



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL No. E039 OF 2020

ERDERMANN PROPERTY LIMITED.....APPELLANT/RESPONDENT

-VERSUS-

LONDON DISTILLERS (K) LTD.....1ST RESPONDENT/APPLICANT

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

RULING

What is before me is the 1st respondent's Notice of Motion application dated 16th November, 2020 seeking the following orders;

1. That this appeal be transferred to the Environment and Land Court at Machakos for hearing and final determination.
2. Costs of the Application.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of Pushpinder Singh Mann sworn on 16th day of November 2020. In summary, the application was brought on the following grounds: This appeal arises from a judgment of the National Environment Tribunal ("NET") made on 30th September, 2020 in NET Appeal No. 21 of 2019, London Distillers (K) Limited v Erdermann Property Limited & others ("the NET Case"). The NET case was challenging the Environmental Impact Assessment License that was issued by the 2nd respondent to the appellant in respect of the development known as Great Wall Gardens Housing Phase 3 ("the development"). The said development was being undertaken on L.R No. 12581/13 situated at Athi River off Mombasa-Namanga Road Interchange in Machakos County. Section 12 of the Civil Procedure Act provides that proceedings affecting immovable property are to be instituted in a court within the local limits of whose jurisdiction the property is situated. Both the appellant and the 1st respondent were dissatisfied with the said judgment by NET. Whereas the appellant was dissatisfied only with certain findings in the said judgment, the 1st respondent was dissatisfied with the whole judgment. The 1st respondent filed its appeal against the said judgment in the Environment and Land Court at Machakos namely, Civil Appeal No. EE007 of 2020, London Distillers (K) Limited v National Environment Management Authority & Another ("the Machakos Appeal") while the appellant decided to file its appeal before this Court in Nairobi. There is a likelihood of the court in Machakos and this court making conflicting decisions on the two appeals which arise from the same decision. To avoid such eventuality and for efficient use of the available judicial resources, this appeal should be transferred to the Environment and Land Court at Machakos for hearing together with the other appeal pending before that court.

The appellant had filed a constitutional petition at the High Court in Nairobi in 2019 against a previous decision by NET made in an appeal that the parties had before NET which petition was transferred to the Environment and Land Court at Machakos on 7th November, 2019. The appellant never appealed against the said order of transfer. The appellant had 3 other cases at the High Court in Machakos which touch on the NET case whose decision is the subject of the present appeal. The appellant and the 2nd respondent would not suffer any prejudice if the orders sought were granted.

The application was opposed by the appellant through a replying affidavit sworn by Ruth Hinga, the appellant's Legal Manager on 15th January, 2021. The appellant contended that its appeal was properly before this court and needed not to be transferred to the Environment and Land Court at Machakos. The appellant contended that the judgment of NET which is the subject of the present appeal was made by NET at its headquarters in Nairobi. The appellant contended further that the 1st and 2nd respondents to the appeal have their offices in Nairobi and such an appeal from the said decision of NET properly lies in Nairobi within the jurisdiction of this court.

The appellant averred that the present appeal was filed 21 days before the 1st respondent filed its appeal against the same decision of NET at the Environment and Land Court at Machakos. The appellant contended that the principle of "first in time prevails" is applicable in the circumstances. The appellant contended that since its appeal herein was the first in time, it must prevail as against the 1st respondent's appeal

filed in Machakos. The appellant contended further that the dispute that was before NET was whether the Environmental Impact Assessment(EIA) Licence was properly issued and that the dispute did not concern recovery of immovable property, with or without rent or profits, partition of immovable property, foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property and such like. The appellant contended further that what the court would be called upon to determine in the present appeal is whether NET was right in not finding that the 1st respondent and its witnesses that testified before it were in contempt of court through perjury and in failing to mete out appropriate punishment. The appellant averred that the court would also be called upon to determine whether NET having found that the 1st respondent had abused the court process it was right in not condemning the 1st respondent to pay the appellant's costs on a full indemnity basis. The appellant averred that the 1st respondent would not suffer any prejudice if its application was not allowed since nothing would stop him from prosecuting its appeal in Machakos.

When the application came up for hearing on 18th January, 2021, the advocates for the parties relied entirely on the parties' respective affidavits in support of and in opposition to the application and left the matter to the court for determination. I have considered the 1st respondent's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the appellant in opposition to the application. The following is my view on the matter. Where a suit is to be filed or appellate proceedings are to be undertaken does not depend on the convenience of the parties but on the applicable procedural law and where there is none, on what would serve the best interest of justice. The present appeal was filed pursuant to section 16 of the Environment and Land Act, 2011. Section 19(2) of the Environment and Land Act, 2011 provides that this court is bound by the Civil Procedure Act. Section 12 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that certain suits in respect of immovable properties must be brought in the courts within whose jurisdiction the property is situate. Among such suits are those seeking the determination of any right to or interest in immovable property. It is not in dispute that the dispute between the parties herein that was the subject of the NET case related to the legality of the development namely, Great Wall Gardens Housing Phase 3 that was being undertaken by the appellant on L.R No. 12581/13. The dispute in my view called for the determination of among others, the appellant's right to use L.R No. 12581/13 for the said development. A claim of this nature in my view falls under section 12(d) of the Civil Procedure Act and must be brought in a court within whose jurisdiction the property that was the subject of the dispute which in this case was L.R No. 12581/13 is situated. The appellant has argued that section 12 applies to suits and not appeals. I find no merit in this argument. An appeal can only be heard by an appellate court within whose jurisdiction the appeal arose. It follows therefore that if a certain claim must be brought at a particular place, any appeal arising therefrom will also have to be determined at the same place.

The appeal before me arises from the decision of NET. NET has countrywide jurisdiction but in most cases it sits in Nairobi for its own convenience from where it hears and determines appeals from all over the country. The appellant had contended that since the appeal before NET that gave rise to the appeal before the court was heard and determined in Nairobi, the present appeal was properly filed in Nairobi. As I have mentioned earlier, NET hears most of its cases in Nairobi for convenience purposes only. In ideal situation, appeals arising from outside Nairobi should be heard at the locations of origin. Since the appeal that has given rise to the appeal before the court arose from a development project in Machakos the appeal should have been heard and determined in Machakos. The fact that it was heard and determined in Nairobi does not mean that it was a Nairobi appeal or dispute. I am in agreement with the 1st respondent that since the development the subject of the appeal that was before the NET was being carried out in Athi River, Machakos County, any appeal against the decision of NET should have been filed in the Environment and Land Court at Machakos. From the evidence before the court, all the disputes that the parties have had relating to the various phases of the housing development the appellant is undertaking in Athi River have been taken to the High Court and the Environment and Land Court at Machakos. Those that the appellant had filed in Nairobi were transferred to Machakos. The appellant has not disputed the fact that apart from the appeal that has been filed by the 1st respondent in the Environment and Land Court at Machakos against the NET decision of 30th September, 2020, there are other cases still pending at the High Court in Machakos between the same parties arising from the said developments that the appellant is undertaking at Athi River. I am in agreement with the 1st respondent that to avoid conflicting decisions and for good order, the present appeal should be transferred to the Environment and Land Court at Machakos for hearing and final determination.

For the foregoing reasons, I find merit in the 1st respondent's application dated 16th November, 2020. The application is allowed in terms of prayer (b) thereof. The costs of the application shall be in the cause.

Dated and Delivered at Nairobi this 25th day of February, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Lusi for the Appellant

Mr. Tiego for the 1st Respondent

N/A for the 2nd Respondent

Ms. C. Nyokabi-Court Assistant