IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 266 OF 2013

JOHN GACHUNGA NJOROGE……APPELLANT/APPLICANT

-VERSUS-

JOSEPH NJOROGE MWANGI…….RESPONDENT

RULING

In a notice of motion dated 21st November, 2013 brought to court under **section 1A, 1B, 3A** and **65** of the **Civil Procedure Act**, **Cap 21 and Order 42 Rules (1) and (2)** of the **Civil Procedure Rules,** the applicant applied for an order for stay of execution of the judgment and decree issued in **Kigumo Senior Resident Magistrate's Court Civil Case No. 24 of 2010** pending the hearing and the determination of the appeal.

The origin of this application goes back to a suit filed against the appellant in the subordinate court on 21st January, 2010; in his plaint, the plaintiff who is the respondent herein prayed for:

> ***"(a) An order transfer of Land Parcel Number LOC.2/MAKOMBOKI/619 from the plaintiff to the defendant."***

This was the main prayer in the plaint. The rest of the prayers related to costs of the suit and interest thereof.

Subsequently, the respondent filed an application to amend his plaint and the pertinent prayers in that application were framed as follows:-

1. ***This honourable court be pleased to grant leave to the plaintiff/applicant to amend his plaint as shown in the annexed amended plaint.***

2. ***The amended plaint be deemed as filed subject to the payment of court fees and the defendant be at liberty to amend his defence within 14 days from the date of such service.***

3. ***The costs herein be provided for.***

The amendments proposed in the main prayer in the plaint were as follows:-

> "a) ***An order of transfer of land parcel number LOC.2/MAKOMBOKI/619 from the defendant to the plaintiff. <u>An order for transfer of 0.75 acres out of LOC.2/MAKOMBOKI/1541 from the defendant to the plaintiff or in the alternative refund the sum of Kshs. 400,500/=."</u>***

The record shows that on 10th June, 2010, the application for amendment of the plaint was allowed with the order that the defendant does file his amended defence within fourteen (14) days.

If the application was allowed in terms of the prayers in the application for the amendment, the plaintiff ought to have paid the requisite court fees for the amended plaint; this is because, in the words of the application itself, the amended plaint could only be deemed as duly filed upon payment of the court fees.

I have gone through the record searching for evidence of this payment but, regrettably, I have not found any; the amended plaint was not paid for. If that is the case, the suit against the appellant must have been, and could only be decided, on the basis of the original plaint whose main prayer was for transfer of an identified parcel of land to the respondent.

In his judgment, the learned magistrate held:-

> ***"After considering the entire evidence, it is my humble finding that the plaintiff proved is (sic) case on a balance of probability. I will therefore enter judgment in his favour as prayed. I will also allow the costs of the suit."***

I take it that the learned magistrate allowed the prayer for the transfer of the suit land into the respondent's name.

It is against this decision that the appellant has appealed; in the meantime he seeks a stay of execution of the decree derived out of that judgment.

Though it is only an application for stay of execution that this court is faced with, I have had to go to the background of the pleadings in the subordinate court to demonstrate that, in the light of **Article 162 (2) (b) of the Constitution** as read with **section 13** of the **Environment and Land Court Act**, Cap 12A, this court may not have the requisite jurisdiction to deal with the appeal herein.

The main prayer in the plaint which the learned magistrate allowed "as prayed" was for the transfer of a parcel of land referred to as **LOC.2/MAKOMBOKI/1541.** It is apparent therefore that the dispute between the parties revolved around either title to or ownership or a contract in respect of an interest in this parcel of land. Litigation on any of these elements would place this matter within the jurisdiction of the Environment and Land Court because **Article 162(2) (b)** of the **Constitution** has donated power to the legislature to establish that court to determine disputes relating to, among others, the environment and the use and occupation of, and title to, land.

Indeed Parliament implemented **Article 162(2) (b)** of the **Constitution** and enacted the **Environment and Land Court Act, Cap 12A** which establishes the Environment and Land Court and thereby gave effect to **Article 162(2) (b)** of the Constitution. **Section 13** of that **Act** spells out the jurisdiction of this court; it says:-

> ***13. Jurisdiction of the Court***
>
> ***(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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

Under this provision, the Environment and Land Court does not only have original jurisdiction but it also has appellate jurisdiction to determine any disputes "***relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land"*** as specifically provided in **section 13(2) (d)** as read with section **13(4)** of the Environment and Land Act.

With this express provision conferring jurisdiction on the special Environment and Land Court in all disputes relating to land as defined in **section 13** of the Act, the **Constitution in Article 165 (5)(b)** thereof makes it clear that this Court shall not have jurisdiction in those matters reserved for the Environment and Land Court.

In view of these provisions of the law, I am of the humble opinion that the appellant's appeal together with any appurtenant applications including the one filed herein should be determined by the Environment Court. I would, in the circumstances, direct that this file be transferred to this particular court sitting in Nyeri for hearing and determination.

Signed, dated and delivered in this open court this 23rd day of September, 2014

Ngaah Jairus

JUDGE