



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 54 OF 2018

SYMON ONYANGO OKUMU.....PLAINTIFF/APPLICANT

Versus

JOHN OTIENO ODERO.....1ST DEFENDANT/RESPONDENT

JOSEPH ONYANGO ODERO.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is with regard to an oral application by Mr. Capis Omolo Gembe, learned counsel for the defendants namely **JOHN OTIENO ODERO** and **JOSEPH ONYANGO ODERO** (The respondents) made on 6th February 2020. Counsel sought that :-

a) The applicant's submissions dated 30th October 2019 and filed in court on 10th November 2019 in respect of his application by way of a Notice of motion dated 2nd May 2019 and filed in court on 15th May 2019 (the motion), be struck out of the court record.

b) If order (a) hereinabove is granted, the said motion be dismissed with costs.

2. The oral application is founded on the assertion that the applicant failed to comply with this court's orders of 5th December 2019 which read, inter alia;-

“.....I allow the applicants counsel to serve the submission within the next seven (7) days from this date.”

3. By the foregone orders, the respondent's counsel was required to file and serve submissions in respect of the motion within 14 days from date of service. That the parties represented by counsel were to highlight their respective submissions on 6th February 2020. So, did the applicant's counsel serve submissions to enable the respondents counsel to file his submissions as ordered herein?

4. It is noted that on 22nd October 2019, learned counsel Mr. Singei holding brief for Owaka learned counsel for the applicant sought to have the motion argued by written submissions. Counsel for the respondents was amenable thereto. This court allowed the prayer in line with **Order 51 Rule 16 of the Civil Procedure Rule, 2010 and Practice Direction, number 33 of the Environment and Land Court Practice Directions 2014**. As a result, the parties were ordered and directed to comply within 30 days from that date.

5. Consequently, learned counsel for the applicant filed submissions dated 30th November 2019 within the set time lines. However, he failed to serve the said submissions.

6. During mention on 5th December 2019 to confirm compliance with the directions given on 22nd October 2019, Mr. Job Oyier holding brief for counsel for the applicants sought seven (7) days to serve the submissions. This court granted the said prayer accordingly. The respondents' counsel was then ordered to file and serve submissions within 14 days from date of service of the applicant's submissions.

7. On 6th February 2020, counsel for the respondents informed the court that the applicant's counsel had not filed and served the submissions as ordered on 5th December 2019. Thus, he generated the instant application.

8. The applicant and his counsel were present in court on 5th December 2019 when the orders regarding service of submission were made. Surprisingly, they failed to attend court on 6th February 2020 without any reason or at all.

9. **Articles 48 and 50 (1) of the Constitution of Kenya, 2010** provide for access to access and fair hearing respectively. The applicant's

counsel was given latitude to file and serve his submissions in respect of the motion. He failed to serve the submissions and argue the application as well as violated the respondent's rights under **Articles 48 and 50 (1) (supra)**.

10. It is well settled that the right to be heard before an adverse decision is taken against a person is very fundamental and permeates our entire Justice system: see **Onyango Oloo –vs- Attorney General (1986-1989) EA 456** applied in the case of **James Kanyiita Nderitu and another –vs- Marios Philotas Ghikas and another (2016) eKLR**.

11. The motion is seeking principal orders namely, leave to amend the plaint dated 24th April, 2018 and reopening of proceedings herein. However, it is pretty clear that this suit was generated by way of an originating summons dated 25th September 2014 and not the plaint referred to in the motion. I find this lapse fundamental and **Article 159 (2) (d) of the Constitution (supra)** can not be invoked in favour of the applicant in the circumstances.

12. I consider the entire pleadings, the motion and the response thereto together with the respondent's oral submissions. Admittedly, this suit is part heard. In view of the fundamental lapse and failure of the applicant's counsel to comply with court's orders of 22nd October 2019 which were extended on 5th December 2019, the motion is devoid of merits.

13. A fortiori, I order as follows;-

a) The applicants' submissions dated 30th October 2019 is hereby struck out of the record herein.

b) The applicant's notice of motion dated 2nd May 2019 be and is hereby dismissed with costs in the cause.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MIGORI this 11th day of March 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. C.O Gembe learned counsel for the applicant

Court Assistant – Tom Maurice