



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

MISC. APPLICATION NO. 205 OF 2012.

JOHN NAKHABI OKELOAPPLICANT

VERSUS

OBURA NELSONRESPONDENT.

RULING.

This application was brought under Section 13 of the Environment and Land Court Act and section 3A of the Civil Procedure Act by the applicant, John Nakhabi Okelo, through M/S. Maloba& company Advocates. The applicant seeks for orders:

1. That Busia CMCC .No. 118 of 2008 and Busia CMLC. No. 20 of 2008 be consolidated.
2. That the two matters as consolidated be transferred to Environment and Land Court for hearing and determination.
3. That the costs be in the cause.

The application is based on three grounds on the face of the application as follows:

- a. Both matters relate to ownership of L.R. No. Samia/Luanda-Mudoma/1260 and involve the same parties.
- b. That due to the changes in Law, all matters touching on use, ownership, occupation and title to land have to be heard by the Environment and Land court.
- c. That no party would suffer any prejudice as a result of the consolidation of the two cases and transfer of the same to this court.

The application is also based on the supporting and further affidavits by the Applicant sworn on 13th November, 2012 and 24th June, 2013 respectively.

The Respondent, Nelson Obura, through M/S. Wanyama& company Advocates opposed this application and filed grounds of opposition dated 24th June, 2012 but filed on 24th June, 2013. The Respondent cites two grounds as follows:-

1. That the Applicant has not annexed copies of the lower court pleadings.
2. That the lower court has jurisdiction to deal with the matters in view of the recent practice directions on land matters.

During the hearing of the application, Mr. Muogi and Mr. Wanyama Advocates appeared for the

Applicant and Respondent respectively and made submissions.

APPLICANT'S POSITION.

1. The Applicant avers in his supporting and replying affidavits that he own L.R.No.Samia/Luanda-Mudoma/1260 which is subject matter of both Busia CMCC. NO. 118 of 2008 and Busia CMCC. NO. 20 of 2008.
2. That from the copy of plaint attached to the further affidavit by Applicant, Busia CMCC. NO. 118 of 2008 is for permanent injunction against the Respondent. The copy of the proceedings for Bulula Land Disputes Tribunal case No. 3 of 2007 shows the Applicant had lost in that case. The copy of the letter dated 16th June, 2008 shows he had filed Provincial Land Dispute Appeal case No. 52 of 2008. The award of the tribunal is the subject matter of Busia CMLC No. 20 of 2008.
3. That under section 150 of the land Act 2012, it is only this court that has jurisdiction to hear and determine the two cases now pending before the Lower court and hence the application before this court.

RESPONDENT'S POSITION.

1. That the Lower court has jurisdiction to deal with the matters in view of the Chief Justice's Practice Direction on matters to deal with land.
2. That Busia CMCC. NO. 118 of 2008 was initiated through plaint and cannot be consolidated with Busia CMLC. NO. 20 of 2008 which can only come before this court through appeal or Judicial Review.
3. That this court not being the trial court for the two matters cannot issue orders of consolidation as such orders can only be issued by the Lower court which is the Trial court.

Having heard both counsel in their submissions and carefully considering the pleadings and affidavits filed for the parties in this application, I find the following issues need to be determined:

- a. Whether the Busia Chief Magistrate's Court has jurisdiction to hear and determine CMCC. NO.118 of 2008 and CMLC. NO. 20 of 2008 between the parties herein in view of the provisions of section 150 of the Land Act 2012.
- b. Whether the Lower court has jurisdiction to hear and determine the cases related to environment, use and occupation of and title to land pending before the courts before the operationalization of the Environment and Land Courts.

Starting with the first issue set out above, it is important to restate the words of Nyarangi J.A. in **The Owners of Motor Vessel "Lilian S" –vs- Caltex Kenya Ltd** (1989) K.L.R that;

“ Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tools in respect of the matter before, at the moment it holds the opinion that it is without jurisdiction.”

The Environment and Land Court was established by Parliament under Section 4 of the Environment and Land Court Act No. 19 of 2011 pursuant to Article 162 (2) (b) of the Constitution 2010. As required under Article 162 (3) of the Constitution 2010, Parliament determined the jurisdiction and functions of the court under Section 13 of the Environment and Land court Act. Sub section I of the said sections states:

“ 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.”

Subsection 4 of the same section states;

“ 13(4). In addition to the matters referred to in subsection (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.”

Article 169 (1) of the Constitution 2010, lists Magistrate's courts to be among the subordinate courts. It follows therefore that the Law creating and providing jurisdiction to this court, recognizes the existence of appeals emanating from the Magistrates court. There would be no appeals filed in this court from the Magistrates Courts without those courts having jurisdictions to hear and determine cases relating to environment, use and occupation of, and title to land.

In addition to the foregoing, the Chief Justice's practice directions of 9th November, 2012 issued under the powers conferred to the Chief Justice by Section 24 of the Environment and Land Court Act are relevant. Subsection 2 of the said section states:

“ 24 (2). The Chief Justice shall make rules to regulate the practice and procedure, in tribunals and subordinate courts on matters relating to land and Environment.”

The practice directions of 9th February, 2012 were superseded by those of 20th September, 2012 which were later superseded by the practice directions of 9th November, 2012. Practice directions numbers 6 and 7 are relevant to this application and state as follows:

“ 6. All proceedings which were pending before the Magistrate's courts, having been transferred thereto from the new defunct District Land Disputes Tribunals, shall continue to be heard and determined by the same courts.

7. Magistrates 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.”

The court having considered the foregoing legal provisions find as follows:

1. The Magistrates court have jurisdiction to continue hearing and determining matters on environment, use and occupation of, and title to land that were pending before the courts by the time the Environment and Land Court was operationalized, those transferred to those courts from the defunct land Disputes Tribunals and new matter subject to their pecuniary jurisdiction. The court therefore finds there is no need to transfer the two matters pending before the Busia Chief Magistrates court as the court has jurisdiction to hear and determine the matters before it. In case the court finds it has no jurisdiction to deal with matters already filed before it, then there would be no need to transfer such a matter to this court. A matter filed in a court that has no jurisdiction cannot be transferred to a court that has jurisdiction. This was the finding in the case of **Charles Wainaina Njehia –vs- Barclays Bank of Kenya (2006) eKLR**, where an application seeking to transfer a suit whose value was Kshs.1,600,000/= from the Magistrates court which did not have pecuniary jurisdiction was dismissed as the matter had been filed in a court without jurisdiction and therefore a nullity ab initio.
2. It is therefore not the position of the law that matters of the environment, use and occupation of, and title to land that were filed before the magistrate's courts are to be transferred to the Environment and Land court.
3. Only a trial court can decide whether a matter should be consolidated with any other before it. This court is not the trial court for Busia CMCC. NO. 118 of 2008 and Busia CMLC. NO. 20 of 2008 and orders as to whether to consolidate the two matters can only be issued by the trial court.

For reasons shown above, I find the application dated 15th November, 2012 is without merit and is dismissed with costs.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 25TH DAY OF SEPTEMBER 2013.

IN THE PRESENCE OF;

JUDGE;