



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO.2 OF 2019

CHARLES MAINA WAMBUGU..... PLAINTIFF/APPLICANT

V E R S U S

TSUYOSHI YOSHINO.....DEFENDANT/RESPONDENT

R U L I N G

By the Notice of Motion dated 24th September, 2019, the plaintiff/applicant, **Charles Maina Wambugu** prays that this Court be pleased to transfer and consolidate Nyahururu C.M. ELC.209/2018 with the instant suit for hearing and determination and that costs be in the cause.

The grounds upon which the application is premised are that the suits involve the same subject matter, similar questions of fact and law and hearing both suits together will save on precious judicial time; that the outcome of this suit will affect the case pending before the Chief Magistrate's Court; that both suits raise the issues of partnership or management of the suit property and it is just and mete that the suits be consolidated.

The application is also supported by two affidavits sworn by the applicant dated 24/9/2019 and 17/10/2019 in which the same grounds are reiterated and adds that the case in the Chief magistrate's court is still fresh, only an application having been heard.

In support of the application, the applicant's counsel Mr. Gakuui Chege also filed written submissions on 15/1/2020.

The application was opposed and the defendant/respondent Yoshino filed a replying affidavit dated 24/10/2019. Mr. Waichungo, counsel for the respondent also filed a notice of preliminary objection dated 12/11/2019 which is pleaded at paragraph 9 of the statement of defence dated 27/3/2019. The deponent is the holder of a power of Attorney for Tsuyoshi Yoshino. He deposes that the dispute – Nyahururu C.M. ELC 209/2018 revolves around the management of Hardashi Running Camp situated on LR.No.Nyandarua/Ol Jororok Salient/1230; that in the Cm's court, the respondent tried to raise the issue of existence of partnership which the applicant opposed and the court ruled that it had jurisdiction to hear and determine the dispute; that by this application, the applicant is trying to appeal the said order by seeking consolidation of ELC CM's 208/2018 with this suit; that this suit raises the issues of existence of a partnership agreement and share of partnership assets which is not within the jurisdiction of this court because it involves land and fixtures thereon and therefore should be determined by the land court; that there is no relationship between the two suits and that if there is need to appeal from C.M.C ELC court, then an appeal lies to ELC court; that the case in CM's court is too spent that it cannot be consolidated; that the substratum of the matter in the lower court is already altered and the status before the order of 11/4/2018 has changed so much that the applicant is no longer in possession since he was ousted as manager and a new manager has taken over.

Another affidavit in reply to the application was sworn on 11/10/2019 by Peter Njoroge Kamunya, a registered holder of a Power of Attorney for the defendant/respondent who deposed that the applicant was represented by Mr. Mbugua Advocate in Nyahururu C.M.ELC.10/2018 where an application for injunction was dismissed; that the suit in the lower court is advanced; that the suit before the trial court and this suit are very different and cannot be consolidated and that the applicant should have had the C.M.ELC case stayed instead of seeking to consolidate the two suits.

Applicant's submissions:

Mr. Gakuhi Chege submitted that the two suits involve the same subject matter, similar questions of fact and law and hearing of the two suits together will save on judicial time; that the outcome of this suit will affect the outcome of the suit in CM.ELC suit; that both raise the issues of partnership and management of the suit property; that the disputes in the two cases revolve around acquisition of Nyandarua/Ol Jororok 1230 and management of the Athletics Camp, the Constructions thereon which the applicant claims to be a joint venture; that in September, 2018, the respondent threw out the applicant and that changed the substratum of the suit property necessitating the filing of this suit where the applicant now seeks dissolution of the partnership and sale of all the assets belonging to the partnership including Nyandarua/Ol Jororok Salient/1230 and all improvements thereon so that the parties can share the proceeds.

In support of the application, counsel relied on the decision of ***Joseph Okoyo v Edwin Dickson Wasunna (2014) eKLR*** where the court cited

with approval *Nyati Security Guards Ltd v Municipal Council of Mombasa (2004) eKLR* which espouses the principles to be considered in an application for consolidation. Counsel also relied on the decision of *Chasinende Farmers Co-operative Society Ltd v Joel Kibet (2018) eKLR* and *Korean United Church of Kenya & 3 others v Sang Ha Sang (2014) eKLR* on when consolidation can be granted.

As regards the Preliminary Objection filed by the respondent, which was to the effect that this suit should have been filed in CM's court, counsel submitted that Section 2 of the Partnership Act Cap.29 Laws of Kenya which defines court as the High Court of Kenya or where the gross assets of a partnership do not exceed Kshs.50,000/=, the Resident Magistrate Court. The respondent having pleaded that the land was purchased for Kshs.2,225,000/= that removes the dispute from the magistrate's court; that this matter is purely a commercial dispute which should be handled by the High Court. Counsel relied on the decision in *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others (2017) eKLR* where it was held that even a partly hard case could be consolidated with another.

The respondent's submissions;

Mr. Waichungo on his part submitted that this court has no jurisdiction to transfer an Environment and Land matter which is pending before ELC Magistrate's court to the High Court for hearing and determination, that to do that would be usurping the power of the ELC court Judge; that since the applicant elected to file his case in the ELC court, he cannot be heard to claim that the said matter is a commercial suit; that the applicant has deponed that the respondent went to the camp and threw out the applicant thus changing the substratum of the suit and that he thus considered filing this suit and that it is therefore an admission that the lower court case has been overtaken by events; that the prayers sought in the lower court and this suit are incompatible and cannot be adjudicated upon together in the same suit, are disjunctive and can only be an alternative to each other; that the application for consolidation is an abuse of the court process and the applicant should withdraw the matter in the lower court and proceed with this case. It was counsel's view that the dismissal of the applicant's application for an interim injunction must have prompted the filing of this suit.

Analysis and determination;

I have considered the application and the submissions of both counsel. There are two main issues, whether this suit can be consolidated with CM ELC 209/2018 and whether this court has jurisdiction to hear and determine this matter.

Order 11 Rule 3(1)(h) Civil Procedure Rules mandates the court to consider consolidation of suits for purposes of expeditious disposal of suits. In the case of *Joseph Okoyo v Edwin Dickson Wasunna (2014) eKLR*, the court considered the principles to be considered in an application for consolidation which were set out in *Nyati Security Guards and Services Ltd v Municipal Council of Mombasa (2004) eKLR* as follows:

“The situation in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

- 1) Some common question of law or fact arises in both or all of them; or***
- 2) The rights or relief claimed in them are in respect of, or arises out of the same transaction or series of transactions; or***
- 3) For some other reason it is desirable to make an order for consolidating them.”***

The plaint in Nyahururu C.M. ELC 209/2018 was annexed as C.M.W.2. The orders sought are for a permanent injunction to restrain the defendant who is still the defendant herein, from unilaterally changing the management of title Nyandarua/Ol Jororok Salient/1230 and the running the camp erected on the said property. In this case, the plaintiff seeks dissolution of the partnership business known as Hadashi Athletics Camp, the sale of assets belonging to the partnership including Nyandarua/Ol Jororok Salient/1230 together with the improvements thereon. The second prayer is for equal sharing of the partnership assets. The respondent has filed a defence and counterclaim in which he seeks cancellation of the defendant name from the register of Nyandarua/Ol Jororok/Salient/1230 to enable the respondent to substitute him with a person of his choice. Amongst the plaintiff's documents is a copy of the title deed which is registered in the names of the plaintiff and the defendant/respondent. What I must however point out that unlike the principles set out in the Nyati case, these two cases are not in the same court.

CM's ELC 209/2018 is in the Environment and Land Court which is a different jurisdiction from the High Court where the instant matter is filed. Under Article 162 2(b) of the Constitution, courts with the status of the High Court are created to hear and determine disputes relating to the Environment and the use and occupation of and title to land. The Environment and Land Court was established under Section 4 of the Environment and Court Act, 2011 with its jurisdiction created at Section 13 of the said Act. The jurisdiction is as hereunder:

“Section 13(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes:-

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) Any other dispute relating to environment and land.”

Under Section 26(3) of the Environment and Land Court Act, the Chief Justice may by gazette, appoint certain magistrates to preside over cases involving environment and land matters over any area in Kenya. The jurisdiction of the magistrates is granted under Section 26(4) of the above Act and Section 9 of the Magistrate’s Court Act 2015. Section 9(a) of Magistrates Court Act provides as follows:

“(a) In the exercise of the jurisdiction conferred upon it by [Section 26](#) of the Environment and Land Court Act ([No. 19 of 2011](#)) and subject to the pecuniary limits under [Section 7\(1\)](#), hear and determine claims relating to:-

(i) Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) Environment and land generally.”

From a reading of the above sections, it is clear that the Constitution intended to create special courts with special jurisdiction in land matters. That jurisdiction is not donated to the High Court. Although the parties in the two suits are the same, with the same subject matter, but the jurisdictions are different. The plaintiff/applicant having filed C.M. ELC 10/2018 as an ELC matter, this court has no jurisdiction to hear it and it cannot transfer it to itself.

Although Mr. Waichungo had submitted that ELC CMC.208/2018 was partially heard and was advanced, that is not the correct position because the CM’s court only heard an application for an injunction which was dismissed. The matter was fresh.

In the end, I find no merit in the application dated 24/9/2019. It is hereby dismissed with costs to the respondent.

As regards the Preliminary Objection raised at paragraph 9 of the defence, I have considered the same. One of the prayers in the plaint is the dissolution of a partnership business. Under Section 2 of the Partnership Act, court means the High Court or where the gross assets of a partnership do not exceed three hundred thousand shillings, the Resident Magistrate court.

Amongst the plaintiff’s list of documents filed in court is a title deed for Nyandarua/Ol Jororok Salient/1230 measuring 2.2 Ha registered in the names of Charles Maina Wambugu and Tsuyoshi Yoshino. It is issued on 10/10/2016. Some receipts are also annexures and pictures of buildings which I believe are the Athletics Camp that the applicant alleges was built by the partners. Apart from the land and the buildings thereon, it is not clear what other property belongs to the alleged partnership.

In *The Owners of Motor Vessel Lilian’S’ Caltex Oil Kenya Ltd (1989) KLR 1*, the court succinctly set out the principles for determination of jurisdiction when J. Nyurangi stated inter alia:

“Jurisdiction is everything, without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

A court’s jurisdiction flows from either the Constitution or legislation and from the principles laid out in judicial precedent. The question of jurisdiction has to be raised at the earliest opportunity and the court has to be raised deal with it at once.

Both counsel did not deal with the issue of jurisdiction in detail. I have considered some of the decisions made by other courts on the same issue. In this case, it seems the only properties the subject of the dispute is land.

In *Commercial and Admiralty CC.650/2015 M.W.K, C.M. and G T/A M.H. Day Nursery v R.K.K.*

Justice Tuiyot in dealing with dissolution of a partnership which had properties including land, dealt with the sharing of properties like furniture, vehicles, income but held that in regard to the question of land and buildings, that court had no jurisdiction and that if parties did not agree, then the matter should be dealt with under the Land Registration Act.

In *Civil Appeal No.128/2014 P.M.M. v Z.W.M.*, the Court of Appeal seemed to have the same view that after dissolution of marriage, the issue of sharing of property registered jointly could be dealt with elsewhere.

Section 91 of the Land Registration Act deals with Land jointly registered whereby the Registrar is given the mandate to deal with severing

of joint or common tenants failing which the aggrieved party may apply to the court for necessary orders. The Section provides:

“(1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

(2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

(3) An instrument made in favour of two or more persons and the registration giving effect to it shall show:-

(a) Whether those persons are joint tenants or tenants in common; and

(b) The share of each tenant, if they are tenants in common,

(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) Dispositions may be made only by all the joint tenants;

(b) On the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; and

(c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

(5)..

(6)...

(7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.

(8) The Registrar may upon receipt of adequate proof dispense with the consent under subsection (6) if the Registrar considers that the consent cannot be obtained or is being withheld unreasonably and the Registrar shall note on the register and on the instrument the reasons for dispensing with the consent.

(9) A person who is aggrieved by the decision of the Registrar may apply to the Court for the necessary orders.”

In this case, since the issue is sharing of the land or removal of the names of one of the partners from the title hence altering the land register, the court with jurisdiction is the ELC. This court therefore lacks jurisdiction and I hereby uphold the objection. The plaintiff should withdraw the suit and file it in the proper court within 14 days failing which it will stand struck out with costs to the defendant.

Dated, Signed and Delivered at NYAHURURU this 23rd day of July, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Both counsel – absent

Eric – court assistant