



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

MISC APPLICATION NO. E004 OF 2021

HASSAN GALBINOOR.....1ST APPLICANT

HASSAN BARE DUALE.....2ND APPLICANT

SHUKRI SATHUR IMAN.....3RD APPLICANT

VERSUS

ISMAIL ABDOW.....1ST RESPONDENT

GABOW ABDI BARRE.....2ND RESPONDENT

ABDI ABDULLAHI HUSSEIN.....3RD RESPONDENT

FAYSAL ABDOW.....4TH RESPONDENT

BASHIR AMIN.....5TH RESPONDENT

RULING

1. The applicants moved this court vide application dated 9th August 2021 seeking the following Orders;

a. Suit No. Garissa CMCC No. E009 of 2021 be and is hereby transferred from the Chief Magistrate Court, Garissa to the Chief Magistrate Court Thika for hearing and determination.

b. In the interim, the honorable Court be pleased to issue a temporary injunction barring the respondents whether by themselves, the agents, employees or anybody acting under their instructions from taking possession of carrying out construction, alienating, transferring to a third party or any activity on or in any way dealing with suit property known as LR 31331 (IR No. 220252) within Garissa Township pending the hearing and determination of this application.

c. Costs of the application be provided for.

2. The application is based on the supporting affidavit of **B Ongeri Oyugi**, advocate for the applicants. He averred that on 22nd June 2021 the applicants filed suit against the respondents. Contemporaneously, they filed an application seeking a permanent injunction against the respondent barring them from in any way dealing with the suit property known as **L.r. Number 31331 (IR Number 220252)** situated within Garissa Township.

3. That interim Orders of injunction were issued ex-parte and the application was fixed for interpartes hearing on 7th July 2021. At the said hearing the Respondent's raised a preliminary objection challenging the pecuniary jurisdiction of the court to hear and determine the matter.

4. That in a Ruling delivered on 29th July 2021, the Court made a finding that the Senior Resident Magistrate Court had no jurisdiction to hear and determine the matter and consequently directed that the matter be heard before the Chief Magistrate Court thereby vacating the interim Orders that were in place.

5. That the matter was thereafter placed before the Chief Magistrate on 29th July 2021 where the Chief Magistrate recused himself from

handling the matter on grounds that he is handling a criminal matter in which the 2nd Respondent is the accused person in a charge of malicious damage to property that is not in relation to the suit property.

6. That the trial Magistrate thereafter advised that the matter be moved to the environment and land Court in Garissa. That the applicants now apply for the matter to be transferred to Thika Chief Magistrate's Court in Order to Preserve the Court's appellate jurisdiction.

7. That since the Orders were vacated on 29th July 2021, the respondents have commenced permanent constructions in the suit land despite the fact that the applicants are the legal and registered owners.

8. The Respondents opposed the application vide a **Replying Affidavit dated 7th October 2021 sworn by Ismail Abdow, the 1st Respondent herein**. He averred that no satisfactory reasons have been given by the applicants why the matter should be transferred from Garissa Chief Magistrates Courts to Thika Chief Magistrate's Courts. That the court should take note of the territorial jurisdiction of the suit premises which is situate within Garissa County.

9. That the jurisdiction issue at the Senior Resident Magistrate was pecuniary i.e. that the suit premises was valued at Kenya Shillings Sixty Million (Kshs. 60,000,000/=) and the appropriate forum to deal with the suit was the environment and Land Court. That the chief magistrate also recused himself and directed the matter to be moved to this Honourable Court.

10. That the respondents together with seventy-five (75) others have moved this Honourable Court vide **Originating Summons Number 1 of 2021 Ismail Abdow & 75 Others versus Hassan Galbinoor** claiming seeking a declaration to be registered as the sole proprietors of the suit premises in place of the applicants herein who are the registered proprietors of the suit premises. That the claim of the applicants herein be deemed to have been extinguished through adverse possession of the same to the Respondents.

11. This court directed the parties to file their respective submissions. At the time of writing this judgement none of the parties had filed their submissions.

Analysis and Determination

12. I have considered the application and the rival reply by the Respondents. Two Rulings were delivered in Garissa Elc 009 of 2021. The *first* was delivered by Hon. Ole Tanchu (SRM). It was his determination that the pecuniary value of the suit premises exceeded his jurisdiction. In his determination, he took note at paragraph 5 that two valuation reports had been filed by the applicant and respondents herein. The Respondent filed a valuation reports prepared by Spring Field Valuers placing the suit property at Kenya Shillings One Hundred and Ninety Million (Kshs. 190,000,000/=). The applicant on the other hand filed a valuation report prepared by Musyoki and Associates valuing the property at Kenya Shillings Twelve Million (Kshs. 12,000,000/=). The Senior Resident Magistrate's Pecuniary limit is capped at Seven Million (7,000,000/=)

13. The *second* was delivered by Hon Cosmas Maundu (CM). The Chief Magistrate recused himself from the case when he held as follow;

“.....This court is seized with Criminal Case Number E707/2021 where the 2nd Defendant is the accused person. In the criminal case the 2nd Defendant herein is charged with 12 counts of malicious damage to property. Some of the complainant in the criminal case are parties to this suit. Both matters revolve around the same subject matter. Therefore, in my view it would not be appropriate to handle both cases and I proceed to recuse myself from hearing this case. Parties are advised to take appropriate steps to have this suit moved to Elc Garissa.”

14. **Section 18 of the Civil Procedure Act** gives the High Court wide powers to transfer any suit pending before it to a subordinate Court competent to try it or transfer any suit from a subordinate Court to itself or transfer any suit from one subordinate Court to another. **Section 12 of the Civil Procedure Act** also provides that a suit for recovery of immovable property “**shall be instituted in the Court within the local limits of whose jurisdiction the property is situated**”.

See also **Peter Mburu v Andrew Kimani Adam & 2 others [2016] eKLR**

15. In **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** the court cited the case of **Heinz Isbrecht v Charles Ochieng Ndiga (Msa) Misc. Application No. 20 of 1997**, where it was held: -

“When making or refusing an order of transfer the court will have regard to the nature and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case.”

16. I have looked at the two Rulings delivered by the trial Court. Of importance and what had not been ostensibly determined by the court is whether the court had jurisdiction to entertain the suit. The two reports place the value of the suit premises at 12 million and 190 million respectively. The trial Courts pecuniary jurisdiction lies at Kenya Shillings 20 million.

17. Mativo J. stated in **Stephen Kinini Wang'ondou –vs- The Ark Limited (Civil Appeal No. 2 of 2014 (2016) eKLR:-**

“While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weight the Probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account.

Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that Judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then be rigidly judged with mathematical precision.

Secondly, a Judge must not consider expert evidence in a Vacuum. It should not therefore be ‘artificially separated’ from the rest of the evidence. To do so is a structural failing. A Court’s finding will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the Court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a Judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a Judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”

18. The land measures 60 hectares (148 hectares). It is located 10 km from Garissa County Hospital and 200 meters from the road. By fair estimation the land cannot be valued at Kshs. 190 million as had been proposed by the Respondent. The value of Kshs. 12 million is also not a just estimation. This court taking judicial notice of the current market value of land within the region of the suit land places the land at approximately Kshs. 150 million. The Statute Law (Miscellaneous Amendments Act No. 12 of 2012) that amended section 5 of the Magistrate’s Court Act enhanced the pecuniary jurisdiction of a Chief Magistrate to Kshs.20,000,000. From the facts however, the pecuniary value of the suit premises in my estimation still exceeds the Chief Magistrate’s court jurisdiction.

19. In **Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another [2012] eKLR**, it was held as follows: -

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law.”

20. Jurisdiction is not a procedural or legal technicality, it is a substantial issue that goes to the very heart of a matter that is before a court, and without jurisdiction a court acts in vain. The words of Nyarangi, JA. In **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] KLR 1** bear repetition: -

“By jurisdiction is meant the authority which a court has to decide matters that are before it or to take cognisance of matters presented in a formal way for its decision... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”

21. Having come to the determination that the trial court lacked jurisdiction to handle the matter and borrowing from **Abraham Mwangi Wamigwi (supra)** this court finds that the suit in the trial court was a nullity and this court cannot therefore be invoked by the provisions of **Section 18 of the Civil Procedure Act**.

22. It is my finding that the application dated 17th August 2021 lacks merit and the same is dismissed with costs.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 26TH DAY NOVEMBER, 2021.

.....
E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Adolla for the Respondent
2. Mr. Ongeru for the Applicant
3. Fardowsa: Court Assistant