair hearing. It is an attempt to summarily determine the issues without a proper trial.



23. This is not a mere procedural or technical issue. Kiage J.A in the case of *Nicholas Kiptoo Arap Korir Salat – Vs- IEBC & 6 others* categorically addressed a similar issue and stated as follows; -

“I am not in the least persuaded that Article 159 of the constitution and the oxygen principles which both command courts to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an archical free-for-all in the administration of justice. This court, indeed all courts, must never provide the succor and cover to parties who exhibit scant respect for rules and timelines. These rules and timelines serve to make the process of Judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

24. I am in full agreement with the above cited decisions. Accordingly, I make a finding that the substantive and final orders sought by the applicants in this matter cannot be issued in a Miscellaneous application.
25. Having arrived at the above conclusion, I will refrain from discussing the merits of the application so as not to prejudice the Applicants’ case in the event they decide to file it in the form and manner provided for under Order 3 rule 1 of the Civil Procedure Rules, 2010.
26. Consequently, the Notice of Motion application dated 17th January 2023 is struck out, but with no orders as to costs since the Respondents have not responded to nor participated in these proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Odhiambo for the Applicants.

No appearance for the Respondents.

