



No. 238

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. APP. NO. 135 OF 2013

DEBORA ADHIAMBO ONYANGO

(SUING AS THE LEGAL REPRESENTATIVE OF

ABEDNEGO ONYANGO OWIRO (DECEASED)..... PLAINTIFF

VERSUS

JOHN KHAMALA DEFENDANT

RULING

1. What I have before me is the application dated 20th June 2013 that was brought by way of Notice of Motion under the provisions of sections 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules. The applicant is the defendant in Migori SPMCC No. 36 of 2010, Debora Adhiambo Onyango vs. John Khamala, while the respondent is the plaintiff in that case. The application seeks the transfer of the said Migori PMCC No. 36 of 2010 to this court for hearing and determination.
2. The application was brought on the grounds that it is only this court which has the exclusive jurisdiction to hear and determine disputes concerning ownership of land and that the cause of action in Migori PMCC No. 36 of 2010 arose within the jurisdiction of this court. The applicant has contended further that Migori Principal Magistrate's court has no jurisdiction to hear and determine the said Migori PMCC No. 36 of 2010. The application was opposed by the respondent who is the plaintiff in Migori PMCC No. 36 of 2010. Through grounds of opposition dated 9th September 2013, the respondent termed the application misconceived and bad in law. The respondent contended that Migori PMCC NO. 36 of 2010 is before a court of competent jurisdiction and as such no good grounds exist to warrant the transfer of the said case to this court. The respondent contended further that if Migori PMCC No. 36 of 2010 was filed in a court without jurisdiction then the same cannot be transferred to this court as this court cannot transfer a case that was filed in a court without jurisdiction.
3. When the application came up for hearing on 4th December 2013 Mr. Oguttu appeared for the applicant while Mr. Minda appeared for the respondent. In his submission in support of the application, Mr. Oguttu reiterated the grounds set out in the body of the application and the contents of the applicant's affidavit sworn on 20th June 2013 in support of the application. Mr. Oguttu submitted that this court has unlimited power under section 18 of the Civil Procedure Act Cap 21 Laws of Kenya to transfer suits from the subordinate courts to this court for hearing and determination. He submitted that similar power is conferred by section 19 of the Environment and Land Act, 2011. In conclusion, Mr. Oguttu submitted that it is only this court which has

jurisdiction to hear and determine disputes over ownership of land. He therefore urged the court to transfer Migori PMCC No. 36 of 2010 which is a dispute concerning land ownership to this court for hearing and determination.

4. In his submissions in reply, Mr. Minda reiterated the contents of the respondents grounds of opposition dated 9th September 2013. Mr. Minda submitted that the Chief Justice has given directions to the effect that land cases that were pending in the subordinate courts before the establishment of the Environment and Land Court shall be heard and determined before such courts. He submitted that Migori PMCC No. 36 of 2010 is such a case and that in view of the said practice directions, there is no need to transfer the same to this court for hearing and determination. He urged the court to dismiss the applicant's application.
5. I have considered the applicant's application, the affidavit filed in support thereof and the grounds of opposition filed by the respondent in opposition to the same. I have also considered the oral submissions by the respective advocates for the parties. Migori PMCC No. 36 of 2010 was filed on 23rd February 2010 before the establishment of this court. The dispute between the parties concerns the alleged encroachment and trespass on parcels of land known as LR. Nos. North Sakwa/Kadera Lwala/8 and 933. The two parcels of land are registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) (hereinafter referred to as "**the Act**"). Section 159 of the Act gives the Resident Magistrate's court jurisdiction to determine civil suits and proceedings relating to title to or possession of land registered under the Act where the value of such land does not exceed kshs. 500,000.00. It follows from the foregoing that if the value of the parcels of land that are in dispute in Migori PMCC No. 36 of 2010 does not exceed Kshs. 500,000.00, Migori Principal Magistrate's court had jurisdiction to hear and determine the suit when the same was filed in that court. In the application before me, I will assume that Migori Principal Magistrate's court had jurisdiction to hear and determine Migori PMCC No. 36 of 2010 when the same was filed because, it has not been shown otherwise. As rightly submitted by the advocate for the respondent, a suit filed in a court without jurisdiction is incompetent and cannot be transferred to another court.
6. What I need to determine now is whether the applicant has given valid reasons that warrant the transfer of that suit to this court for hearing and determination? The applicant's argument is that this is the only court which now has jurisdiction to hear and determine disputes over land. Section 30 (1) of the Environment and Land Act, 2011 provides that all proceedings relating to the environment or to the use of occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until this court is established or as may be directed by the Chief Justice or the Chief Registrar. By a Gazette Notice No. 16268 dated 9th November, 2012, the Chief Justice directed among others that, "**Magistrate's Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction**". It follows from the foregoing that if any matter had been filed before the Magistrates Court before the establishment of this court and the particular Magistrate's Court has the pecuniary jurisdiction to hear and determine the same, the matter shall continue before that court. As I have stated above, the Migori Principal Magistrate's Court had the jurisdiction to determine the dispute between the applicant and the respondent herein in Migori PMCC No. 36 of 2010. The applicant has not indicated that the value of the parcels of land in dispute exceeds Ksh. 500,000.00 or that the magistrate presiding over the Principal Magistrate's Court at Migori does not have pecuniary jurisdiction to determine the case sought to be transferred to this court. I am not satisfied therefore that the applicant has shown sufficient reasons that would justify the transfer of Migori PMCC No. 36 of 2010 to this court. The applicant's argument based on this court's exclusive jurisdiction over environment and land disputes has been laid to rest by the Chief Justice's Practice Directions that I have referred to above. The Chief Justice's said practice directions have not been varied or set aside. I was invited by the respondent's advocate to comment on the validity or otherwise of the said Practice Directions. I do not think that this is the best opportunity to do so. There is no application before me challenging the validity of the said practice directions. I would like however to draw the attention of counsels to the decision of my brother judge, Lenaola J. in the case of, **Edward Mwaniki Gaturu & Another vs. Attorney General & 3 Others [2013] eKLR** in which he held that the Practice Directions by the Chief Justice contained in the Gazette No. 16268 dated

9th November, 2012 are not unconstitutional and that this court does not have exclusive jurisdiction to determine environment and land disputes.

7. The upshot of what I have set out hereinabove is that no good grounds have been put forward to warrant the transfer of Migori PMCC No. 36 of 2010 to this court for hearing and determination. The application dated 20th June, 2013 has no merit. The same is accordingly dismissed with costs to the respondent.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE