



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC CASE OS NO. 40 OF 2021

(FORMERLY MIGORI ELCC NO. 38 OF 2020-OS)

JOSEPH ODONGO OPIYO.....PLAINTIFF/APPLICANT

VERSUS

BENJAMIN OKWARO ESTIKA.....DEFENDANT/RESPONDENT

RULING NO. 2

1. The present ruling is in regard to a Notice of motion dated 31st July 2020 and filed herein on 3rd August 2020 pursuant to, inter alia, sections 1A, 1B,3, 3A and 18 of the Civil Procedure Act Chapter 21 Laws of Kenya and Articles 48 and 50 (1) of the Constitution of Kenya, 2010 (The application herein). One, Joseph Odongo Opiyo (The applicant) through M/S Oguttu Mboya, Ochwal and Partners Advocates formerly, M/S Oguttu, Ochwangi, Ochwal and Company Advocates is seeking the orders infra;

a) The Honourable court be pleased to order and/or direct the withdrawal and transfer of Ndhiwa SRMCC ELC NO. 14 of 2020, touching on and or concerning the same subject dispute in respect of **LR No.Homa Bay/Kawere Konyango Karanding/3413** (hereinafter referred to as the suit property), to this honourable court for hearing and final disposal.

b) Consequent to prayer 1 herein being granted, the Honourable court be pleased to consolidate the subject matter and the withdrawn Ndhiwa **SRMC ELC Case NO. 14 of 2020** and upon such conditions, same be heard and disposed of simultaneously.

c) The Honourable court be pleased to grant such further and/or further orders and or directions, as the Honourable court may deem fit, just and expedient, towards the expeditious disposal of the two suits, which touch and or concern the same suit property.

d) Costs of the application herein do abide the cause.

2. The application is based on a nineteen (19) paragraphed supporting affidavit sworn on even date by the applicant and grounds (a) to (z) stated on it's face. In a nutshell, the applicant states in part that on 17th June 2020, the respondent, Benjamin Okwaro Estika lodged civil proceedings vide Ndhiwa SRM's Court Environment and land case No. 14 of 2020 by way of a plaint of even date seeking, inter alia, eviction of the applicant from the suit property, LR No. Homa Bay/Kawere/ Konyango Karanding/3413. That on the other hand, the applicant mounted the instant suit against the respondent by way of an originating summons dated 9th July 2020 and filed herein on 17th July 2020 claiming ownership of the suit property by adverse possession. That the issues involved in the two suits are substantially the same. That the issues pertaining to adverse possession can only be entertained by this court which has unlimited jurisdiction over matters concerning land and environment including the issues at the foot of the proceedings pending before Ndhiwa Law courts. That the intended transfer and consolidation of the two suits shall avert wastage of precious judicial time, unnecessary expenses, inconvenience and that the orders sought in this application be granted in the interest of justice.

3. By a seventeen (17) paragraphed replying affidavit sworn on 1st September 2020 and filed herein on 2nd September 2020, the respondent through the firm of Nyauke and Company Advocates, opposed the application and sought that the application and the Originating summons dated 9th July 2020 altogether, be disallowed. He termed the originating summons an afterthought and an attempt to derail the suit filed at Ndhiwa Law Courts. He annexed a copy of the proceedings in the case pending at Ndhiwa Law Courts and marked as "BOE-01" in support of the affidavit.

4. On 19th January 2021, this court ordered and directed that the application be argued by written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010; see also Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**

5. So, learned counsel for the applicant duly filed eight (8) paged submissions dated 1st February 2021 on 3rd February 2021. Counsel framed four (4) issues for determination including whether the subordinate court (Ndhiwa Law courts) has the jurisdiction to address the issue of adverse possession and whether the conditions exist to warrant consolidation of the two (2) suits. In the analysis of the issues, counsel urged this court to allow the application and relied on **section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, section 7 of the sixth Schedule of the Constitution of Kenya 2010, Article 159 (2) (b) of the same Constitution, the case of Chevron (K) Limited -vs-Harrison Charo wa Shutu (2016) eKLR and sections 1A, 1B and 18 of the Civil Procedure Act Chapter 21 Laws of Kenya.**

6. On the other hand, learned counsel for the respondent filed six (6) paged submissions dated 19th January 2021 on 25th January 2021 providing a brief statement of facts of the application and the response thereto. Counsel identified twin issues for determination namely whether the application has merit and whether the ingredients of adverse possession claim has been met. Counsel urged this court to dismiss the application and relied on **sections 7 and 38 of the Limitation of Actions Act (supra) and the case of M'Mbaoni M'Ithara-vs-James Mbaka (2019) eKLR.**

7. On 4th March 2021, I called for the original record and typed certified copies of the proceedings and orders, if any, in Ndhiwa Principal Magistrate's Court Environment and Land case number 14 of 2020 for examination before arriving at this finding. Notably, the same have been availed herein accordingly.

8. I have taken into account the application, the replying affidavit and the original record alongside the proceedings as pointed out at paragraph 7 herein above and the rival submissions in their entirety. On that score, has the applicant made a sufficient case for grant of the orders sought in the application"

9. It is common ground regarding the issues hereunder;

a) The applicant and the respondent filed their respective suits as discerned at paragraph 2 hereinabove. The former filed his suit earlier than the latter.

b) The suit property is the same in both suits

c) The suit property is located within Ndhiwa sub county in Homa Bay County

d) Both parties reside within the said sub county.

e) Both suits are yet to be heard and determined

10. The area of the suit property is measuring zero decimal eight hectare (0.08Ha) as discerned in the parties' respective pleadings in both suits. I am guided by **section 13 of the Civil Procedure Act Chapter 21 Laws of Kenya** thereof.

11. In view of **section 26 (3) and (4) of the Environment and Land Court (ELC) Act, 2015 (2011) as read with sections 7 and 9 (a) of the Magistrates' Courts Act No. 26 of 2015**, Ndhiwa Principal Magistrate's Court is seized of jurisdiction regarding both suits. I am also aware of section 13 (1) as read with section 26 (4) of the ELC Act on the original and appellate jurisdiction of this court.

12. The respondent asserted that jurisdiction over the instant suit is the preserve of this court. However, I am of the view that it is not the position in light of the current Constitutional dispensation and as I endorse the decision in the case of **Patrick Ndegwa Munyua-vs-Benjamin Kiiru Mwangi and another (2020) eKLR**.

13. Bearing in mind the manner of bringing the instant suit as well the character of the same, I subscribe to the case of **Kibutiri-vs-Kibutiri (1983) eKLR** where the Court of Appeal held thus;

“The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way. The procedure is however, not meant to determine matters which involve serious and complex questions of law and fact (Re Giles (2) (1890) 43 Ch D 391 and Kulsumbai-vs-Abdulhussein (1957) EA 699)...”

14. Access to justice for all persons is anchored under **Articles 6 (3) and 48 of the Constitution of Kenya, 2010**. The parties can more reasonably and appropriately access justice in both suits before a designated magistrate at Ndhiwa Law Courts rather than before this court.

15. Thus, it would enhance speedy delivery of justice as commanded by **Article 159 (2) (b)** of the said Constitution of Kenya, 2010 which states that;

“Justice shall not be delayed.”

16. In the obtaining scenario, it would be fair and reasonable for both suits to be consolidated and heard together before a designated magistrate at Ndhiwa Principal Magistrate’s court being informed by sections 11,12, 13 ,15 and 18 (a) of the Civil Procedure Act Chapter 21 Laws of Kenya. In the case of **Judicial Commission of Inquiry into Goldenberg Affair and 3-others vs Kilach 2003 KLR 249 at 265/266**, it was observed;

‘ ...It would not be right for the two matters to be heard simultaneously by the High Court and the Commission....’

17. A fortiori, I am of the considered view that the application is partially unmerited. I hereby proceed to make the orders as follows;

a) Orders 1 and 2 sought therein and as stated at paragraph 1 (c) and (d) hereinabove, are hereby disallowed.

b) Order 3 sought in the application, is hereby granted. For avoidance of doubt, it is further ordered that this suit generated by way of an originating summons dated 9th July 2020 and filed herein on 17th July 2020, be and is hereby transferred to Ndhiwa Principal Magistrate’s court and to be consolidated with Ndhiwa Principal Magistrate’s court Environment and Land case number 14 of 2020 (The original file of the latter case is herewith returned to that court) for hearing and determination by a designated magistrate.

c) Mention before the Principal Magistrate at Ndhiwa Law Courts on 9th February 2022 for directions

d) Costs of the application be in the cause.

RULING DELIVERED, SIGNED AND DATED AT HOMA- BAY THIS 24TH NOVEMBER 2021.

G.M.A ONG’ONDO

JUDGE

In the presence of;

MR H.O BUNDE HOLDING BRIEF FOR MS W. OCHWAL LEARNED COUNSEL FOR THE PLAINTIFF/APPLICANTOKELLO,

COURT ASSISTANT

G.M.A ONG'ONDO

JUDGE



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