REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CIVIL APPEAL NO. 8 OF 2019

BETWEEN:

1. HEZEKIAN MACHARIA WANYOIKE

2. CECILIA WANJIRU WAMATU.....APPELLANTS

-v-

1. KENYA MEDIAL RESEARCH INSTITUTE

2. JOWAKINS (K) LIMITED.....RESPONDENTS

Being an appeal from the Judgment/Decision of the Trial Magistrate

Hon. Benson S. Khapoya SRM sitting at Taveta on 1st February 2019

R U L I N G

1. The Appellants before the Court filed a Memorandum of Appeal on 4th March 2019. The Appeal is against the Learned Trial Magistrate's decision. The Grounds of Appeal can be summarized as firstly the Trial Magistrate erred in law by failing to understand his jurisdiction by failing to appreciate the implications of Kenya Gazette Notice No. 5039 of 18th October 2013. Secondly, the Grounds complain of the Hon Trial Magistrate's handling and admission of relevant evidence, for example excluding witnesses and declining to visit the scene and thirdly, for failing to appreciate and give proper weight to the facts and matters eg decision of the National Land Commission that were before the Court.

2. On 2nd May 2019, the First Respondent filed an Application by Notice of Motion. The Application is "*brought under section 1A, 1B, 3 & 3A of the Civil Procedure Act Cap 21*". The First Respondent/Applicant seeks the following orders:

> "*1. The Memorandum of Appeal dated 1st March 2019 be struck out for lack of jurisdiction.*
>
> *2. The costs of this application and of the struck out appeal be awarded to the 1st Respondent/Applicant as against the Appellants.*".

3. The Application is based on five separate grounds as follow:

> "*1. The 1st & 2nd Appellants' suit before the subordinate court as disclosed in the Amended Plaint dated 20th August 2015 involved the use, occupation of and title to portions of land known as Plot No. T/MM/115/1 and T/MM/115.*
>
> *2. The 1st Respondent's Statement of Defence dated 19th June 2018 answered the very question of use, occupation of and title to land.*
>
> *3. The judgment delivered by the subordinate court resolved the question of use, occupation of and title to land known as Plot No. T/MM/115/1 and T/MM/115.*
>
> *4. Since the appeal filed herewith related to the use, occupation of and title to land, the High Court lacks jurisdiction, by virtue of*

Article 165(5)(b) of the Constitution, to entertain and hear the appeal.

5. *It is only the Environment and Land Court which is clothe with appellate jurisdiction over disputes relating to the use, occupation of and title to land"*.

4. The Affidavit is further supported by the Affidavit of Margaret Rigoro, the First Respondent's Legal Officer. The Affidavit exhibits the Pleadings from the Trial Court. The Matter first came before the Court for directions on 24th October 2019. The Court directed as follows:

"*1. Both Parties be and are hereby granted leave to and are further directed to file and serve written submissions on the issue of transfer as opposed to dismissal within 14 days*

2. List for Highlighting5th December 2019.

5. On 5th December 2019, Counsel for the Respondent did not attend and the Appellants still had not filed and served their written submissions. The Court therefore directed that the matter be re-listed for 16th December 2019 and directed the Appellants to file their Written Submissions. That was done 10th December 2019 as directed.

6. Strangely enough, the Appellants' (Respondents' in the Application) submissions seem to have translated the Application into a preliminary objection, likening it to the Preliminary Objection filed on 6th August 2015 during the Suit. In fact, Counsel for the Appellants has conceded that the High Court does not have jurisdiction to hear the Appeal because of the subject matter of the dispute. In the circumstances, the issue to be resolved at this stage is whether this Court should dismiss the Appeal in limine or whether it can, and should be transferred to the closest Environment and Land Court, which happens to be in Mombasa.

7. The Appellants relate the background facts, the Respondent/Applicant considers that is unnecessary due to the fact that they have conceded the issue on jurisdiction. However, it aids the Court to consider the underlying dispute in its deliberations. What the Appellants say is that "The First Appellant obtained, vide a Letter of Allotment dated 2011, a piece of land from the Town Council of Taveta in or about 1993 at a place known as Majengo Mapya within Taveta Township. His plot, on which he has constructed a house in which he has lived since 1993… He, as well as other neighbours, share a boundary with the First Respondent, the Kenya Medical Research Institute. According the the First Appellant, in or about 2015, some people emerged … who started destroying his fence and putting up perimeter walls. The First Appellant having attempted and, failed to stop their activities, was compelled to seek the advice of an advocate." Eventually the First Respondent filed a suit. The Applicant raised a preliminary objection arguing that the SRM's Court did not have jurisdiction to hear the dispute. The Applicant did not succeed in its objection and the Trial Court heard and determined the matter.

8. The Appellants were dissatisfied with the decision of the Trial Court. In short, the two sides are claiming ownership of the same piece of land. The Appellants say they have a Letter of Allotment from the Town Council for a piece of land on which they built a family home which is occupied. The First Respondent asserts that it has a letter of allotment for the larger piece of land (Taveta Township/Block I/291) which included the Plaintiff/Appellants' land (*Plot No. T/MM/115/1 and T/MM/115*) in 1999 from the Commissioner of Lands. The Plaintiff/Appellants claim to have been in occupation since 1993. The issue turns on which letter of allotment takes precedence. The Hon. Trial Court simply preferred one Letter. The Appellants complain that the Hon SRM did not make or allow adequate inquiry into the validity of the Letter of Allotment given to KEMRI. It seems to this Court that is a valid challenge. Whether or not it has any basis can only be decided by an Appellate Court, however, the record demonstrates that there was no inquiry into validity of the respective letters.

9. The Appellants therefore filed a Memorandum of Appeal. They filed it in the High Court at Voi which has appellate and supervisory jurisdiction over the SRM's Court at Taveta. The Applicant complains that is the wrong procedure and therefore the appeal becomes a nullity fit only to be dismissed. The Appellants concede that the High Court does not have jurisdiction to hear any appeal but has made an application for the file to be transferred to the nearest Environment and Land Court. Although the issue as expressed in Notice of Motion appear straightforward, to follow such a simplistic approach could result in injustice to either one side or the other. Firstly, this Court must consider the issue of access to justice. Court generally should lean towards enabling parties to litigate without being hampered by red tape, or in the language of the Constitution without undue technicality. The Respondents however, are entitled to have the matter litigated in the correct forum specialist in resolving this kind of dispute. Next there must be consideration given to both the jurisdiction, and the powers of the High Court. On the first point, **Article 159(2) of the Constitution provides:**

In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted.

10. The Application for dismissal is brought under Section 1A, 1B and 3A of the Civil Procedure Act. It is instructive to look again at the precise words of the overriding objective. ***Sections 1A, 1B of the Civil Procedure Act (Cap 21 Laws of Kenya)***. They provide:

"*Section 1A:*

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious , proportionate and affordable resolution of the civil disputes governed by the Act

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A Party to civil proceedings or an advocate for such a Party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B:

(1) For the purpose of furthering the overriding objective specified in section 11A 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".

From that, it is clear that the ethos is of just disposal and efficient handling of matters. The question must therefore arise, is it more efficient to dismiss or to transfer a case. The Applicant argues that the Court does not have the power to do so. It is argued that since the High Court does not have the jurisdiction to hear the substantive dispute, it has no locus to deal with the file at all. The Applicant's then go onto file an application, for dismissal, not a declaration of nullity. Dismissing an action involves a qualitative judgment, in other words handling the file. The widely held jurisprudence is that a Court only dismiss a suit as a last resort because it is a draconian measure (***DT Dobie vs Muchena***). That is all the more so in the case of an appeal which could become time barred meaning that Party would be denied access to justice, if dismissed. The Applicant/First Respondent's file a List of Authorities on which they rely on to support the proposition that if the Court finds it has no jurisdiction, it has no jurisdiction to make any procedural orders. However, the Authorities relied upon are distinguishable. For example in the first listed authority, ***Kenya Ports Authority v Modern Holdings [E.A.] Limited [2017] Eklr***. The Court of Appeal found fault with the High Court for hearing a suit where the statute (***Kenya Ports Authority Act***) provided for a completely different procedure for the type of dispute being litigated. ***Section 62*** of that Act provided that: *(1) … and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore….*". There the Court could not hear the matter, but also could not simply transfer the matter to the appropriate tribunal because there were mandatory preliminary steps to be taken.

That situation is more akin to arbitral disputes. In addition, the Court of Appeal also considered the Opinion expressed by Hon Justice Ojwang SC in ***Multi-Serve Oasis Company Limited vs Kenya Ports Authority***. However, that opinion expresses itself on what would be the hypothetical position **if and when** an Industrial Court and/or an Environmental Court are established and in the circumstances can only be an expression of a hypothetical in the current dispute.

11. The Applicant also relies on the South African Authority of ***Andre Vernon Oostuhuisen vs Road Accident Fund***, again it has no application here because there is no equivalent to ***Section 173*** of the Constitution of South Africa in the ***Constitution of Kenya 2010 (CoK)***. Namely, that the inherent jurisdiction of the High Court is limited to regulation of its own process.

12.The Applicant also lists the Court of Appeal Decision in ***Prof Daniel N Mugendi vs Kenyatta University and 3 Others Civil Appeal; No.6 of 2012***. The Respondents to the Application also rely on that Judgment. The Submissions on behalf of the Respondents state that "The Respondents have renewed their preliminary objections to the Appeal, stating that the same ought to have been filed in the Environment and Land Court. The answer to the said Preliminary Objection, however, is to be found within the spirit and letter of the holding in the ***Court of Appeal Case of Daniel N. Mugendi versus Kenyatta University & 3 others [20130*** eKLR" (sic)

13. In that Judgment the Court of Appeal said:

"*We have quoted in extensor the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court has no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find.*

Believing as we do that the approach taken by Majanja J is the correct one, as in endeavouring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant petition and direct that the High Court do transfer to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relation matters…. In the event the High Court, the Industrial Court or the Land & Environment Court 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/equal status should in the spirit of harmonization, effect the necessary tranfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice…".

There too the Court heard the argument that there was no jurisdiction to transfer a matter incorrectly filed. It came to a very clear decision as set out above.

14. The Applicant in oral submissions, augments that argument by saying that it is now 10 years since the ***CoK 2010*** was promulgated and that is ample time for the citizenry to appreciate which is the correct forum. It urges that any mistakes must be "punished" by dismissal.

15. Dealing first with the argument that the citizenry has had ample time to appreciate the jurisdiction and limited of the other Courts of equal status and therefore transfer should no longer be an option, it is instructive to look at the history of the establishment of the ELC. The Court was established by the ***ELC Act 2012***. ***Section 22*** of the ***6th Schedule CoK 2010*** provided the transitional arrangements. It provides: "*All judicial proceedings pending before any court shall continue to be hear and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or Registrar of the High Court"*. Gazette Notice No 1617 of 9 February 2012 and Gazette Notice No. 13573 of 20th September 2012 provided for the High Court completing matters filed, before the setting up of the new court.

16. There was also direction that cases pending before the District Land Disputes Tribunal be transferred to the Resident Magistrates Courts. A separate register was established in the High Court to ease transfer once the ELC became operational. Those transitional directions were challenged in ***John Nakabi OKelo v Obura Nelson [2013] eKLR***. In addition, even as late as 2015, there were mixed benches sitting in the ELC, including High Court Judges. In addition, there were amendments to the Magistrates' Court Act giving that Court the jurisdiction to hear and determine environment and land disputes. Those were challenged in the ***High Court in Malindi Law Society v Attorney General & 4 Others (Constitutional Petition No. 3 of 2016***). All matters were transferred from the Magistrates' Courts causing a log jam in the ELC. The Court of Appeal resolved the issue in ***Law Society of Kenya Nairobi Branch v Malindi Law Cosiety & 6 Others (2017) eKLR.*** The Court held: "In our view, conferring jurisdiction on magistrates' courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates' court over those matters lie with the specialized courts and would therefore undoubtedly imprint the specialized jurisprudence on the magistrates' courts… Public interest in our view would be better served by increasing the number of courts with the capability of resolving such disputes.". The dates of those challenges. Decisions and Practice Directions, demonstrates that the issue has not, in fact been resolved for as long as argued by the Applicant. The Law has been developing and applications for transfer are made on a regular basis when the issue is clear as well as when the dispute needs analysis to ascertain the principal subject matter.

17. As for the issue of "punishment" by dismissal. This Court notes that proceedings are usually filed by Advocates. When an Advocate makes a mistake, it is a well-accepted precept that the mistakes of the Advocate should not be visited on the client. Why then should the same not extend to a lay person?

18. In addition, there is the issue of the supervisory jurisdiction of the High Court over the magistrates' court. That falls within the inherent jurisdiction of the High Court and is unlimited under ***Article 165(3)*** and ***Article 165(6).*** It must follow therefore, that the High Court has supervisory jurisdiction over what happens to matters, perhaps incorrectly filed and/or left and/or abandoned in its Registry.

19. For those reasons, the Court holds that it does have (a) the jurisdiction to transfer the file to the ELC Mombasa, (b) it also has the power to make such an order. In the circumstances, it is ordered and directed that this matter be transferred to the ELC in Mombasa at the earliest opportunity. Further, it is ordered that the Hon DR of the Court inform the Parties when the File is received and what directions will follow.

20. The initial Ruling date of 30th January 2020 could not be met due to technological problems. The delay is regretted.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 6th April 2020

Signed and Delivered in Voi this the 27th day of May 2020 Delivered by WhatsApp MS Teams Video Call

In the Presence of

Court Assistant: Josephat Mavu

Applicant/Respondent: Billy Kongere

Respondent/Appellant: Mr Mwanyumba