



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CAUSE NO. 21 OF 2020

ANTHONY MASIBO DIFFU aka ANTHONY GABRIEL MASIBO and

JOSEPHINE NAOMI DIFFU (suing as Administrators of the estate of

CHARLES NAULE DIFFU (DECEASED).....PLAINTIFFS

VERSUS

MILDRED AWINO WERE.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR.....2ND DEFENDANT

FELISTER JUMA SIFUNA (Sued as the Administrator of the estate of

EDWARD BULUMA SIFUNA (DECEASED).....3RD DEFENDANT

FRANK OKINGO.....4TH DEFENDANT

THE HONOURABLE A.G.....5TH DEFENDANT

MATHEWS TONADO OKECH.....6TH DEFENDANT

RULING

1. The Plaintiffs/Applicants brought an application dated 29th June 2021 under Article 50 of the Constitution of Kenya 2010, Section 19 of the Environment and Land Court Act, Section 1A, 1B and 3A of the Civil Procedure Act, Order 46 Rule 7 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking for the following orders;

- a) **That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to issue an order restraining the 6th Defendant and/or his agents/servants/employees from attacking, intimidating, threatening, assaulting and in any other way causing apprehension of injury to the plaintiffs herein.**
- b) **That this Honourable Court be pleased to grant the Plaintiff leave to further witness statement and bundle of documents.**
- c) **That Honourable Court be pleased to order the transmission and/or allocation of this suit to the Environment and Land Court in Bungoma, Kakamega or Kisumu.**
- d) **That the costs of this application be provided for.**

2. The application is supported by the grounds on the face of it inter alia and the affidavit of Anthony Masibo Diffu;

- i. *That on or about the 13th May 2021, the plaintiff in the company of his newly instructed advocates went to visit the neighbours of the suit property in a bid to get witness statements that would buttress the Plaintiff's evidence in the instant suit.*
- ii. *While on their way to visit one of the neighbours, Mr. Diffu and his advocate were accosted by the 6th defendant together with 4*

heavily built men who threatened to harm the said Mr. Diffu and his advocate if they ever came to Busia.

iii. They attempted to call for help from the police but no help was forthcoming. It was only by sheer luck and Mr. Diffu's understanding of the environs that he and his advocate were able to escape the wrath of the 6th Defendant and his accomplices.

iv. That Mr. Diffu and his advocate have not been able to communicate with the said neighbours since they do not have phones and therefore have not been able to get the further evidence they sought to buttress the Plaintiff's case.

v. The Plaintiff is apprehensive that harm may come his way if they ever set foot in Busia on account of the 6th Defendant's threats.

vi. That the 6th Defendant is a man of great influence in Busia town and is well connected and is very likely to know the whereabouts of the Plaintiff's if they ever came to Busia town.

3. The 1st, 3rd and 6th Respondents opposed the application by filing their grounds of opposition dated 5th July 2021. They stated that the application is frivolous, vexatious and unmerited and is meant to further delay an otherwise unmeritorious claim filed without support of law or facts. They stated that it is not necessary that the applicant appear in Busia ELC Court to testify on his claim and a virtual hearing can be necessitated if he is serious. They further stated that it is common knowledge that there is only one ELC Court in Kenya and the rest are sub-registries and one ELC Court cannot transfer to itself outside territorial jurisdiction where subject matter is situated and without concrete grounds.

4. Parties agreed to dispense with the hearing of the application by way of written submissions. However, only the 1st, 2nd and 3rd defendants/respondents filed their written submissions. The court has considered the application, the grounds of opposition, the submissions on the record and the applicable law. The plaintiff has alleged that the 6th defendant/respondent together with 4 heavily built men had threatened to teach him a lesson while he was on his way to visit one of their neighbours. He reported the incident to Busia Police Station and was issued with an OB No. 70/13/05/21. He further stated that a confrontation occurred at the police station and that the 6th respondent told him not to set foot in Busia and if he ever did, he is fearful that the 6th Respondent would be notified of the same as he is well connected.

5. The 6th respondent has denied the allegations raised by the plaintiff and further stated that if the plaintiff is feeling threatened, he can proceed with the hearing of the suit via virtual hearing. It is trite in law that he who alleges must prove. The allegations the plaintiff has raised and which is the basis for seeking the transfer of this case to another court are serious and the burden of proof of the allegations must be discharged by the plaintiff. Though the plaintiff/applicant has claimed that the 6th defendant/respondent is a man of influence he has not demonstrated to court the extent of his influence and he has not shown what assistance the police were reluctant to give.

6. On the second issue, the plaintiff/applicant has sought leave of court to file further witness statements and bundle of documents. Though the 1st, 2nd and 3rd respondents opposed the application as a whole, they have not shown what prejudice they might suffer should the court allow the plaintiff/applicant leave to file further witness statement and bundle of documents. Since the matter is yet to be heard any prejudice can be cured by the defendants' witnesses filing additional statements and documents. Consequently, the plaintiff is granted 14 days from the date of this ruling to put in his further witness statements and bundle of documents and serve the defendants. Corresponding leave to the defendants to file additional evidence within 14 days of being served with the plaintiff's documents.

7. On the third issue, the plaintiff has requested the court to order the transmission and/or allocation of this suit to the Environment and Land Court in Bungoma, Kakamega or Kisumu. The plaintiff is requesting the court to transfer the suit from a court to neighbouring courts because the 6th defendant/respondent allegedly threatened him from stepping foot in Busia for the hearing of the suit and it would be a great injustice if the proceedings are conducted in Busia. The 1st, 3rd and 6th Respondents have opposed the said prayer and stated that an Environment and Land Court cannot transfer to itself outside territorial jurisdiction where the subject matter is located without concrete grounds.

8. Pursuant to Order 47 rule 6 (2) of the Civil Procedure rules, a court on its own motion or on the application of any party to a suit and for good cause shown, can order that the case be tried in a particular place to be appointed by the court.

9. In Daniel Kimani Moseka vs Japheth Arthur Mwangi Kiurire (2012) eKLR the court stated that:

“Suffice it to say that I agree with the holding and reasoning of justice Waweru in Kenya Tea Development Agency Vs Thomas Mboya Oguttu T/A Ms Oguttu Mboya & and Co. Advocates & another (Nairobi High court case No. 6/2004) (unreported). In that case, Justice Waweru said that there is only one High Court in Kenya which sits at various locations as the Chief justice may appoint. That High Court (established under section ... of the Constitution) has a central office in Nairobi and various district registries. Machakos is one such registry. It is the same High Court that sits in Nairobi and all the various registries. It is not different High Courts. As such, a High Court judge may, in good faith, direct that a case be heard at a different registry if it would be more convenient for the parties or the court or for some other just cause. This is not “transfer” from one High Court to another High Court but a transfer from one registry to another. I am therefore of the opinion that, in an appropriate case, a High Court judge can invoke its inherent jurisdiction or the powers donated in order 47 rule 6 to transfer a case from one registry to another even if those registries are manned by different judges”.

10. There is no doubt that the Environment and Land Court which conducts its proceedings in accordance with the Civil Procedure Act and Rules does have inherent powers or authority whether prompted suo moto or on being moved by a party, to cause a transmission of a file from the registry where it is sitting to another Environment and Land Court registry. It follows therefore, that the Environment and Land Court reserves residual powers to direct transmission of a file from one Environment and Land Court registry to another where the situation

so dictates in the interest of justice. Such circumstances would include consideration of; the location of the subject matter; number of potential witnesses and their residences, where the cause of action arose and likelihood of parties suffering unnecessary hardship or expense.

11. In this present case, although the subject matter of the suit is land parcel BUKHAYO/BUGENGI/14739 and 14740 is located in Busia County and thus within the territorial jurisdiction of this court. The plaintiff/applicant has stated that his place of residence is in Nairobi. The 1st, 3rd defendants/respondents have admitted that their place of residence is within Busia County. The 6th defendant had in an earlier affidavit intimated to court that he carries on business in Eldoret, Nairobi and Busia cities. The whereabouts of the 4th defendant/respondent are unknown as they are yet to enter appearance. There is no affidavit sworn to express that if this suit were to be transmitted and/or allocated to the Environment and Land Court in Kakamega, Bungoma or Kisumu, the parties herein and the potential witnesses might suffer unnecessary hardship or expense.

12. While it is indeed possible for the matter to proceed virtually, the court also has to take into account whether all the parties and the potential witnesses have access to technology to make a virtual hearing possible but technology also has its challenges in terms of clarity and or reliability of the source of power. The distance of the proposed courts from Busia is also reasonable and the inconvenience will not be of such a nature that cannot be compensated by award of costs each time the matters shall be listed for hearing. In the interests of the right to fair trial, I shall grant the plaintiff/applicant the request and transmit the file to Kakamega Environment and Land Court for hearing and determination of the dispute.

13. In view of the above, the application partially succeeds in terms of prayer 3 and 4 of the motion. The costs of the application awarded to the 1st, 3rd and 6th Respondents in the cause.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 18TH DAY OF NOVEMBER, 2021

A. OMOLLO

JUDGE