



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
(COMMERCIAL & ADMIRALTY DIVISION)
CIVIL CASE NO. 8 OF 2016

HASSAN BAKAR OSMAN 1ST APPLICANT/PLAINTIFF

ARAFCO AGRICULTURAL

INTERGRATED LTD 2ND APPLICANT/PLAINTIFF

VERSUS

NUH ABDUL WAHAB MOHAMUD 1ST RESPONDENT/DEFENDANT

MILESTONE DEVELOPERS LTD 2ND RESPONDENT/DEFENDANT

REGISTRAR OF COMPANIES 3RD RESPONDENT/DEFENDANT

THE ATTORNEY GENERAL 4TH RESPONDENT/DEFENDANT

RULING

This matter was fixed for the hearing of the plaintiff's application dated 16th April, 2016 on 17th May, 2016. Mr. Kigen, counsel for the 1st and 2nd respondents informed the court that he has instructions to request me to recuse myself from hearing this case. Counsel submitted that the transaction in dispute took place in Nairobi. Counsel for all respondents come from Nairobi. All the respondents come from Nairobi. It is extremely expensive for the respondents to travel from Nairobi to Malindi. Counsel requested the court to refer the file to the Chief Justice to allocate a Judge in Nairobi to hear and determine the matter. The issue of access to justice is paramount. Counsel further contend that although he personally has faith in this court, this court issued orders in another case, vide Environment and Land Court case No. 218 of 2015 on 13th May, 2016 which case has a direct bearing to this dispute. Those orders interfered with a Ruling that was pending in the Environment and Land Court Case.

Mr. Ondieki, counsel for the plaintiff opposed the application. Counsel's position is that the Ruling or Orders issued in the Environment and Land Court file has no bearing on this suit. The Environment and Land Court matter was filed by the respondents. The suit involves a company which operates in Kilifi. It is the respondent who benefited from the orders. The applicant came to court while the Environment and Land Court matter was pending Ruling as the property of the company was being vandalized. The court issued orders in relation to the property and that cannot amount to affect the impartiality of the court.

Counsel is of the view that this is not a matter requiring the attention of the Chief Justice.

The application by the 1st and 2nd respondents raises two issues. Firstly, whether this file should be transferred to Nairobi, secondly, whether I should recuse myself from hearing this suit. The first issue is grounded on the fact that the transaction was entered into in Nairobi and that it is expensive for the respondents to travel from Nairobi to Malindi. Section 12 of the Civil Procedure Act states as follows: -

12: Subject to the pecuniary or other limitations prescribed by any law, suits: -

- a. for the recovery of immovable property, with or without rent or profits;**
- b. for the partition of immovable property;**
- c. for the foreclosure, sale of redemption in the case of a mortgage of or charge upon immovable property;**
- d. for the determination of any other right to or interest in immovable property;**
- e. for compensation for wrong to immovable property;**
- f. for the recovery of movable property actually under distraint or attachment.**

Where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

The dispute herein can be traced to a lease granted to the 1st plaintiff by the Government of Kenya in relation to Plot Number Galana Ranch/Block 1/1 located in Kilifi County. The plaintiff's prayers in the plaint relate to the shareholding of the 2nd plaintiff as well as claims for damages and lost profit arising from the land. The plaintiff's claim falls within the provisions of Section 12 (d) and (e) of the Civil Procedure Act. The property which led to the entering of the Nairobi transaction is based in Malindi within Kilifi County. Section 12 of the Civil Procedure Act requires that suits relating to disputes on a property be filed at the court where the property is situated in Kenya.

I have gone through the court record in file number ELC 218 of 2015. When that suit was filed, the record shows that it was filed in Nairobi on 19th November, 2015. Justice Mary M. Gitumbi directed that the matter be placed before Justice Angote in Malindi. Mr. Kigen, the current counsel for the 1st and 2nd respondents, appeared before me on 1st December, 2015 as Justice Angote was not sitting. Counsel sought for interim orders in relation to his application dated 19th November, 2015. I did grant prayer one of the application on interim basis pending interpartes hearing on 23rd February, 2015 before the Environment and Land Court. Mr. Kigen made a request to serve by way of advertisement in one of the daily Newspapers which request was granted.

The record of that file also shows that on 21st March, 2016, Mr. Ondieki counsel for the plaintiffs herein appeared before me. Counsel informed the court that there was a Ruling pending before Justice Angote. However, there was threats to have the guards at the land evicted. I did certify Mr. Ondieki's application dated 21st March, 2016 as urgent. I also granted interim orders and clearly indicated on the record that the intention of the orders that were being sought was to secure the property pending the Ruling that was scheduled for 29th April, 2016. I went further and indicated that those orders were to lapse on 29th April,

2016. Since then I have not dealt with the Environment and Land Court file.

I have further observed that the parties in the Environment and Land Court file are **ARAFCO AGRICULTURAL INTEGRATION COMPANY LTD V HASSAN BAKAR OSMAN** (defendant). In the current case before me, those two parties are the plaintiffs while the 1st and 2nd defendants are enjoined with the Registrar of Companies and the Attorney General as the defendants.

The record in the environment and Land Court file shows that I granted interim orders to both counsels appearing in that matter. Mr. Kigen seems to be of the view that this court will not be impartial as it granted orders in the environment and Land Court matter. When Mr. Kigen appeared before me on 1st December, 2015 I did grant his client interim orders. I cannot understand how the issue of impartiality comes in. When I issued the orders stopping the eviction for the guards on 21st March, 2016, those orders were to specifically lapse on 29th April, 2016. This cannot call the impartiality of a Judge into question. Before the Environment and Land Court Mr. Kigen appears for the company which is the 2nd plaintiff in this matter. The plaintiffs in this matter are represented by Mr. Ondieki. I have not dealt with the 1st and 2nd respondents as parties in the Environment and Land Court matter. Even if they are involved, all what I did was to grant interim orders which were temporary in nature. Indeed it is Mr. Kigen who obtained orders of injunction in the Environment and Land Court matter. The Ruling that was delivered by Justice Angote subsequently favoured Mr. Kigen's client.

I have noted that Environment and Land Court Case Number 218 of 2015 was filed in Nairobi first. The case was transferred to Malindi. The dispute herein is the same. The respondents cannot raise the issue of access to justice or financial expenses as they have been attending court in Malindi for the Environment and Land Court matter.

Given the record of both matters, I do find that there is no good reason for having this suit transferred to Nairobi. The indication that the file be taken to the Chief Justice so that he allocates a Judge to hear the case is misplaced. If the file deserves to be taken to Nairobi, it can be taken to Nairobi directly without involving the Chief Justice.

On the issue of impartiality, there is no evidence that the court will be biased. My understanding of Environment and Land Court file No. 218 of 2015 is that the 1st and 2nd respondents are not parties thereto. I have seen the two Rulings by Justice Angote delivered on 13th May, 2016 and 27th May, 2016 and the 1st and 2nd respondents are not named as parties. The two respondents cannot question the impartiality of this court as I have not dealt with them as parties. The orders I granted in Environment and Land Court Case No. 218 of 2015 did not involve them as parties and those orders cannot be the basis of my recusal. I only dealt with the file during the absence of Justice Angote.

In the end, the application to have the file transferred to Nairobi is hereby declined. Similarly, the request that I recuse myself from hearing this file is not merited and is as well dismissed. There shall be no orders as to costs.

Dated and delivered in Malindi this 9th day of June, 2016.

S.J. CHITEMBWE

JUDGE