



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 36 OF 2020

SAMSON NDAMBO NGUGI.....PLAINTIFF/RESPONDENT

VS

ANTHONY MUCHINA KAMAU1ST DEFENDANT/APPLICANT

STANLEY KINUTHIA KAMAU.....2ND DEFENDANT/APPLICANT

RULING

1. The Defendants/Applicants filed the instant application dated 7/6/2021 seeking orders that;
 - a. That this Honorable Court be pleased to order that ELC No. 36 of 2020 be transferred to the Chief Magistrate's Court at Murang'a for final hearing and determination.
 - b. That costs of this application be in the cause.
2. The application is based on the grounds on the face of it and the Supporting Affidavit of Moses Gatitu Wang'oo, the Applicant' Counsel. The gist of the application is that the value of the subject matter of the suit namely Plot No. LOC.4/GARARARA/1156/23 Kandara market (hereinafter referred to as the suit land) is within the Chief magistrate's pecuniary jurisdiction. Learned Counsel Mr. Gatito deponed that the matter was previously handled at the Thika Magistrate's Courts. He annexed a copy of the valuation report MGW-1 indicating the value of the suit land as Kshs. 12M and averred that it is in the interest of justice that the matter be transferred to the Chief Magistrate's Court.
3. The Application is opposed.
4. The Plaintiff/Respondent filed a Replying Affidavit sworn on 22/6/2021 by his Counsel, James Makura M'abira. He termed the application as an afterthought, misconceived, an abuse of Court process and appears to be a forum shopping expedition. He avowed that this Court has original and appellate jurisdiction to determine the issue of trust which is the gravamen of the substantive suit by dint of Section 13 Environment and Land(ELC) Act. That the matter was previously before the Principal Magistrate Court at Kandara Civil Case No. 173 of 2013 where the Court ruled that it did not have jurisdiction. That the Applicants numerous applications are a delaying tactic including a notice of Appeal already filed to the Court of Appeal. He maintained that no prejudice will be suffered if the matter is heard and determined by this Court and in the interest of justice, the application be dismissed with costs.
5. The application was argued orally in open Court on 30/6/2021.
6. The Applicants relied on the grounds on the face of the motion, his Supporting Affidavit together with the valuation report of the suit land.
7. On the other hand, the Respondent relied on his Replying Affidavit and copy of the Kandara Ruling – SNN1 and rehashed this Court's jurisdiction to hear and determine the issue of trusts. The Respondent pointed out that this Court determined a Preliminary Objection and an Appeal was preferred against its Ruling. That the Applicants move is akin to engaging a reverse gear after losing the Preliminary Objection hence creating delay.
8. In a brief rejoinder, the Applicants was emphatic that the Kandara Ruling was delivered before the amendment of the Magistrate's Court Act. That there was no evidence of delay and the Applicants is interested to have the matter heard and determined expeditiously.
9. The main issue for determination is whether in the circumstances of this case, this suit can be transferred to the Chief Magistrates Court at Murang'a for hearing and determination.
10. The Application is expressed to be brought under Article 162 (2)(b) of the Constitution of Kenya, section 3 and 13 pf the ELC Act

section 7,9 (a) of the Magistrate's Court Act and sections 1A, 1B, of the Land Registration Act, Order 51 of the Civil Procedure Rules, sections 1A, 1B of the Civil Procedure Act.

11. It is also trite this Court exercises both original and appellate jurisdiction over Environment and Land Court matters as set out under Article 162 (2)(b) of the Constitution of Kenya, read together with Section 3 and 13 of the ELC Act.

12. The jurisdiction of the Magistrates Court is found in Section 7 and 9 of the Magistrates Act as follows; 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 —

- (a) twenty million shillings, where the Court is presided over by a chief magistrate;
- (b) fifteen million shillings, where the Court is presided over by a senior principal magistrate;
- (c) ten million shillings, where the Court is presided over by a principal magistrate;
- (d) seven million shillings, where the Court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the Court is presided over by a resident magistrate.

(2)

(3) A magistrate's Court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —

- (a) land held under customary tenure;
- (b) marriage, divorce, maintenance or dowry;
- (c) seduction or pregnancy of an unmarried woman or girl;
- (d) enticement of, or adultery with a married person;
- (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy;
- (f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.

12. This claim is based on customary trust. It is not in dispute that the valuation of the subject matter is Kshs 12 million.

13. The relevant provision applicable to the transfer of cases to the subordinate Court by this Court is found in Section 18 (1) (a) of the Civil Procedure Act which states;

(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 proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same;

14. This Court has power to transfer a suit to the lower Court. Such power is discretionary and exercised in the interests of justice depending with the facts of the case. The suit therefore falls within the jurisdiction of the Magistrates Court.

15. That said the circumstances of this case are such that on perusal of the file I note that the Applicants have lodged a notice of Appeal on the ruling of this Court on a preliminary objection in the Court of Appeal. They also applied for typed proceedings to enable them prepare their record of Appeal. For purposes of the procedural rules as set out under Order 42 Rule 6 (4) an Appeal to the Court of Appeal shall be deemed to have been filed when a notice under the rules of the Court has been given. There is no doubt that there is an intention to file the Appeal on record in form of the notice of Appeal and for the Applicant to submit themselves to the jurisdiction of the Court of Appeal.

16. For good order and so as not to convolute the case further the Applicants should make up their minds and elect either to prosecute the Appeal to is logical conclusion or defend the suit. Having lodged an Appeal and whilst the same is pending, I find that the application is an abuse of the process of the Court. Such a scenario should not be encouraged. It is for this reason that I find the application unmerited and proceed to strike it out.

17. I order costs in favour of the Respondent.

18. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 15TH DAY OF JULY 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Pala for the Applicants

Respondent: Absent

Court Assistant: Alex