



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT

AT MOMBASA

MISC. APPLICATION NO. 85 OF 2020

KENYA AGRICULTURAL & LIVESTOCK

RESEARCH ORGANIZATION (KALRO).....APPLICANT

VERSUS

DAWID SHEIKH ABDULRAHMAN.....1ST RESPONDENT

KWALE COUNTY LAND REGISTRAR.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION....INTERESTED PARTY

RULING

(Application to withdraw suit from the lower court and transfer to the Environment and Land court for disposal; suit properly filed by the 1st respondent before the Kwale Magistrate's Court; applicant, as defendant, however raising a counterclaim which cannot be heard by the Magistrate's court given the pecuniary value of the subject matter in the counterclaim; counterclaim can only be ventilated by a transfer of the case to this court which has unlimited jurisdiction; application allowed)

1. What is before me is the Notice of Motion dated 12th November 2020 which seeks the following principal orders :-

a) That the suit before the Subordinate Court being CM ELC CASE NO 19 OF 2020 KWALE: DAWID SHEIKH ABDULRAHMAN V KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANIZATION & OTHERS be withdrawn and brought before this honorable court forthwith for hearing and determination and or disposal.

b) That the costs of this application be provided for.

2. The application is based on the grounds that the Principal Magistrate court at Kwale has no jurisdiction to hear and determine the suit herein, as the value of the subject matter is Kshs 1, 310,250,000/=, which is way above Kshs 10,000,000/=, which is said to be the pecuniary jurisdiction of a Principal magistrate. It is averred that this court has the requisite jurisdiction to hear the suit as well as the power to order the suit to be withdrawn from the Principal Magistrate's court into this court.

3. The application is supported by the affidavit of Patricia Ngutu the Legal Officer of the applicant. She has inter alia annexed the plaint in Kwale PMCC No. 19 of 2020. She has deposed that the 1st respondent instituted the suit against the applicant, alleging trespass on parcels of Land Title No. Kwale/Mackinon Road Phase II/1425, Kwale/Mackinon Road Phase II/1426, Kwale/Mackinon Road Phase II/1530, and Kwale/Mackinon Road Phase II/1531 all totaling to approximately 29.8 acres, and prayed for a permanent injunction against the applicant from dealing with the said parcels of land. Ms. Ngutu deposes that the parcels of land that the 1st respondent lays claim to, are part of the larger KALRO-BUCHUMA CENTRE LR NO. 28731 MACKINON ROAD, which measures approximately 2,121 ha and belongs to the applicant. Ms. Ngutu further contends that the applicant has established that out of the larger KARLO-BUCHUMA RESEARCH CENTRE land, a settlement scheme was irregularly created, identified as MACKINON SETTLEMENT SCHEME PHASE TWO, which comprises of hundreds of subdivisions and titles issued to private persons by the Kwale Land Registrar, including the 1st respondent. She has annexed the applicant's statement of defence and counterclaim filed in that case, which inter alia seeks a permanent injunction restraining the 1st respondent and all allottees and beneficiaries of allocations of land carved out of LR No 28731. She has annexed a 2005 valuation report placing the open market value of the land at Kshs 98,000,000/=, and a Certificate of title dated 18th August 2020 of LR. NO 28731 MACKINON ROAD that measures approximately 5,214.09 acres. She asserts that the current market value is estimated at Kshs

1,310,250,000/=. Ms Ngutu alludes that the value of the suit property as claimed by the applicant in its counterclaim, goes over and above the pecuniary jurisdiction that the Principal Magistrate of Kshs 10,000,000/=. and therefore the magistrate's court cannot hear and determine the suit.

4. The 1st interested party filed its replying affidavit on 10th March 2021, sworn by Stephen Ivuvu an investigator with the interested party. He states that the interested party supports this application. He has deposed that the interested party conducted investigations on the allegations of irregular, fraudulent and illegal acquisition of the applicant's parcel of land LR. NO. 28731, and found that the property is public property set aside by the Government of Kenya for use by the applicant. Mr. Ivuvu deposes that parcels of land Title No. Kwale/Mackinon Road Phase II/1425, Kwale/Mackinon Road Phase II/1426, Kwale/Mackinon Road Phase II/1530, Kwale/Mackinon Road Phase II/1531 measuring approximately 31.149 were illegally excised from the applicant's LR. NO 28731. He has annexed a report dated 20 January 2021 indicating the value of LR. NO 28731 to be Kshs 800,000,000/=. He supports that the Kwale Chief Magistrates lacks the jurisdiction to hear the matter and is of opinion that the matter should be transferred to this court for hearing and determination.

5. The 1st respondent swore a replying affidavit to oppose the motion. Basically, he states that what is in issue in the Kwale Magistrate's Court are the titles that he holds and he has annexed a valuation report showing that their value is Kshs. 4,500,000/=. It is his argument that what is before the Kwale Magistrate's court falls within the pecuniary jurisdiction of the trial Magistrate in Kwale. He does not think much about the alleged title of the applicant reading LR No. 28731 which he claims was procured after he had already filed his case. He wants his case to proceed where filed.

6. I have considered the matter alongside the submissions filed.

7. I will be brief in my delivery because to me the issues are clear.

8. First, I cannot fault the 1st respondent for filing suit before the Magistrate's Court in Kwale. The combined value of the properties that he believes belong to him, and for which he seeks orders to restrain the applicant, are below Kshs. 10,000,000/= which would comfortably fall within the jurisdiction of the Magistrate's Court in Kwale. The issue here is not really whether the Magistrate's Court has jurisdiction over the 1st respondent's case. The complication comes with the counterclaim filed by the applicant. The applicant wants orders to nullify, not only the title of the 1st respondent, but other titles that the applicant alleges were illegally created from LR No. 28731 which the applicant asserts belongs to it. That counterclaim therefore has potential to affect land whose value is way above the pecuniary jurisdiction of the Magistrate's Court and will thus need to be entertained by this court which has unlimited jurisdiction. In other words, it cannot be heard by the Magistrate's Court. If it is to be insisted that the case remains in Kwale court, then the applicant will be denied the opportunity to fully ventilate its counterclaim which may lead to an injustice to the applicant. I am aware that the 1st respondent is of the strong opinion that the applicant's title is bogus, but that is an issue that can only be determined after the case goes to trial yet the Magistrate's court will have no jurisdiction to determine the veracity of the applicant's title since it goes beyond the pecuniary jurisdiction of the Magistrate. I see nothing wrong with the counterclaim only that it may need to be amended to include all the owners of the land parcels that the applicant claims fall within the larger LR No. 28731.

9. The situation that I face herein is no different from that which arose in the case of *Mitchell Cotts Freight Limited vs Civicon Limited (2017) eKLR* and *Insecta Limited vs Mastermind Tobacco (K) Limited (2004) eKLR*, cited by Mr. Oluoch learned counsel for the applicant. In the former case, there was a suit filed before the Magistrate's Court where the plaintiff claimed the sum of Kshs 3,366,938.00/= which claim properly fell within the jurisdiction of the Magistrate's Court. The defendant raised a counterclaim for Kshs. 27,342,300/= which went beyond the jurisdiction of the Magistrate's Court. The defendant subsequently filed an application to transfer the matter to the High Court for determination. The court (Njoki Mwangi J), allowed the application. In the former case of *Insecta Limited vs Mastermind Tobacco (K) Limited*, Waweru J, held as follows :-

"It is merely incidental, in my view, that the counterclaim is beyond the pecuniary jurisdiction of the subordinate court. A transfer of the entire suit to the High Court is therefore necessary, and the plaintiff will not have suffered any prejudice for its claim to be tried in the High Court rather than in the subordinate court."

10. In the same way that Waweru J, found no prejudice if the matter before him was transferred to the High Court, I also see no prejudice to the 1st respondent if the matter before the Kwale court is transferred to this court. The transfer to this court will indeed facilitate the disposal, with finality, of the question whether the titles that are said to have been carved out of LR No. 28731, including the titles of the 1st respondent, are genuine or not. This court has power pursuant to Section 18 (1) (b) (i) of the Civil Procedure Act, Cap 21, Laws of Kenya, to make the order of transfer of a matter pending before the Magistrate's Court to this court for disposal.

11. I am persuaded that it is necessary to transfer the suit Kwale Magistrate's Court Land Case No. 19 of 2020 to this court for disposal and I so make that order.

12. The applicant will have the costs of this application as against the 1st respondent, for in my view, the challenge to the transfer was wholly unmerited.

13. Orders accordingly.

DATED AND DELIVERED THIS 8TH DAY JUNE 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA