



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 76 OF 2019

TERESA MUTHONI MUTEGLI.....PLAINTIFF

VERSUS

JOSEPH KIBWANA.....DEFENDANT

RULING

1. The application for determination is the notice of motion dated 21st September, 2020 by the 2nd, 3rd and 4th defendants seeking to have this suit transferred to the Chief Magistrate's Court at Kwale for hearing and determination. The application is supported by the affidavit of Jason Ondabu Advocate sworn on 21st September, 2020.

2. According to the applicants, the plaintiff's suit against them is all about the property known as Kwale/Diani Complex/84 which is situated at Diani Town near Kwale Law Courts in Kwale County. That the subordinate court has both pecuniary and territorial jurisdiction to hear and determine the matter.

3. The applicants aver that it is not disputed by any of the parties to the suit that the value of the subject matter of the suit from the pleadings and exhibits on record is Kshs.12,000,000.00 only, which amount is way below the pecuniary jurisdiction of a Chief Magistrate's Court which is Kshs.20,000,000.00. The applicants add that the Land Registrar Kwale County will be a key witness in helping the court to determine the issue of ownership of the suit property. That it will be easier, cheaper and convenient for the Land Registrar Kwale County to attend court and avail all the records about the suit property as the Land Registry is adjacent to the Kwale Law Courts. That under the Magistrate's Court Act Section 7 (1) a Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of civil nature in which the value of the subject matter does not exceed Kshs. 20 million where the court is presided over by a Chief Magistrate. That this court has unfettered powers to transfer this suit to the Magistrate's Court at Kwale for hearing and disposal upon an application by any of the parties to the suit or even suo moto.

4. The application is opposed by the plaintiff through a replying affidavit sworn on 10th November, 2020. The plaintiff states that the application is meant to obstruct justice and delay the expeditious disposal of this matter. That the matter herein was recently consolidated with Kwale CMCC Land Case No.36 of 2019, **Miriam Wawuda Kibwana –v-Nobert Schmidt & 3 Others** which was transferred to this court from Kwale Chief Magistrate's Court for hearing and determination as both suits relate to the same suit property. That the application has been filed in bad faith as the Applicants ought to have opposed the respondent's application to transfer and consolidate Kwale CMCC Land Case No.36 of 20000000019 with this suit instead of filing this application when the matter is about to proceed for full hearing. The plaintiff avers that she is apprehensive that any further delay in the hearing and determination of this matter will be highly prejudicial to her as she is yet to make use of the suit property. The plaintiff states that counsel for the 1st defendant and the plaintiff work for gain in Mombasa and Nairobi respectively and therefore Mombasa would be a more convenient forum for the administration of justice in this matter as opposed to Kwale. That the court should take into consideration the interest of all parties and is not sufficient for the applicant to claim pecuniary and territorial jurisdiction alone. Relying on advice the plaintiff avers that this court has original and appellate jurisdiction to hear and determine all disputes concerning the environment and land in accordance with Article 162 (2) (b) of the constitution of Kenya, hence this suit is properly instituted. The plaintiff further states that she is apprehensive that there is a likelihood of the defendants interfering with the subordinate court at Kwale since that is the home area of most of the defendants and that they may be able to exert influence on the outcome of the matter.

5. Joseph Kibwana, the original defendant in ELC No. 76 of 2019 opposed the application through a replying affidavit sworn on 18th November, 2020. He states inter alia that the 2nd, 3rd and 4th defendants did not oppose the application for consolidation of Kwale CMCC Case No.36 of 2019 and this suit. That it is therefore impossible to have the Kwale file taken back to Kwale yet there is an unchallenged court order directing that the Kwale file be consolidated with the file herein. That the application can best be termed as forum shopping and therefore should be dismissed. That the applicants have not annexed any valuation report to the application showing that the value of the suit property is Kshs.12 million. That this court enjoys the scope of unlimited jurisdiction to handle the Kwale file and is not difficult for the Land Registrar Kwale to appear before this court to testify.

6. The application is also opposed by Miriam Wawuda Kibwana the 1st defendant herein and the original plaintiff in Kwale CMCC No.36 of 2019 through a replying affidavit sworn on 18th November, 2020 in which she echoes the averments of Joseph Kibwana.

7. The application was canvassed by way of written submissions. The plaintiff filed and the 1st defendant filed their respective submissions on 4th December, 2020 while the 2nd, 3rd and 4th defendants did not file any submissions.

8. I have considered the application, the pleadings on record and the submissions filed as well as the authorities cited. The only issue I have to determine is whether to transfer this suit to the Chief Magistrate's Court at Kwale for hearing and determination. The main ground given for the order for transfer is that the subject matter of the suit property known as Kwale/Diani Complex/84 is situate in Kwale and that its value is Kshs.12 million only. The applicants further argue that it would be easier, cheaper and convenient for the witnesses, especially the Land Registrar Kwale to attend to the subordinate court in Kwale.

9. In the replying affidavits filed, none of the respondents have denied that the value of the suit property is less than Kshs.20 million. The only reasons for the objection of the transfer are that this court has original and appellate jurisdiction to hear and determine the matter in accordance with the provisions of Article 162 (2)(b) of the constitution. The respondent's also seem to suggest that the applicants are forum shopping and that they are likely to exert influence on the outcome of the matter if the same is transferred to the subordinate court at Kwale since that court is the home area of most of the defendants. In my view, these allegations have not been substantiated and cannot be a basis for declining to transfer the matter to the subordinate court.

10. In the present case, it is not in dispute that one of the case being Kwale CMCC ELC Case No. 36 of 2019 was initially filed in the Chief Magistrate's Court, Kwale. On the other hand, ELC Case No.76 of 2019 was filed before this court. Subsequently, an application dated 1st November, 2019 was brought by the plaintiff seeking to transfer and consolidate Kwale Land Case No.36 of 2019 with Mombasa ELC No 76 of 2019 because the two suits relate to the same subject land parcel. By consent of the parties, the court on 9th December, 2019 allowed the said application dated 1st November, 2019.

11. It has now emerged that the value of the subject parcel of land does not exceed Kshs.20 million. I say so because the respondents have not challenged the applicant's averment that the valued of the subject land parcel is Kshs. 12 million only.

12. The overriding objection provided for under Section 1A and 1B and the inherent power of the Court under Section 3A of the Civil Procedure Act are meant for the attainment of justice to the parties who come to court. The court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of proceedings at a cost affordable by the respective parties. The respondents have opposed the application herein and argued that the applicants may exert some influence on the subordinate court since some of them come from the area. As already stated, this allegation is unfounded because pursuant to the provisions Section 11 of the Civil Procedure Act, every suit shall be instituted in the court of the lowest grade competent to try it within the local limits of whose jurisdiction the property is situate.

13. Section 18 of the Civil Procedure Act provides as follows:

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage:-

a. Transfer any suit, appeal or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

b. Withdraw any suit or other proceedings pending in any court subordinate to it, and therefore:-

i. Try or dispose of the same; or

ii. Transfer the same for trial or disposal to any court subordinate to it and competent to try it or dispose of the same; or

iii. Re-transfer the same for trial or disposal to the court from which it was withdrawn.”

15. It is clear from the provisions of Section 18 above that this court has the power to transfer and re-transfer a suit to a subordinate court which is competent to try or dispose of the same. As a matter of fact, the court can suo moto transfer or re-transfer a suit to a subordinate court as long as that court is competent to try or dispose of the same. Section 7 of the Magistrate's Court Act provides that a magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed Kshs.20.million, where the court is presided over by a Chief Magistrate. In addition, Section 26 (3) of the Environment and Land Court Act gives the Chief Justice power to appoint certain magistrates to preside over cases involving environment and land matters of any area of the country. Indeed, the Chief Justice has by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the Environment and Land Court Act and there are several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land. I am aware that there are such magistrates serving in Kwale Chief Magistrate's Court where Kwale Land Case No. 36 of 2019 was originally filed. Section 9 (a) of the Magistrates Courts Act, 2015 also gives the magistrates jurisdiction to hear environment and land matters, subject to their pecuniary limits.

15. The upshot of the foregoing therefore is that I reach a finding that the application herein is merited and the same is allowed. This suit (ELC Case No. 76 of 2019) as consolidated with ELC Case No.36 of 2019 is hereby transferred to the Chief Magistrate's Court Kwale for

hearing and determination. Costs shall be in the cause.

16. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 17th day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant