



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 38 OF 2020

JOSEPH ODONGO OPIYO.....PLAINTIFF/APPLICANT

Versus

BENJAMIN OKWARO ESTIKA.....DEFENDANT/RESPONDENT

RULING NO. 1

1. On 3rd August 2020, the plaintiff/applicant namely **JOSEPH ODONGO OPIYO** (the applicant herein) through M/s Oguttu Mboya, Ochwal and partners Advocates formerly, M/s Oguttu, Ochwangi, Ochwal and Company Advocates, lodged herein an application by way of Notice of motion dated 31st July,2020 under various Constitutional and legal provisions set out on it's face. He is seeking the following orders :-

- a) *The Honourable court be pleased to order and/or direct the withdrawal and transfer of Ndhiwa SRMCC ELC No. 14 of 2020, touching on and/or concerning the same subject dispute in respect of LR NO. Homabay/Kawere Konyango Karading/3413 (hereinafter referred to as the suit property) to this Honourable court for hearing and final disposal.*
- b) *Consequent to prayer 1d herein being granted, the Honourable court be pleased to consolidate the subject matter and the withdrawn Ndhiwa SRMC ELC No. 14 of 2020 and upon such consolidation, same be heard and disposed of simultaneously.*
- c) *The Honourable court be pleased to grant such further and/or further orders and/or directions, as the honourable court may deem fit, just and expedient, towards the expeditious disposal of the two suits, which touch and/or concern the same suit property.*
- d) *Costs of the application herein do abide the cause.*
- e) *The Honourable court be pleased to grant such further and/or other orders as the court may deem fit and expedient.*

2. In a seventeen (17) paragraphed replying affidavit sworn on 1st September 2020 and filed in court on 2nd September 2020, the respondent, **BENJAMI OKWARO ESTIKA** through M/s Nyauke and Company Advocates, opposed the application. He deposed inter alia, that the applicant's entire originating summons dated 9th July 2020 duly filed herein on 17th July 2020 and the application, are all but abuses of due process of the court and should be dismissed with resultant costs to the respondent. That he filed Ndhiwa Principal Magistrate's court Environment and Land case No. 14 of 2020 to which the applicant filed a statement of defence dated 9th July 2020 and lodged in court on 15th July 2020.

3. The applicant's learned counsel and the respondent's learned counsel filed their respective submissions dated 1st February 2021 and 19th January 2021 respectively further to this court's orders and directions of 19th November 2020; see **Order 51 Rule 16 of the Civil Procedure Rules,2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions,2014**.

4. It is common baseline that the respondent filed Ndhiwa PM's Court Environment and Land case No. 14 of 2020 and the applicant filed the application in the instant suit as revealed in a copy of a plaint (J00 6) annexed to the originating summons and copy of a statement of defence (BOE-01) annexed to the replying affidavit. In view of the foregoing, I have to thoroughly examine the original records in both suits as I subscribe to the Court of Appeal decision in **Kanwal Sirjit Singh Dhimani =vs= Kashvji Jivraji Shah (2015) eKLR** that courts exist for the purposes of dispensing justice, that the sword of Justice cuts both ways and the need to balance the two divergent interests in a case.

5. Thus, pursuant to Article 159 (2) (b) and (e) of the Constitution of Kenya,2010, sections 1A,1B,3 and 3A of the Civil Procedure Act (Chapter 21 Laws of Kenya) and sections 3 of the Environment and Land Court, 2015,and in lieu of grant of the orders sought in the application at this stage, it is hereby ordered and directed that :-

a) The Deputy Registrar of this court to urgently call for the original record and typed certified copies of proceedings and orders, if any, in respect of Ndiwa Principal Magistrate's court Environment and Land Court case No. 14 of the 2020 for purposes of satisfying this court as to the correctness therein vis a vis the contention of the parties in this application for further consideration.

b) The application is fixed for further orders and directions on 19th April, 2021.

c) The applicant's counsel be serve the respondent's counsel.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 4TH DAY OF MARCH, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. B. Mulisa learned counsel for the applicant.

Tom Maurice - Court assistant