



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**MISC. APPLICATION NO. E012 OF 2021**

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 50 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 159 (2) (a) (d) (e) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SUPERVISORY JURISDICTION PURSUANT TO ARTICLE 165 (6) & (7) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 3(1) & (3) OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011 AND PRACTICE DIRECTIONS OF PROCEEDINGS OF THE ENVIRONMENT AND LAND COURTS.**

**AND**

**IN THE MATTER OF NON-COMPLIANCE OF ORDER 11 OF THE CIVIL PROCEDURE RULES 2012**

**AND**

**IN THE MATTER OF SECTION 78 (b) (c) (d) (e) & 1A, 1B & 3A OF THE CIVIL PROCEDURE ACT, CAP 21-LAWS OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTION 35 (b), 36, 59 (1)9, 2, 68 and 69 OF THE EVIDENCE ACT CAP 80-LAWS OF KENYA.**

**AND**

**IN THE MATTER OF THE NATURE AND MANNER OF RECORDING PROCEEDINGS IN THE SUBORDINATE COURT**

**BETWEEN**

**SABINA MORAA SWANYA .....PLAINTIFF/APPLICANT**

**VERSUS**

**EVERLY KEMUNTO ONTIRI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AUGUSTUS OIRERE .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

## INTRODUCTION

1. The Applicant herein filed a miscellaneous application seeking the following orders:

1. That the Honourable Court be pleased to issue an order staying proceedings and/or setting aside proceedings before the subordinate court in Chief Magistrate' Court Environment and Land Court Case No. 66 of 2020 Sabina Moraa Swanya v Augustus Oirere & Another pending the hearing and determination of this application.
2. That the Honourable Court be pleased to call and place before it the proceedings in CMC ELC No. 66 of 2020 before the subordinate court for purposes of interrogating the correctness/genuineness of the proceedings before the subordinate court and make any appropriate orders/directions to ensure fair administration of justice.
3. That the Honourable Court be pleased to make a finding that the Plaintiff's production of documentary evidence not filed in court by PW3 and PW4 (alleged County Land Registrar and County Surveyor) (sic) was irregular and unprocedural and unlawful hence prejudicial and a miscarriage of justice.
4. That the Honourable Court be pleased to issue/make a declaration of a mistrial and thereby order a *de novo* trial/ a retrial of CMELC No. 66 of 2020 before another court of equal jurisdiction.
5. That the Honourable Court be pleased to grant/issue any other orders/directions as may be just and expedient with a view to dispensing justice.

2. The application is premised on the grounds set forth on the face of the Notice of Motion and the Supporting Affidavit of Augustus Oirere sworn on the 26<sup>th</sup> October 2021.

3. The gravamen of the Applicant's complaint is that the trial court allowed witnesses (PW3 and PW4) to produce documents from the Lands office which were not contained in the Plaintiff's List and bundle of documents and which had not been served upon the Defendants or their counsels. Further, that no leave was sought to have the said documents filed as the parties had already complied with order 11 of the Civil Procedure Rules.

4. The Applicant also complained that there was selective recording of proceedings by the learned magistrate as some of the answers to questions in cross-examination of the two witnesses were not recorded. The Applicant was therefore of the view that in view of the above-mentioned irregularities and what he termed as unprocedural handling of evidence, continuing with the hearing in its current status would be prejudicial and would occasion a miscarriage of justice.

5. The application was opposed by the Respondent through her Replying Affidavit sworn on the 9<sup>th</sup> November 2021 in which she faulted the Applicant for bringing his complaint by way of miscellaneous application rather than by way of Petition or Judicial Review. She maintained that the Applicant had been granted a fair hearing as no objection was raised when her advocate applied for witness summons in respect of the Land Registrar and County Surveyor to attend court and produce the documents in their custody relating to the suit property. She further stated that no objection was raised when the said witnesses testified and produced documents and the Applicant's advocate cross-examined them. The objection was raised on the next hearing date before the defence hearing commenced when the Applicant's counsel sought to have the documents produced by the two witnesses expunged from the record but the court overruled the objection.

6. It is the Respondent's contention that the question concerning production of documents should be determined by the trial court and if the Applicant was dissatisfied by the ruling of the court on the issue, he ought to have filed an appeal rather than a miscellaneous application. The Respondent is of the view that the application is merely intended to delay the hearing of the suit or engage in forum-shopping.

7. Both counsels presented their oral submissions which I have carefully considered.

8. The main issue for determination is whether this court has supervisory jurisdiction over the subordinate courts in the manner in which they conduct their proceedings and if so, whether such jurisdiction has been properly invoked.

9. In his oral submissions, learned counsel for the Applicant cited Article 165 (6) of the Constitution as the basis of the Applicant's application.

The said Article provides as follows:

*165(6). "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.*

*(7) For purposes of clause (6) The High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and make any order or give any direction it considers appropriate to ensure the fair administration of justice".*

10. It is clear that the above provisions specifically refer to the High Court and not the courts of equal status with the High Court. Jurisdiction of Courts in Kenya is donated by the Constitution or statutes. Courts cannot arrogate themselves jurisdiction beyond that which is conferred upon them (see **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR at paragraph 68**).

11. The jurisdiction of the Environment and Land Court is found in Article 162 (2) of the Constitution and section 13 of the Environment and Land Act.

Article 162(2) of the Constitution provides that:

*Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:*

*(a) Employment and labour relations*

*(b) The environment, use and occupation of, and title to land.*

12. Section 13 of the Environment and Land Court Act elaborates the court's jurisdiction as follows:

*13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*(2) In exercise of its jurisdiction under Article 162*

*(2) (b) of the Constitution, the Court shall have power to hear and determine disputes;*

*a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*b. relating to compulsory acquisition of land;*

*c. relating to land administration and management;*

*d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*e. any other dispute relating to environment and land.*

13. In the case of **Patrick Musimba vs. National Land Commission & 4 Others (2016)eKLR** the court observed that:-

***“By the Amendments in 2012 Parliament took away the supervisory jurisdiction of the ELC over subordinate judicial and quasi-judicial tribunals under Article 165 (6).***

14. What this means is that unlike the High Court, the Environment and Land Court has no supervisory jurisdiction over subordinate courts and can only deal with appeals arising from decisions of the subordinate courts.

15. In view of the foregoing, this court's jurisdiction has not been properly invoked and the prayers sought cannot be granted. Consequently, the application is dismissed with costs to the Respondent.

**Dated, signed and delivered at Kisii this 22<sup>nd</sup> day of November, 2021.**

**J.M ONYANGO**

**JUDGE**