



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

HCC NO. 23 OF 2009

DISMAS EGESA OSINYAPLAINTIFF/RESPONDENT

VERSUS

THE COUNTY GOVERNMENT OF BUSIA....DEFENDANT/APPLICANT

R U L I N G

1. For determination is the notice of motion application dated 14th October 2019. The application is brought under the provisions of sections 3, 3A and 80 of the Civil Procedure Act; Order 10 rule 11 and Order 45 rule 1 of the Civil Procedure Rules. The defendant/applicant seeks to be granted orders;

- 1) That the judgement herein dated 5th December 2018 be set aside and/or stayed pending the hearing and determination of this application.**
- 2) That the judgement herein be reviewed and any decree and consequential Orders granted thereunder be set aside.**
- 3) That the costs of this application be provided for.**

2. The application is supported by the three (3) affidavits of Joe Maurice Odundo. The supporting affidavit was sworn on 14/10/2019, further affidavit sworn on 31st October 2019; supplementary affidavit sworn on 3rd February 2020 and further affidavit of Rodgers Sekwe sworn on 27/7/2020. It is also premised on the grounds listed on its face *inter alia*;

(i) That the delay in bringing this application has been caused by the fact that the land the subject matter of the claim and judgment herein, was the subject of compulsory acquisition by the Government of Kenya under the Land Acquisition Act (Cap 295, Laws of Kenya) for the benefit of the defunct local authority, the then Municipal Council of Busia, and it has been a pains-taking exercise piecing relevant information together showing that the land, subject of the judgment was lawfully acquired and the defendant herein was not only non-suited but the action itself was statute-barred by operation of Law.

(ii) That our research has found new and important evidence which after the exercise of due diligence, was not within the knowledge or could not be produced by the defendant at the time the judgment was passed or orders made.

(iii) That in light of the foregoing it is only fair and just and in the interest of justice that his application be allowed.

3. Mr. Odundo who is the Chief Officer department of Lands Housing and Urban Development of the Applicant deposed that they have traced documents to show the land the subject of the judgment sought to be set aside was compulsorily acquired by the Government of Kenya between 1977-1981. He annexed copies of gazette notices No. 1217 and 1218 dated 16th April 1981 in respect of L.R No. 1295 owned by Joseph Osinya Buluma - deceased. That gazette notices dated 1146 and 1147 published on 30th April 1982 clearly showed compensation was duly paid.

4. In the further affidavit, Mr. Odundo annexed correspondence which he deposed were evidence of the acquisition. Amongst the letters annexed are;

(i) A letter dated 15th July 1981 from the office of the District Commissioner (Ref. LND.16/3 Vol.II/51,) addressed to the Chief Bukhayo Wst Location, through the District Officer, Nambale Division, forwarding awards of compensation to land owners, among whom, listed as No. 4, was Joseph Osinya.

(ii) A letter dated 30th July 1981 (Ref No. LND.6/6/1) from the Chief West Bukhayo Location addressed to the District Commissioner through the District Officer Nambale Division returning the forms of compensation awards, duly signed by the

persons named therein whose lands had been acquired except for the deceased persons, Joseph Osinya and Osimata Masete (Nos. 10 & 12).

(iii) A letter dated 13th October 1981 from District Commissioner, Busia District, to the Chief Valuer, Department of Lands, Nairobi, stating that the persons named therein were deceased and their compensation should be made in the names of their heirs, and in respect of Joseph Osinya, equally among his sons:

(a) Dismas Egesa Osinya(b) Peter Juma Osinya

(c) Alfred Wabwire Osinya, and

(d) Moses Sikuku Osinya

(iv) A letter dated January 5, 1983 Ref. BTC/PH/1/4/14 from the Town Clerk, Buisa Town, to the District Commissioner Busia District verifying the particulars of the land owners of the land acquired, one of whom was Joseph O. Buluma, (deceased), and the son, Dismas Egesa Osinya as the heir administrator of LR. No. Bukhayo/Mundika/1295.

(v) A letter dated 29th November 1982 (Ref No. PH/21/18/4) from the Town Clerk to the District Commissioner forwarding what appears to be signed Grants of Letters of Administration in respect of among the others the Judgment/Creditor, Dismas Egesa Osinya in respect of Plot No. Bukhayo/Mundika/1295.

5. The Applicant deposed that the land having been compulsorily acquired and compensation paid, there was no violation of rights of the late Joseph O. Buluma. That it is on this land that is built sewerage ponds for Busia Municipality. That the purported sub-division of title No. Bukhayo/Mundika/1295 or any superimposition or transmutation of that title to Bukhayo/Mundika/6181 or any subsequent sub-divisions were illegal acts and conferred no legal or equitable interest upon the judgement-creditor or any other person.

6. That in light of the illegal acts aforesaid, the judgement creditor's claim is a fraud and the illegality vitiates every transaction hence the said judgment ought to be set aside and the respondent condemned to pay costs.

7. In the supplementary affidavit, Mr. Odundo deposed further that if the plaintiff/respondent had interest on the land where the sewerage plant is, such claim is statute-barred since the plant has been in existence for over 12 years. That L.R No. Bukhayo/Mundika/7883 is derived from title No. Mundika/311 registered in the name of Joseph Osinya Buluma – deceased. That pursuant to a mutation registered on 28/2/1975, L.R No. Bukhayo/Mundika/311 was sub-divided to create L.R Nos 1295 and 1296 as shown in the Registrar's letter annexed as '**JMO2**'.

8. That L.R No. Bukhayo/Mundika/1295 was acquired by the government and that in Busia RMCC Succession Cause No. 4 of 1982, the respondent was declared to be the sole owner ('**JMO3**'). That the respondent used the said judgment to register himself as owner of L.R No. 1295 on 30th December 1982. That upon registration, he subdivided L.R No. 1295 into two to create numbers 2274 and 2275.

9. The applicant proceeded to show subdivisions carried out by the respondent in respect of parcel No. 2274 and which he attached the respective green cards as follows;

(1) Parcel Number 2274 was sub-divided into parcels numbers 2630 and 2631.

(2) Parcel Number 2630 (approximate area 7.0Ha), was sub-divided into parcels numbers; 3123, 3124 and 3125.

(3) Parcel Number 3123 (comprising 6.82Ha approximately), was sub-divided into parcels numbers; 3362, 3363 and 3364.

(4) Parcel Number 3362 was sub-divided into parcels number 3912 and 3913 (approximately 6.57Ha).

(5) Parcel Number 3912 was sub-divided into parcels numbers 4585 and 4586.

(6) Parcel Number 4585 (approximately 6.48Ha) was sub-divided into parcels numbers 6181 and 6182.

(7) Parcel Number 6181 was sub-divided into parcels numbers 6339, 6340, 6341, 6342 and 6343.

(8) Parcel Number 6339 was sub-divided into parcels numbers 7883 and 7884. Parcel 7883 is said to be 6.1Ha (approximately the original area of Parcel No. 1295 and which was 6.14Ha).

10. It is the applicant's contention that once part of parcel No. 1295 was acquired by the Government, it ceased being part of the estate of Joseph Osinya Buluma and the respondent had no right in law to include it as such. That the systematic subdivisions of L.R No. 1295 was to confuse, obfuscate and hide the fact that L.R No. 7883 (on paper) is one and the same as L.R No. 1295 on the ground which was lawfully acquired, compensated for and vested in the government. That the respondent obtained the judgment to be set aside by non-disclosure of material facts. He therefore urged the Court to grant the orders sought in their application.

11. The plaintiff/respondent filed grounds of opposition dated 7th November 2019 in opposition to the application. The grounds listed are;

- (a) *That the defendant/applicants' application is an afterthought.*
- (b) *That the defendant's/applicant's application lacks merit.*
- (c) *That defendant/applicant participated in every aspect of the hearing up to judgment.*
- (d) *That the evidence they are trying to introduce was in their custody all along.*
- (e) *That evidence they are intending to introduce by them is on the court file.*
- (f) *That the application is a delaying tactic and intended to deny the plaintiff/respondent fruits of his judgment.*

12. The respondent also filed albeit late a replying affidavit on 16th July 2020. In it, Mr. Egesa deposed that as at the time of filing of this application on 15th October 2019, there was already filed a notice of appeal lodged on 11th December 2018 as per copy annexed as 'DEO1'. That once an appeal is filed, an application for review of the same judgment is illegal and untenable. That the applicant vide a letter dated 6th November 2019 purported to withdraw the appeal but which letter is dated after the filing of the impugned application.

13. The respondent also deposed that the application for review was filed by a stranger who came on record vide notice of change of advocates on 4th June 2020. That the notice of change takes effect after filing and cannot have retroactive potency. Further the respondent deposed that the applicant's counsel came on record after judgment without an order of the court contrary to the mandatory provisions of the law.

14. That the evidence purported to be brought to the fore is evidence that was in the domain of the applicant since the same were in possession of the Land Registry and the County Commissioner's office both having their officers opposite the applicant's office. That from the affidavits of Mr. Odundo, no new evidence abounds nor is there proof the same was not within their reach. That as early as 5th August 2016, Mr. Makokha their counsel on record for the applicant had sought for the same information as shown in the letter annexed as 'JMO1' (DEO 3). That all the other documents would have been obtained by a search at the lands office hence there is no new evidence.

15. That the gazette notices annexed by Mr. Odundo were filed in court by the defendant though not formally produced. The respondent stated that the judge made reference to the gazette notices at page 9 of the judgement when he stated thus;

“The gazette notice dated 7/4/1981 availed by the Defence detailed the purpose for which the land parcels enumerated therein were to be acquired, namely for the “Busia Sewerage project.” It however did not make reference to the suit property as correctly observed by the plaintiff. The plaintiff also avers that he did not receive any notice of the impending acquisition nor was he ever compensated for it. It can therefore be safely concluded from the evidence on record that the suit property was unlawfully appropriated by the defendant”.

16. In response to the respondent's replying affidavit, the applicant filed a further affidavit on 27/7/2020 sworn by Rodgers Sekwe, the County Solicitor. He reiterated the applicant's discretion to appeal or apply for review. That the matter of the County Solicitor coming on record for the applicant was already addressed in the preliminary stages of the hearing of this application. That procedures are hand-maids of justice not its fetters. Mr. Sekwe deposed further that the office of the County Attorney is a department of the defendant/applicant established in line with sections 4, 7 and 8 of the office of the County Attorney Act 2020.

17. That the County Solicitor is an employee of the defendant thus filing a notice of change was merely an execution of his duty. It is his averment that this Case was inherited from the defunct Municipal Council of Busia and that strenuous efforts were put in place to source for the records from the office of the Commissioner of Lands and Kenya National Archives in Nairobi and the Provincial Archives in Kakamega. That obtaining those records cannot be equated to walking into a retail shop and buying goods of one's wish as is being deposed by the plaintiff/respondent.

18. The applicant filed written submissions on 30th June 2020. It is submitted that there is discovery of new and important evidence which the Respondent concealed from the Court. Secondly that the plaintiff's suit was statutorily time barred by dint of the provisions of section 4(1) (c) of the Limitation of Actions Act. The applicant cited the Case of *Kennedy Mureithi & Ano Vs Peterson Karimi Gacewa (2016) eKLR* and Environment and Land Court *Case No. 290 of 2017; Grace Adhiambo Ogaga Vs William Ochieng Ogaga & 3 others* in support of this submission.

19. On the issue of appointment, the applicant submits that their county attorney is properly on record having remedied the omission. Further on the discretion to appeal or apply for review, it is submitted that the same is overtaken by events since the notice of appeal was validly withdrawn hence there is no valid appeal before the Court of Appeal. That procedures are hand maids of justice not its fetters. He relied on the provisions of Article 159(2) of the Constitution for curing any procedural defect. In respect to the delay in filing the application, the applicant cited Sir Salmon L. J. in the Case of *Allen Vs Sir Alfred McAlpine & Sons Limited C.A (1966) ALL E.R 543* thus;

“There has to be inordinate delay. It is not possible to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary from case to case but it should not be too difficult to recognize inordinate delay when it occurs.”

“That the defendants are likely to be seriously prejudiced by the delay. This may be prejudicial at the trial of issues between themselves and the plaintiff or between each other, or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the larger the delay, the

greater likelihood of serious prejudice at the trial”.

20. The plaintiff/respondent filed his submissions on 15th May 2020. He opened his submissions by paraphrasing the provisions of Order 9 rule 7 and Order 6 rule 1 of the Civil Procedure Rules. That in instances where judgement has been rendered; a formal application shall be made to court and served on the previous counsel as provided in Order 9 rule 5. That all pleadings filed in contravention of this rule are null and void *abinitio*. The respondent cited the holding in ***Malindi HCC Misc. Appl. No. 6 of 2018; S.K. Tarwadi Vs Veronica Muehlrmann*** thus;

“Even after the anomaly was drawn to the applicant through the ruling of 13th February, 2018, he has neglected to make amends. He continues to act in total disregard of the rules and expect the Court to act in support of such impunity. That will not happen. Had he moved to redress the failure to comply with Rule 9, I would have exercised discretion in his favour for it is the duty of court to dispense substantive justice. He has not taken any action. I will thus proceed to strike out the instant application for being incompetent. Costs are awarded to the respondent.” (I have underlined the part for emphasis).

21. The respondent submitted further that the present application fails because it was brought after inordinate delay of 11 months and cited the case of ***Allen supra***. The respondent proceeded to cite instances where the defendant/applicant sought adjournments during the hearing of the main case. That the conduct of the applicant displayed lack of seriousness in the matter. That the application is also incompetent for being filed when there is an existing valid appeal. That there is no evidence that the appeal was marked as withdrawn.

22. On merits, the respondent submits the application is lacking merit because; L.R No. Mundika/7883 and 6339 are not included in gazette notice No. 1217. Further that gazette notices number 1146 and 1147 does not mention the plaintiff’s name or title. Thirdly that no cheques or payment vouchers were attached to prove that compensation was paid. That acquisition without compensation is null and void. The respondent relied on the case of ***Machareus Obaga Anunda Vs Kenya Electricity Transmission Company Limited, Kisii ELCC No. 197 of 2015*** at paragraph 8 where Okong’o J stated as follows;

“There is no dispute that the plaintiff is the owner of the suit properties, there is also no dispute that the defendant has entered the suit properties without the plaintiff’s consent and commenced the construction of electricity transmission towers thereon. The plaintiff’s contention is that the defendant’s entry onto the suit properties is illegal and unconstitutional”.

23. The principles for review to be proved are well anchored in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. An order or decree can be reviewed when it is demonstrated that;

(a) *There is discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him.*

(b) *On account of some mistake or error apparent on the face of the record.*

(c) *For any sufficient reason.*

(d) *The application is made without unreasonable delay.*

24. In the present application, the applicant has dwelt on the heading of discovery of new and important evidence as well as explain the reason for the delay of eleven (11) months before bringing the application. The plaintiff/respondent in opposing the application stated that the evidence sought to be introduced would have been obtained during the hearing of the suit were the applicant diligent.

25. The first question for this court to answer is whether the discovery of new and important evidence would have been procured by the applicant after exercising due diligence. In the affidavit in support of the application, Mr. Maurice Odundo deposed that the office of the County Attorney was recently set up and it is in the process of setting up its necessary operational structures. He deposed further that they have been tracing documents and evidence that the land the subject of this judgment was acquired by the government between 1977-1981 under Cap 295. That they were seeking copies of some of these documents from the National Archives and Commissioner of lands offices in Nairobi.

26. The applicant was duly represented by an advocate who filed a notice of appointment of advocate together with a statement of defence on behalf of the defunct Municipal Council of Busia by the firm of S. O. Madialo & Co. Advocates. Later on 21st August 2015, J. P. Makokha & Co. Advocates filed a notice of change of advocate in favour of the applicant as well as another statement of defence. There is no indication given by the applicant in regard to when they started tracing these documents. It has not been explained whether or not the tracing of these documents were commenced immediately after the transition from the Municipal Council to the County Government which process is presumed to have taken place between 2013 – 2015 (the transitional period).

27. From the record, the hearing commenced on 17th January 2017 which is about 7-8 years after the suit was filed; and approximately 2 years after the transition took place. The setting up of the office of the County Attorney is neither here as the documents sourced would have been given to the applicant’s previous advocates by the instructing client. I am therefore persuaded to go by the plaintiff’s plea that the new evidence in this case would have been obtained had due diligence been applied. This is exhibited for example by the inclusion of the Land Registrar’s letter dated 5/8/2016 in the defendant’s list of documents filed on 16th July 2017.

28. Should the application be dismissed for failure to meet the threshold of lack of due diligence in obtaining the new & important documents? I think not because the court has discretion to consider the application on all the three headings. Since there is no averment that there was mistake on the face of the record, I will deal with the application under the heading ***“for any sufficient reason/cause”*** given that the application was also premised on the provisions of section 3 and 3A of Civil Procedure Act which grants the court powers to exercise its

discretion. The Court of Appeal in the Case of *D. Chandulal K. Vora & Co. Limited Vs Kenya Revenue Authority (2017) eKLR* page 5 cited its decision in the Case of *Wangechi Kimata & Ano Vs Charan Sing Court of Appeal No. 80 of 1985 (unreported)* where it held thus;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by section 80 of Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

29. In the present application, the applicant has pleaded and annexed documents to show that the suit property Bukhayo/Mundika/7883 traces its origin through sub-division to parcel number Bukhayo/Mundika/1295 as shown in the Land Registrar’s letter annexed by the Respondent as “DEO3”. That Bukhayo/Mundika/1295 was acquired by the government sometimes in 1977-1981 as per gazette notices number 1217 and 1218 dated 16th April 1981 annexed as “JMO1” and compensation paid to Joseph Osinya Buluma – deceased and/or the plaintiff. Thus the land having been compulsorily acquired by the government, the plaintiff’s right over the suit land was extinguished. The documents relating to the payment of compensation were not available when the court rendered its decision on 5th December 2018. No wonder the judge stated thus;

“The gazette notice dated 7/4/1981 availed by the Defence detailed the purpose for which the land parcels enumerated therein were to be acquired, namely for the “Busia Sewerage project.” It however did not make reference to the suit property as correctly observed by the plaintiff. The plaintiff also avers that he did not receive any notice of the impending acquisition nor was he ever compensated for it. It can therefore be safely concluded from the evidence on record that the suit property was unlawfully appropriated by the defendant”.

30. The plaintiff in his submission has listed the following dates when the defendant sought adjournment thus blaming the defendant for the delay in this matter which delay then should not entitle the defendant to exercise of discretion for sufficient cause:

(i) No defence was filed and judgement entered against them; the same was set aside by consent on 1/12/2015; the period granted to the defendant was not utilized in filing a defence.

(ii) On 9/2/2016, Counsel Mr. Makokha sought for more time to file a defence.

(iii) On 13/6/2016, counsel Makokha told the Court he was not filing the anticipated defence to the amended Plaintiff.

(iv) On 27/9/2017, Mr. Makokha filed his exhibits in Court just before the hearing, as a consequence, the plaintiff’s counsel sought for time to study them.

(v) On 17/7/2017, when PW1 was heard, counsel sought to adjourn; his witness was allegedly not in Court.

*(vi) On 27/11/2017; Counsel Mr. Makokha was said to be engaged in the election court; matter adjourned to 29/1/2018, **and a last adjournment granted to the defendant.***

31. I have perused the record and note that in regard to paragraph (i) there were already two statements of defence on record so it is misleading for the plaintiff to submit that the defendant did not utilize the time they were given to file their defence. The record shows that on 1-12- 2015, it is the plaintiff who sought leave to file a further amended plaint; on 13-7- 2016, the plaintiff again sought leave to file a further list of documents. Further on 27- 9-2017, the matter was adjourned because the plaintiff’s documents were served a day before hearing thus the plaintiff contributed to the matter being adjourned. The record show the plaintiff’s further list dated 26th September 2016 filed on the same date to confirm late service was by them not the defendant.

32. However, the record does show that the defendant did apply for adjournment on 16th January 2017 and the matter rescheduled to hearing the following day on 17th January 2017 where upon the plaintiff testified and closed its case. The next time that the defence sought adjournment in respect to hearing was on 17th July 2017 and 27th November 2017. Although this suit was filed in the year 2009, the record has shown that it is not conduct of the defendant that solely contributed to its delay in being finalized. The argument of delay thus cannot be used against the defendant to dis-entitle her to favourable exercise of the Court’s discretion.

33. On the question of inordinate delay, it is indeed true that 11 months can be counted as inordinate. The Applicant explained that this was caused by their internal regulations requiring them to set up offices of the County Attorney. The explanation given that it took the applicant a while in setting up the new office in my opinion is reasonable thus making the delay excusable. I say so because once an office is set up, there is recruitment process of office holders which in this case the applicant called setting up the operational structures.

34. In the Case of *Essanyi & Another Vs Solanki (1968) E.A, 218* the court observed that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.

35. The lapse herein was the laxity on the part of the defence to call evidence in support of their case. That lapse in my view should not be ignored where it is demonstrated that there is important evidence which may help the court to reach a determination that is just to both parties. It would serve the interests of justice to afford an opportunity to such an applicant to present their defence. The plaintiff can be compensated for the prejudice by an award of costs as the case may be. In this instant the important evidence is after the acquisition of the property, was compensation paid and is the applicant non-suited?

36. Secondly, the plaintiff/respondent took up the issue that this application was filed during the pendency of an appeal to the Court of

Appeal. In support of this submission, the respondent cited the provisions of **section 59(1) of the Appellate Jurisdiction Act**. However, the Appellate Jurisdiction Act is inapplicable to this Court. In answering to the existence of the appeal, the applicant stated that they already filed a letter withdrawing the pending appeal. Whether there is an order marking that appeal as withdrawn or not is in my view the mandate of the Court of Appeal to deal with. For purposes of this court, it is sufficient for a party to show evidence of such withdrawal filed which has been done.

37. Lastly on non-compliance with order 9, the same was cured by the consent filed on 15th June 2020. The purpose of Order 9 is to protect the interest of advocates being denied fees for services rendered. I do not think it can be used as a barrier by the opposing counsel in challenging proceedings as in this case being raised. A similar issue arose in the case of **Ahamed Mohamud Adam vs. Jimmy Tomino & 2 Others Nakuru HCCC No. 244 of 1998** and **Koome, J** (as she then was) held that:

“The mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words, it was meant to secure the interest of the advocate who acted for the party up to the judgement.”

38. On the application being filed by a stranger to the proceedings. This is also a procedural technicality that can be cured by the provisions of article 159(2) (d) of the Constitution. Why do I say so? If the application dated 14th October 2019 is struck out; the defendant is still permitted in law to bring a similar application as they already have a consent on record between her and the previous advocate J.P Makokha & Co. advocates. Instead of allowing the current application to be struck out and or withdrawn, the substantive justice requires that cases should not be delayed. The filing of a similar application will result in delay to both the plaintiff and the defendant in having this matter concluded once and finally.

39. The other issue picked up by the plaintiff is that the Notice of Change of Advocates was filed on 4-6-2020 after the application had been filed. The County Attorney is an employee of the County Government who is the Applicant in this case. The application filed on 14-10-2019 in my view is deemed as having been filed by the applicant in person. Hence the provisions of order 9 of the Civil Rules apply. As I have said above, the defect is curable by article 159(2) of the Constitution.

40. The Respondent has deposed that the documents annexed do not include the cheques or payments vouchers. I hold the view that these are matters that can be argued after the case is re-opened to allow the defence to show proof that the land was compulsorily acquired and payment made. From the judgement sought to be set aside and or reviewed, the court noted that the government acquired the plaintiff's land without compensating him. It is not too much to ask that the defence be given an opportunity to provide such evidence if there is any and if the compensation is payable by the defendant or its non-suited.

41. In view of the foregoing analysis, I do find the application is merited and allow it in terms of **prayer 2** of the motion that judgment rendered on 5th December 2018 is reviewed by setting it aside to enable the defence present its case by introducing the documents annexed to the affidavits filed in support of the motion. The plaintiff is granted leave to recall their witness should they deem it fit to do so. The costs of the application is awarded to the plaintiff and assessed at Kshs.25,000 to be paid within 45 days of the delivery of this ruling. In default the respondent is at liberty to execute.

Ruling dated, signed and delivered at BUSIA this 30st day of July, 2020.

A. OMOLLO

JUDGE