



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CONSTITUTIONAL PETITION NO. 7 OF 2016

MICHAEL MORAGIA NYACHAE.....1ST PETITIONER

JITENDRA LILADHAR NAGDA.....2ND PETITIONER

VERSUS

BUDDLES KISII LIMITED.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

Introduction

1. The petitioner filed the petition dated 1st March, 2016 and a chamber summons dated 3rd March, 2016 which application was brought under certificate of urgency. This court on its own motion directed service upon the respondents and fixed a hearing date on 19th April, 2016.
2. Before the date slated for the hearing Mr. Begi learned counsel for the 1st respondent filed a Notice of Preliminary Objection dated 19th April 2016 on a point of law stating that this court lacks jurisdiction to entertain the application dated 3rd March, 2016 and the entire petition in the first instance.
3. When all the parties came before me on 19th April, 2016, Mr. Nyamurongi counsel for the petitioner intimated to this court that this is a matter for the Environment and Land court that had been registered and brought to this court erroneously. He thus prayed that the case be returned back to the registry for proper registration before the Environment and Land Court.
4. Mr. Begi in opposing the above submissions by the Petitioners counsel, referred to the preliminary objection he had raised, and submitted that since the preliminary objection questioned the jurisdiction of this court, this court lacks jurisdiction to transfer this case to another court. Mr. Begi's submissions were not objected to by Mr. Ayieko and Miss Nyaega counsels for the 2nd and 3rd respondents respectively.
5. Mr. Nyamurongi in reply to Mr. Begi's submissions stated that the Environment and Land Court can hear constitutional petitions and that **Act NO. 19 of 2011 at Section 13 (3)** vests jurisdiction in the Environment and Land court to hear Constitutional Petitions under **Articles 42, 69 and 70 of the**

Constitution. He further submitted that this are the sections of the law cited on the preamble of his petition, that registration of a case in the registry is an administrative function and that since the relief sought is on a land matter, this court was not being called upon to transfer the case but to it to refer the right court. Lastly, he submitted that constitutional petitions touching on land can be heard before the Environment and Land Court under **Article 159 (2) of the Constitution.** Mr. Nyamurongi therefore urged the court not to give undue regard to legal technicalities, and refer the case to the right court.

6. The issue before me is whether or not this court has jurisdiction to transfer the suit from one high court to another high court. In my humble view this court has inherent residual jurisdiction to put right that which would otherwise amount to injustice within the meaning of power donated by **Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya.**

7. **Ouko J.** (as he then was) observed as follows in the matter of the estate of **George M'mboroki, Meru HCSC NO. 357 of 2004:**

“...the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary wherever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, the prevent abuse of process to do justice between the parties.”

8. In **Kenya Power and Lighting Company vs Mumbi Residents Association & Another [2015] eKLR D.A Onyancha J.** dealing with a similar matter held:

“In my view justice simply means that the court acts 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.”

9. In **Rev. Matara Evans Okanga vs Housing Finance Company of Kenya HCC NO. 262 of 2005,** Kimaru J held:

“...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 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.”

10. The relevant question that arises is whether such inherent or residual power of this court can authorize this court to transfer this case to the high court which has jurisdiction?

11. In **Prof Daniel Mugendi vs Kenyatta University & Others, Civil Appeal No. 6 of 2012** the Court of Appeal rendered thus:

“...the order to do justice in the event where the high court, the industrial court or the environment and 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...”

12. In accordance with the above direction, the High Court exercised this inherent power and transferred cases to the Environment and Land division notwithstanding that the cases had originally been filed in other divisions of the High Court. Even before the coming into operation of the **Environment and Land court and the Labour and Relations Court** in accordance with **Article 162 of the Constitution of Kenya 2010,** transfer of cases from one high court to another was already in practice as evidenced in **Rapid Kate Services Ltd vs Freight Forwarders Kenya Limited & 2 Others [2005]1 KLR 292** where

Emukule J. stated:

“...the court’s power to transfer proceedings from the court to another is a useful directive 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 these 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.”

13. In the instant case, it is not disputed that the subject matter of the petition falls within the purview and jurisdiction of the environment and land court. This case appeared before me for the very first time on 19th April, 2016 when the preliminary objection on jurisdiction was raised by Mr. Begi after Mr. Nyamurongi alerted the court that the petition had erroneously been registered before this court instead of before the Environment and land court.

14. The error of registration of the case before this court cannot be blamed on the petitioner. Furthermore, it is my humble opinion that the transfer of this case to the right court, the Environment and Land court, will not prejudice any of the parties to the suit, but will afford them an early opportunity to delve into the substance of the case before the right court.

15. Consequently, I direct that this Petition be transferred/referred to the environment and Land Court for hearing and determination.

16. It is so ordered.

Dated, signed and delivered in open court this 27th day of April, 2016

HON. W. A.OKWANY

JUDGE

In the presence of:

- Mr. Ochoki for Nyamurongi for the Petitioner
- Mr. Begi for the 1st Respondents
- Omwoyo court clerk