

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND COURT CASE NO. E007 OF
2025

BRIAN OTIENO WEKE.....1ST
PLAINTIFF/APPLICANT

TOM OCHIENG DANIEL.....2ND
PLAINTIFF/APPLICANT

VERSUS

KENYA FORESTRY

RESEARCH

INSTITUTE.....DEFENDANT/RESPONDENT

RULING

- 1.** This ruling follows an application that was made by the 2nd Plaintiff in which he sought to strike out the defense. As the court embarked on the determination of the merits of the application it became important to understand one question first: whether the application would be moved in a suit that was alleged to have been consolidated with many others of which there was one made a test suit.
- 2.** With that background, then, by way of Notice of Motion dated 12th November, 2025 the 2nd Plaintiff sought the following orders:
 - 1) ...Spent**
 - 2) The Defence dated 24th February, 2020 by the Defendant be and is hereby struck out.**
 - 3) The costs of this application and of the suit be paid by the Defendant.**

- 3.** The Application was expressed to be brought under Order 2 Rule 15 (1) (b), (c) and (d) of Civil Procedure Rules. It was premised on the grounds on the face of it and the depositions of the 2nd Plaintiff in his supporting affidavit sworn on the 12th November 2025. He deponed that he seeks the striking out of the Defence dated 24th February, 2020 by the Defendant as Property Land Reference Number Suna East/Wasweta 1/22729 (property) is registered in the names of the Plaintiffs, annexing and marking as "TOD-1" the title for the property. That the Plaintiffs filed this suit through a Plaint dated 2nd December, 2019 seeking vacant possession of the property from the Defendant, and damages for trespass and unlawful occupation of the property. The Defendant filed a Defence dated 24th February, 2020 pleading the defence that the property was allocated to it by Migori County Government in 2013. He deponed that the property is private property being alienated land, and that Migori County Government has no power of allotment of over any property, let alone alienated land.
- 4.** He deponed further, that the property was not available for allotment and could not have been allotted to the Defendant by Migori County Government in 2013 or at all. That the Defence dated 24th February, 2020 is scandalous, frivolous, or vexatious, the Defence may prejudice, embarrass or delay the fair trial of this suit, and the Defence is otherwise an abuse of the process of the Court for the reason that allotment of land is a statutory process and the preserve of the National Government in respect unalienated land,

evidenced through a letter of allotment, survey, payment of premium and issuance of a certificate of title to the allottee.

5. He urged that the statutory process referred to hereinabove does not apply to the property, and in any event, was not been pleaded, particularized or evidence of the same given in the List and Bundle of Documents and Witness Statement dated 15th November, 2021 and 5th October, 2022 respectively, filed by the Defendant. That the issue dispositive of the claim by the Plaintiffs is purely legal, and not factual, as the registration of the property in the names of the 1st Plaintiff and him were not impugned. He urged the court to allow the Application as prayed.
6. The application was served. The defendant/respondent, despite asking for time on two occasions, to file a response did not do so. Further, none of the parties filed submissions in respect to the application.

ISSUE, ANALYSIS AND DETERMINATION

7. This court has considered the application. The germane issues for determination are basically three, namely, Whether The application can be decided on its merits before this matter is deconsolidated; Whether the defence dated 24th February 2020 should be struck out; and who to bear the costs of the application.
8. I will determine the issues in the sequence I have given them above because if this court finds that this suit can proceed irrespective of the Order of transfer and consolidation thereof with ELC No. 81 of 2019 in which the orders are alleged to have been made, then it will proceed to determine

the application on merits and decide on who to bear the costs depending on how the court finds on it.

- 9.** The first issue then is whether this is can proceed independently of the Test Suit during the pendency of the Orders which are said to have been made in the Tested Suit, by which this suit was transferred to this court and consolidated therewith.
- 10.** This court can only arrive at the merits of this issue by first considering brief history of the suit, or understanding how it finally got placed before this court yet it previously was not. The brief background is that the suit was instituted on 4th February 2020 vide a Plaint dated and signed on 2nd December 2019. It was filed in the Environment and Land Court and registered as Migori ELCC No. 5 of 2020. It was transferred to the Chief Magistrate' Court vide an Order of J. Ong'ondo, made on 8th February 2021. It was then given a new number, being, Migori CMCELC E008 of 2021. Subsequent to that the matter proceeded before the court on a number of occasions until 11th March 2025 when, according to the Case Tracking System (CTS), it was mentioned before Hon. Okuche SPM. Then the CTS shows that was subsequently transferred to this court soon thereafter and registered on 20th March 2025. It was given the current number, and placed before me on a number of occasions, starting with 12th June 2025, although there is a printout of orders given on 25th March 2025 in a file which may have been consolidated with ELC No. 81 of 2019 that is filed in this matter. The present application was then filed.

- 11. I have perused the file and noted that there is a copy of an order made on 30th October 2023 and issued on 28th November 2023 in Migori ELCC No. 81 of 2019 which was filed in this physical file of this matter. It is the said order that mentions transfer of a number of files and their consolidation with file No. ELCC No. 81 of 2019 which was made a test suit.**
- 12. I have very carefully studied the Order made on 30th October 2023. It lists fourteen files and their respective parties, which were to be transferred to this court and be consolidated. The on the last line of the order it states that all the files in the Notice of Motion dated 11th July 2023 were to be transferred from the Magistrates' Court to the ELC Court. Apparently, this is the order that the registry used to transfer the file into this court.**
- 13. Upon examination of the cases and parties of the fourteen (14) files listed on the order, the instant one is not among them. With the 15th limb of the order mentioning "all files" listed on the application dated 11th July 2023 as required to be transferred yet the instant one was transferred but not among those specifically listed, this court was of the considered view that it was obligated to find out which other, if at all, files were listed in the said application but were not captured in the Order made and issued.**
- 14. This caused the court to look at the Application itself, in the file No. ELCC No. 81 of 2019 to satisfy itself as to whether the instant file was among ones intended to be and indeed transferred. Upon perusal of the Application, the**

court found that this matter is not among the matters listed for transfer and consolidation.

- 15.** This Court having found that to be the position is of the view that then the instant suit was transferred to this court by error: there is an error apparent on the face of the record, and it must be corrected. The court therefore, makes a finding that the transfer was irregular because there has never been an order to transfer the suit from the Chief Magistrates Court to it. Further, it means the suit has never been transferred nor has it ever been consolidated with file No. 81 of 2019.
- 16.** For this reason, it is irregularly before the court. Further, it means that all the proceedings which were taken in it upon the transfer of the same in March 2025 to his court were irregular and null and of no effect henceforth. It means further that this Court is not clothed with the power to proceed further with the matter. It must down its tools return the file by way of a retransfer to the right court, being the Chief Magistrate's Court Migori, and it be placed before the trial magistrate to whom it was allocated at the time of transfer, if he is in the Station still, or be allocated to another one if the one then handling it has left the station. This court cannot therefore make a determination on the second and third issue that it set out to determine on the Application that was placed before it, which means that the merits of the application cannot be considered by this Court. That can only be done before the right Court.

17.The upshot of the foregoing is that, in the interest of justice pursuant to section 3A, and there being an error apparent on the face of record which needs immediate correction under Section 100 of the Civil Procedure Act, this court hereby orders that the matter be returned or transferred to the Magistrates Court and placed before the Hon. Okuche SPM for further directions. Mention before the said trial Magistrate on 28th May 2026 for further directions.

18.Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 13th day of May 2026.

**HON. DR. IUR NYAGAKA
JUDGE**

In the presence

Mr. Owino Advocate for the 1st Plaintiff

Mr. N. Havi Senior Counsel for the 2nd Plaintiff/Applicant

Mr. Okello State Counsel for Mrs. Opiyo for the Defendant/
Respondent