



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

MISC. APPLICATION CASE NO. 6 OF 2020

OPIYO REGGY OPERE.....1ST APPLICANT/DEFENDANT

VERSUS

LAWRENCE ONDUSO NYAKWAMA.....1ST PLAINTIFF/RESPONDENT

NIFRIDA ADEYA IMINZA (Suing for and on behalf of the estate of

CALEB ADEYA MAGOMERE).....2ND PLAINTIFF/RESPONDENT

RULING

1. The present ruling is in respect of a preliminary objection dated 8th May 2020 and filed in court on 11th May 2020 by M/S Abisai and Company Advocates, counsel for the 1st plaintiff, Lawrence Onduso Nyakwama (the respondent herein). He contends that the 1st defendant's (applicant's) Notice of Motion dated 19th March 2020 and filed in court on even date is hopelessly misconceived, frivolous, totally devoid of merit and *mala fides* on the grounds that;-

i. That the defendant/applicant has not preferred any appeal against the orders made by the Honourable Mr. Richard Odenyo and Moses Obiero on 28th November 2018 and 10th March 2020 respectively. In which orders Migori CM ELC 59 of 2018 and Migori CM ELC 60 of 2018 were consolidated, and, the court declined to adjourn the matter respectively.

ii. That further, the 1st defendant/applicant has sneaked in further documents i.e supplementary affidavit dated 4th May 2020, in the court record without seeking leave of court as required by law.

iii. That this Honourable court has no jurisdiction to determine this application as the same is a preserve of the trial court.

2. On 12th May 2020, it was ordered and directed that the preliminary objection be argued by written submissions. Accordingly, learned counsel for the applicant filed submissions dated 17th June 2020 while learned counsel for the 1st plaintiff respondent filed submissions dated 21st May 2020.

3. Learned counsel for the respondent made reference to the grounds of the preliminary objection and the background of the matter including denial of an adjournment of the matter by the Honourable trial court as date for hearing was fixed by consent of the parties. That there was no compelling reason advanced to adjourn the hearing of the matter before the trial court.

4. Counsel submitted that transfer of a suit under Section 18(1)(b) of the Civil Procedure Act (Cap 21)

from one court to another has several basic considerations including balance of convenience, expense questions, interest of justice and orders of recusal before the trial magistrate had been sought. He cited, inter alia, **David Kabungu v Zikarenga and 4 others Kampala HCCS No. 36 of 1995, Hangzhon Agrochemicals Industries Ltd v Panda Flowers Ltd (2012)eKLR**, and Article 160 (1) and (5) of the Constitution of Kenya 2010, to fortify that specific argument.

5. Counsel further submitted that the applicant's counsel filed supplementary affidavit contrary to Order 51 Rule 14 (3) of the Civil Procedure Act (Cap 21 Laws of Kenya). That the said affidavit should be struck off the record. Reliance thereof was made on the Supreme Court of Kenya decision in **Raila Odinga and 3 others –vs- Independent Electoral and Boundaries Commission and 3 others(2013)eKLR**.

6. Counsel asserted that the issues raised in the preliminary objection meet threshold set out in **Mukisa Biscuits Manufacturing Co. Limited –vs- West End Distributors (1969) EA 626**. That therefore, the preliminary objection be upheld.

7. On the part of learned counsel for the applicant, reference was also made to the grounds of the preliminary objection and contended that the applicant's counsel could not proceed with cross-examination in the trial court till County Surveyor's reports regarding three (3) visits to the *locus in quo*; 11th July 2018, 14th June 2019 and 4th July 2019. That this court has jurisdiction to entertain this matter pursuant to Section 18 of the Civil Procedure Act (supra), Section 3 of the Environment and Land Court Act, 2015 (2011).

8. On ground two (2), counsel termed the same misplaced. Reference was made to the three visits to the *locus in quo* and what transpired on 10th July 2019.

9. Counsel lamented that there is evidence that the trial magistrate is blocking the cross-examination of the plaintiffs and their witnesses and the County Surveyor on matters that happened at the *locus in quo*. That this court should use its supervisory jurisdiction to call for lower court file and handle the same as provided by the law.

10. To buttress his submissions, counsel relied on **Patrick Ndegwa Munyua versus Benjamin Kiiru Mwangi and another (2012)eKLR, Owners of Motor Vessel Lilian S versus Caltex Oil (Kenya)Ltd (1989)eKLR**. Counsel urged this court to dismiss the preliminary objection with costs

11. I have thoroughly considered the preliminary objection in its entirety and the rival submissions including authorities cited therein. The issues for determination are as set out per grounds (i) to (iii) of the preliminary objection and embrace them accordingly for the purposes of the present ruling.

12. On ground (i), it is noted that the preliminary objection was ignited by the applicant's Notice of Motion dated 19th March 2020 and lodged in court on even date (the application) pursuant to Articles 10 (1)(a) and (b), 27(1), 40(1)(a) and (b) and 50(1) of the Constitution (supra), Sections 1A, 1B, 3, 3A, 18(b) (1) of the Civil Procedure Act (supra) and Rules 2010 and all other and or further provisions of the law. Orders sought in the motion are as follows:-

- a) That the Honourable Court be pleased to withdraw Migori Chief Magistrate's Court (ELC NO. 59 as consolidated with No. 60 of 2018) and pending proceedings therein from the said Chief Magistrates Court and thereafter try and dispose of the same or transfer the same to any other Magistrate with jurisdiction to hear and dispose of the same.
- b) That there be stay of any further proceedings in the lower court pending the hearing and determinations of this application inter partes.
- c) That cost of this application be in the cause.

13. The application is anchored on grounds I to VII set out on its face and the 1st applicant's supporting affidavit sworn on even date and annexed documents marked as "ORO1A, 1B, 1C and 1D to "ORO3(c)". The gist of the application is that the applicant questions the transparency of the trial in Migori CM's court ELC No. 59 of 2018 as consolidated with No. 60 of 2018. The applicant averred, inter alia, that he instructed his counsel to apply for an adjournment before the trial magistrate pending the supply of surveyor's reports in respect of land parcel numbers Suna East/Wasweta1/7112, 1544 and 7397 for the 2nd plaintiff/respondent, himself and another, but the court declined an adjournment of the hearing of that suit which prompted his counsel to seek to be released therefrom. That the trial magistrate released the counsel from the conduct of the proceedings and proceeded to hear the evidence of the plaintiff, in spite of the 1st applicant/defendant's plea for an adjournment.

14. In his 43-paragraphed replying affidavit sworn on 24th March 2020, the 1st plaintiff (respondent) opposed the application and sought dismissal of the same with costs. He deposed, inter alia, that the applicant has always sought means of delaying the case and merely interested in arm twisting and ego satisfaction as opposed to substantive justice offered by the courts of law. In support of his affidavit, are copies of documents marked as "LON1" to "LON5c" which include the plaint in Migori CMCC No. 59 of 2018, letter of application and correspondence.

15. By a 35-paragraphed supplementary affidavit sworn on 4th May 2020, the applicant/defendant deposed, inter alia, that he is in agreement with the respondent that this court would be guided by the perusal of the proceedings in the trial court, and that the replying affidavit is replete with falsehoods and a distortion of the prevailing position. That he has never raised the issue of consolidation of Migori CMCC Nos. 59 and 60 of 2018. That the plaintiff and his witnesses including the surveyor, cannot be effectively cross-examined without the surveyor's reports on the two visits of 3rd April 2019 and 11th July 2019. That the application has merit and should be allowed in order to uphold the Constitution and the law.

16. Having looked at the background of the preliminary objection which arose from the application, was the applicant denied an adjournment on 28th November 2018 and 10th March 2020 as alleged herein? The answer is to be discerned from the proceedings of the trial court.

17. Moreover, has the applicant preferred an appeal from alleged orders of the said dates? The answer is to be disclosed from the proceedings, too.

18. This court is aware of orders from which appeal lies, time for filing appeals from subordinate courts and appeal out of time as provided for under Sections 75,79G and the proviso to the latter section respectively. It is common ground that this court would be guided by the perusal of record of the trial court. However, the record is yet to be typed to clearly inform this court on issues concerning consolidation of the suits, withdrawal sought and any appeal from orders in the suits.

19. As pertains to ground (ii), it is alleged that the applicant's counsel sneaked supplementary affidavit into court record contrary to Order 51 Rule 14(3) (supra). The applicant denied the allegation and termed the same misplaced.

20. Notably, the respondent's counsel referred to the supplementary affidavit. So, was he made aware of the same?

21. In **Ogada v Mollin (2009) KLR 620**, the Court of Appeal held that it was the court's duty to ensure the 2nd respondent was made aware of the existence of the appeal and have her served with all the necessary papers. That she had the right to appear or to decline to appear in the matter.

22. In the instant matter, the respondent was made aware of the application. He has appeared in court through counsel. The parties herein have the right of access to justice and the right to fair hearing under Articles 48 and 50(1) of the Constitution of Kenya respectively. Thus, let the applicant's counsel serve the respondent's counsel with the supplementary affidavit for fair hearing of the application.

23. As regards ground (iii), I am guided by Articles 162(2)(b) of the Constitution (supra), Sections 3 and 26(3) and (4) of the Environment and Land Court Act, (supra) as well as Section 9 of the Magistrates' court's Act, 2015. Admittedly, this court has both original and appellate jurisdiction over the instant matter.

24. The respondent has raised a preliminary objection concerning the jurisdiction of this court to entertain the application as noted in **Mukisa Biscuits case (supra)**. This court has a duty to hear the applicant in respect of the application in order not to violate the *audi alteram rule* as observed in **Re Hebtullah Properties Ltd (1976-80)IKLR 1195 at 1209** and in line with Article 50(1) as read with Article 25(c) of the Constitution of Kenya, 2010.

25. The upshot is that the preliminary objection dated 8th May 2020 is devoid of merits. I proceed to disallow the same with costs in the cause.

Delivered, Signed and Dated at Migori in open Court and through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 28th day of JULY , 2020.

G.M.A ONGONDO

JUDGE

In the presence of;

Mr. Roch Odhiambo, learned counsel for the applicant.

Ms Okota, learned counsel for the respondent.

Tom Maurice - Court assistant.