



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT AND LAND**  
**MISC CASE NO.113 OF 2014**

**JAMES ONUNGA OGUTU.....PLAINTIFF**

**VERSUS**

**JESSICA OGADA.....1ST DEFENDANT**

**OLIECH OGOLLA.....2ND DEFENDANT**

**THOMAS AGOO.....3RD DEFENDANT**

**JABER OGALO..... 4TH DEFENDANT**

**RULING**

1. This matter was filed as a miscellaneous application on 20/6/2014 seeking, inter alia, transfer to this court of lower court's case No. **WINAM SRMC No.87/2014**. That order was granted but the application also had other prayers, specifically prayers 2, 3, 4 and 5.

2. The prayers were formulated thus:

**Prayer 2:** Pending the hearing and determination of the application, the honourable court be pleased to issue an order to maintain the Status Quo of orders granted in respect of **WINAM SRMC No.87/2014**, more specifically the order of lower court dated 3/6/2014.

**Prayer 3:** Pending the hearing and determination of this application, the honourable

court be pleased to issue an order of eviction on parcel **No.KSM/KOKANDO/822** and/or **KSM/KORANDO/4412** and or **KSM/KORANDO/4413**.

**Prayer 4:** Costs of the application be borne by the defendant/Respondents.

**Prayer 5:** Such further or other orders as the court may deem fit and expedient.

3. The thrust of the application is that the suit in the lower court was filed as a burial dispute. But the response made by the defendants changed the whole scenario because issues of ownership were raised. As the lower court had no jurisdiction to decide on ownership of land, the need arose to transfer the matter to this court for determination.

4. The defendants filed a response by way of a replying Affidavit. The suit in the lower court, it was deponed, concerned burial, not ownership, and the order to transfer that suit here should not have been given. That it was given was due to plaintiffs non-disclosure of crucial information to the court.

5. It was deponed further that the aim of the plaintiff is to delay the outcome of the suit filed in the lower court.

6. The matter was argued before me interpartes on 30/9/2014. That happened after the plaintiff had already filed a further affidavit responding to some of the assertions made in the replying Affidavit. The precis of the further Affidavit is that the plaintiff is the legal owner of the land, having purchased it way back in 1986.

7. The hearing that took place essentially amplified what each side had already put in writing. I will not say much about the hearing because my decision will not depend so much on it. Suffice it to observe however that a lot was said about ownership and if I delve deep into the issue, I risk being seen as pointing the way forward yet all evidence from both sides is not yet in.

8. The application as filed has serious shortcomings and that is why I have said that my decision does not hinge so much on what was said during hearing. The first shortcoming is this: Prayer 2, which is the one asked for, is supposed to run **“Pending the hearing and determination of the application”**. The application was heard. This ruling itself is the determination. What this essentially means is that the prayer as formulated is not supposed to go beyond this ruling. It is plain therefore that the plaintiffs counsel was labouring under serious misdirection to think that any order given would have a lifespan beyond this ruling.

9. But there is even more to the prayer than what I have observed: When the application was first entertained ex parte, the same prayer 2 was granted. At that early stage, I gave the order to last until hearing and determination of the application. And that was proper because hearing and determination were yet to come. That same prayer was argued without being varied at all to be granted yet again. It is obvious that it can't be granted twice. In my view, the same prayer needed to be re-formulated to run until hearing and determination of the lower court's suit. This was not done. This works against the plaintiff.

10. There is another shortcoming. The plaintiff referred to the lower court's order, and even availed it but without the lower court's proceedings. Obviously, I was entitled to see the reasoning of the lower court. I couldn't see that reasoning without the proceedings. It was a basic requirement that the proceedings be availed. That was not done. Why then am I being invited to act blindly? How can I confirm an order whose basis of issuance is not well known to me? It was absolutely necessary to avail the proceedings, and the ruling if any was made.

12. The position then is clear: This is an application that was not well thought through. It was poorly formulated and poorly presented. The orders sought can not be granted. The application is therefore dismissed with costs.

**A.K. KANIARU**

**ENVIRONMENT & LAND - JUDGE**

**30/6/2015**

30/6/2015

A.K. Kaniaru J.

N.O. Oyugi court clerk

No party present

Interpretation: English/Kiswahili

M/S Opondo for plaintiff/Applicant

Onsongo for defendant/Respondent

Court: Ruling on application filed on 20/6/2014 read and delivered in open court. Right of appeal 30 days.

**A.K. KANIARU**

**ENVIRONMENT & LAND - JUDGE**

**30/6/2015**