



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC MISC. No. E006 OF 2020**

**LEONIDA OUMUKHOYA SHIKUKU.....APPLICANT**

**VERSUS**

**PETER ANDAI ATIRA.....1<sup>ST</sup> RESPONDENT**

**ROSE ATEMA AYUBU ATIRA..... 2<sup>ND</sup> RESPONDENT**

**ROSE MULONDA OPANDA.....3<sup>RD</sup> RESPONDENT**

**THE CHAIR, CHURCH COMMITTEE**

**EPISCOPAL CHURCH OF AFRICA.....4<sup>TH</sup> RESPONDENT**

**THE CHAIR SCHOOL COMMITTEE**

**EBUTENJE PRIMARY SCHOOL.....5<sup>TH</sup> RESPONDENT**

**JAPHETH ASIRANDAI OPANDA.....6<sup>TH</sup> RESPONDENT**

**JOSEPH OPANDA..... 7<sup>TH</sup> RESPONDENT**

**JIMMY OPANDA AMBUNYA..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. By Notice of Motion dated 28<sup>th</sup> October 2020, the applicant herein seeks the following orders:

*1. That KAKAMEGA CMC E.L.C NO.86 OF 2018 be transferred to High Court in Environment and land Court.*

*2. That the costs of this Application be provided for.*

2. The application is supported by an affidavit sworn by the applicant. She deposed that the matter started at the High Court as Kakamega HCC No 74 of 2012 and was later transferred to the subordinate court. That the subordinate court lacks jurisdiction to hear and determine the matter and that at some point in the year 2019, the advocates for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents wrote to the court seeking transfer of the matter. Among the grounds listed on the face of the application are that the suit property is of an approximated value of over KShs 20,000,000 and that the subject matter in the suit is purely land.

3. The 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents responded to the application through a replying affidavit sworn by the 3<sup>rd</sup> respondent. She deposed that in the absence of a valuation report the issue of whether the suit property is valued at over KShs 20 million is one of conjecture. She added that the applicant is enjoying injunctive orders made by the subordinate court and that the application is aimed at frustrating the finalization of the suit. That the letter referred to by the applicant has no force of law.

4. The application was canvassed through written submissions. Save for the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents, the rest of the respondents neither responded to the application nor filed submissions.

5. The applicant cited **Section 13** of the **Environment and Land Court Act, 2011** and argued that this court has jurisdiction to call for the subordinate court's file so as to peruse it and give directions. Further, the applicant argued that the suit property is about 22 acres and that some of the parties are public entities thereby making appropriate that the matter be handled by this court.

6. The 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents argued that in the absence of a valuation report to ascertain the value of the suit property, the claim that the suit property is valued at approximately over KShs 20,000,000 remains a mere allegation and that the application should be struck out or dismissed.

7. I have considered the application, the affidavits and the submissions. The applicant has not annexed a copy of the pleadings in the subordinate court case to enable this court ascertain the nature of the claim. The main reason why a transfer to this court is sought is that the suit property is of an approximated value of over KShs 20,000,000 and that the subject matter in the suit is purely land. As the respondent has pointed out, there is nothing placed before the court to ascertain the value. Even if I were to peruse the subordinate court's file, it has not been shown how such a perusal will enable me determine the value. I must however restate that its always the duty of a party who wants to establish a certain fact to avail material to prove the fact. The applicant out to have availed a valuation report.

8. Pursuant to **Section 26 (3) and (4)** of the **Environment and Land Court Act, 2011** as read with **Section 9 (a)** of the **Magistrates' Courts Act, 2015**, subordinate courts have jurisdiction to hear and determine claims relating to environment and land generally. Thus, even the argument that the subject matter of the suit is purely land does not aid the applicant.

9. In view of the foregoing discourse, Notice of Motion dated 28<sup>th</sup> October 2020 is devoid of merit. I dismiss it. Considering that parties are still litigation the main dispute, I order that each party shall bear own costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF DECEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Applicant

No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 8<sup>th</sup> Respondents

Ms Shimoli for the 3<sup>rd</sup> Respondent

Court Assistant: E. Juma