



REPUBLIC OF KENYA



KENYA LAW
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Bell Atlantice Communications Ltd v Rwingo (Environment and Land Appeal 1 of 2023) [2023] KEELC 18120 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

**NA MATHEKA, J
JUNE 21, 2023**

BETWEEN

BELL ATLANTICE COMMUNICATIONS LTD APPELLANT

AND

EPHRAIM MAINA RWINGO RESPONDENT

RULING

1. The application is dated January 23, 2023 and is brought under Order 42 Order 2 Rule 15(1) (d) and Sections IA, 1B, & 79B of the Civil Procedure Act seeking the following orders;
 1. This Honourable Court be pleased to strike out the Memorandum of Appeal dated January 10, 2019 and the entire Record of Appeal because the Appeal is a nullity and not transferable to this Court.
 2. Costs of this application.
2. It is brought under the following grounds that the dispute Civil Suit No 1104 of 2010 Bell Atlantic Communications Ltd vs Ephraim Maina Rwingo, the matter giving rise to the appeal in the High Court relates to the enforcement of an alleged Agreement of Sale for half share in the parcel of land known as LR No MN/I/3254 and a prayer for transfer of title in the parcel of land from the Applicant to the Respondent. The dispute in Civil Appeal No 5 of 2019 Bell Atlantic Communications Ltd vs Ephraim Maina Rwingo filed by the Respondents in the High Court on March 10, 2021 also relates the enforcement of an alleged Agreement of Sale for half share in the parcel of land known as LR No MN/I/3254 and the transfer of title in the parcel of land known as LR No MN/I/3254 as shown in the Memorandum of Appeal dated 10th January 2019. That Civil Appeal No 5 of 2019 Bell Atlantic Communications Ltd vs Ephraim Maina Rwingo was a nullity as it was filed in the High Court which Court does not have jurisdiction to hear and determine disputes relating to land article 165(5) of the Constitution expressly bars the High Court against exercising jurisdiction in respect



of matters falling within the jurisdiction of the superior courts established under Article 162(2) of the Constitution. One of the superior courts established under Article 162 (2) of the Constitution is the Environment and Land Court. Under section 13 of the Environment and Land Court Act, the Environment and Land Court is vested with original and appellate jurisdiction to hear and determine all disputes relating to environment and land. The High Court is therefore expressly barred by the Constitution against exercising jurisdiction in respect to matters relating to title in land such as the instant suit.

3. That it has been settled by the Court of Appeal in Civil Appeal No 244 of 2010 Phoenix of EA Assurance Company Limited vs SM Thiga T/A Newspaper Service that a suit filed in a Court without jurisdiction is nullity ab initio and cannot be transferred to another Court. The Court of Appeal in Civil Appeal No 244 of 2010 Phoenix of EA Assurance Company Limited vs SM Thiga T/A Newspaper Service also held that all orders emanating from a suit filed in a court without jurisdiction are null and void. The Order of the High Court transferring Civil Appeal No 5 of 2019 Bell Atlantic Communications Ltd vs Ephraim Maina Rwingo is null and void and has no legal effect.
4. The Appellant opposed the Respondent's notice of motion application dated January 25, 2023 on the following grounds that the application is frivolous vexatious misconceived, bad in law and amounts to an abuse of the Court process. That the application is res judicata by dint of the order made on November 17, 2022 and affirmed on December 14, 2022 transferring the Appeal to the Environment & Land Court for hearing and disposal. The primary suit in Mombasa Magistrate Civil Case No 1104 of 2010 Bell Atlantic Communication Ltd Vs Ephraim Maina Rwingo was filed and heard before the creation of the Environment & Land Court at the Chief Magistrate Court. The filing of the Appeal before the Civil Registry was an administrative oversight on the part of the Court Registry which is remedied by an administrative order to transfer the Appeal to the Environment & Land Court has already been done. That the suit was filed heard and determined by the appropriate Court with requisite jurisdiction. That the application is filed after an inordinate and inexcusable delay and the same has been overtaken by events. That the High Court has both original, appellate and inherent jurisdiction to transfer an appeal to the Environment & Land Court for hearing and determination. That Courts of equal status have the jurisdiction and unfettered direction to transfer cases amongst themselves to ensure the ends of justice in line with the provisions of Article 165 of the Constitution of Kenya 2010. That there is no Appeal against the decision by the High Court to transfer the Appeal to their Honourable Court and the application by the Respondent is therefore misconceived and filed contrary to the Law.

This court has considered the application and submissions therein. The power bestowed upon the High Court to transfer suits of a Civil nature is provided for in Section 18 of the Civil Procedure Act that stipulate thus:

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - (a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) Try or dispose of the same; or



- (ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) Retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn'.
6. Section 1A(1) of the *Civil Procedure Act* provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 1B(1) of the said Act provides as follows-
- 'For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
- (a) The just determination of the proceedings;
 - (b) The efficient disposal of the business of the Court;
 - (c) The efficient use of the available judicial and administrative resources;
 - (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) The use of suitable technology.'
7. The issue before me is whether or not the said court has jurisdiction to transfer the suit from one High Court to another Court of equal status. In my view and finding, this High Court has inherent residual jurisdiction to put right that which would otherwise be or amount to injustice within the meaning or power donated by Section 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya.
- In the matter of the Estate of George M'Mboroki, Meru HCSC No 357 of 2004* the court stated that;
- 'The court retain certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties'.
8. I find that the court should act in a manner or with the view of accomplishing a fair and proper administration of the law which would also mean or be in the interest of justice. In the case of *Rev Madara Evans Okanga vs Housing Finance Company of Kenya, HCCC No 262 of 2005* the court held that;
- 'The jurisdiction of the Court which is comprised within the term 'inherent', is that which enables it to fulfill itself properly and effectively, as a court of law in sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and secure a fair trial between them.'
9. The court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due



process of the law. Therein also lies the power for the court to act to prevent abuse of court process by a party so that fairness is maintained between the parties. The relevant question that arises is whether such inherent or residual power of this court can authorize the court to transfer this case to the High Court which has jurisdiction?

In the case of *Prof Daniel Mugendi vs Kenyatta University & Others, Civil Appeals No 6 of 2012* the Court of Appeals stated that;

'In order to do justice in the event where the High Court, the Industrial Court or the Environmental Land Court Division comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves.'

10. I find that High Court exercised this inherent power and to transfer cases to the Environment Land Court notwithstanding that the case had originally been filed in the High Court. Indeed, this inherent power has often been exercised by the High Court which transferred cases from one High Court to another High Court. In *Rapid Kate Services Ltd vs Freight Forwarders Kenya Limited & 2 others (2005) IKLR 292* Emukule, J stated that;

'The court's power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff had initially chosen, should be dealt with or heard or determined by the court most appropriate and suitable for those proceedings. When making or refusing an order for transfer the court will have regard to the nature and character of the proceedings and, the nature of the relief or remedy sought, the interest of the litigants and most important, the administration of justice. It is a matter of discretion for the judge and it must be for compelling reasons which would be for the purpose of ensuring justice and this is all within the inherent powers of court under Section 3A. whereas there is no express provision in the Civil Procedure... for the transfer of cases from one High Court to another, it does not mean that in a proper case the court cannot transfer a case before it to another registry of the High Court.'

11. In conclusion the High Court and Courts of equal status have inherent jurisdiction, it means that, these courts, exercising such jurisdiction, allow the transfer of this appeal to the Environment Land Court. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

