



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMABAY**

**ELC OS NO. 24 OF 2021**

**(FORMERLY MIGORI ELC OS NO. 57 OF 2019)**

**REUBEN OMWA OKELLO.....APPLICANT/PLAINTIFF**

**VERSUS**

**1. ALEX OTIENO GUDA.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**2. NASHON ONDIGO GUDA .....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**3. MICHAEL AGWANI GUDA .....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**RULING**

1) By a Notice of Motion dated 22<sup>nd</sup> August 2019 duly filed in court on 4<sup>th</sup> September 2019 pursuant to, inter alia, sections 1A, 1B, 3A and 6 of the Civil Procedure Act Chapter 21 Laws of Kenya (The application herein), one Reuben Omwa Okello, the plaintiff (The applicant) through M/S Nyauke and Company Advocates is seeking the orders infra;

a) Moot

b) That this Honourable court be pleased to stay the proceedings of Mbita Principal Magistrate's court Environment and Land Case No. 36 of 2018 (The Mbita PM's court suit herein) pending the hearing and determination of the originating summons dated 5<sup>th</sup> of August 2019 in this suit.

c) That the costs of this application be provided for.

2) The application is anchored on the applicant's supporting affidavit sworn on even date together with a copy of plaint and the accompanying documents in the Mbita PM's court suit marked as "ROO-1" and annexed thereto as well as grounds 1 to 5 set out on it's face. In a nutshell, the applicant complains that he recently found out that the respondents filed the Mbita PM's court suit seeking to evict him from the suit land, LR No. Lambwe West/Lambwe West "B"/731 where he has lived since childhood. That he is on the verge of not only losing his home but also his source of livelihood thus, precipitating the instant application.

3) In the 1<sup>st</sup> respondent's replying affidavit sworn on 14<sup>th</sup> November 2020 for and on behalf of himself and the other respondents and filed herein on 9<sup>th</sup> December 2020 through J.O Otieno and Company Advocates, the respondents sought dismissal of the application with costs as it is based on misleading facts. The 1<sup>st</sup> respondent deposed, inter alia, that the applicant was aware of the Mbita PM's Court suit where he filed his statement of defence and other documents on 5<sup>th</sup> March 2019. That the suit was heard on 17<sup>th</sup> October 2020, the applicant participated duly represented by his counsel on record herein and the same is coming up for further hearing on 17<sup>th</sup> December 2021.

4) The 1<sup>st</sup> respondent further deposed that the application and the pleadings in this suit were filed one and half years after the Mbita PM's court suit was lodged. That the applicant is trying to delay the trial of Mbita PM's court suit and deny them justice. Annexed to the affidavit, are copies of the statement of defence in Mbita PM's court suit and other documents marked as "AOG1 to AOG 4" herein.

5) On 6<sup>th</sup> February 2020, this court ordered and directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010**

6) So, learned counsel for the applicant filed a 3-paged submissions dated 2<sup>nd</sup> November 2021 on 29<sup>th</sup> November 2021. Counsel made reference to the application, the replying affidavit and identified an issue for determination namely whether the application is merited. In analysing the issue, counsel submitted that the application is unopposed, reiterated the grounds of the application, referred to paragraphs

8, 10 and 11 of the replying affidavit and urged this court to allow the application.

7) On 26<sup>th</sup> November 2021, learned counsel for the respondent filed a 3-paged submissions of even date. Counsel submitted, inter alia, that the applicant filed a statement of defence in Mbita PM's court suit, the same has progressively been heard and the applicant has participated in every stage of the proceedings thereof. Counsel also made reference to this application and the replying affidavit and relied upon **section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya** (The CPA herein) on stay of suits.

8) I have thoroughly considered the entire application, the replying affidavit and the rival submissions in their entirety. In that regard, is the application merited?

9) It is common baseline that the plaintiff in this suit is the defendant in Mbita PM's court suit. That the defendants herein are the plaintiffs in Mbita PM's court suit which is partly heard and the parties have actively participated in the same. The subject matter in both suits is the suit land as captured at paragraph 2 hereinabove.

10) On that score, learned counsel for the respondents submitted that **section 6 of the CPA** is applicable. I bear in mind the said legal provision which is relevant hereto.

11) It is noteworthy that the Mbita PM's court suit was lodged on 28<sup>th</sup> December 2018 while the instant suit was filed on 26<sup>th</sup> August 2019. The principles of equity especially as regards the first in time as provided for under **Article 10 (2) (b) of the Constitution of Kenya, 2010**, tilts in favour of the defendants against the plaintiff in the obtaining circumstances.

12) It is further noted that the suit land is located within Lambwe area. Thus, the parties' dispute falls within the jurisdiction of Mbita PM's court in the first instance as stipulated under **sections 11, 12 and 15 of the CPA**.

13) Besides, this suit was commenced by way of an Originating summons and the intention of that procedure is well settled; see **Re Giles (2) (1890) 43 chD 391 and Kibutiri-vs-Kibutiri 1983 eKLR**.

14) The applicant has sought only interim orders of injunction and costs on the face of the Originating summons. This court has the mandate to grant interim orders including injunctions under **section 13 (7) of the Environment and Land Court Act, 2015 (2011)**. However, the orders sought in the originating summons do not speak to the provisions of the law under which this suit is mounted.

15) This court is conscious of amendment of originating summons pursuant to **Order 8 Rule 4 of the Civil Procedure Rules, 2010**. Be that as it may, the application is unmerited and the suit is incompetent in light of the foregoing observations.

16) To that end, I am guided by the **Black's Law Dictionary 10<sup>th</sup> Edition** at page **1649** on the term "strike out" and proceed to order that this entire suit initiated by way of an originating summons dated 5<sup>th</sup> August 2019 inclusive of the application, be and is hereby struck out

17) Given the circumstances of this matter and taking into account the proviso of section 27 (1) of the CPA, each party to bear own costs of the application and the suit.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 8TH DAY OF DECEMBER 2021.**

**G M A ONGONDO**

**JUDGE**

**PRESENT;**

**DEFENDANTS/RESPONDENTS**

**OKELLO, COURT ASSISTANT**