



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CASE NO. 381 OF 2017**

**MARCELLA OMWENGA.....PLAINTIFF**

**VERSUS**

**KWAME INVESTMENTS LIMITED.....1ST DEFENDANT**

**AMINA MOHAMED.....2ND DEFENDANT**

**ISAACK ADAN DABARO.....3RD DEFENDANT**

**HUSSEIN TARY SASURA.....4TH DEFENDANT**

**SOFIA DUBA HALAKE.....5TH DEFENDANT**

**ABDULLAH KUSSU HARO T/A TAKBIR DISTRIBUTORS.....6TH DEFENDANT**

**RULING**

1. The plaintiff brought this suit on 9/6/2017 through a plaint dated 8/5/2017. She contended that on or about 22/10/2003, she purchased Land Reference Numbers 209/24884/55 and 209/24884/56 which were then designated as Plot Numbers 92, 93 and 97, situated along Airport North Road, Embakasi, Nairobi. It was her case that the defendants had, through fraud, obtained titles to the said parcels of land and had colluded to defraud her the parcels of land. She sought the following verbatim orders against the defendants.

***a) Permanent injunction against the defendants jointly and severally restraining them from interfering with the plaintiff's possession of the property known as L.R No. 209/24884 and L.R No. 209/24884/56 Old Numbers No. 92, 93, 97 and L.R. No. 248840/60.***

***b) The Title No L.R. Number 248840/60 be cancelled and or revoked.***

***c) General Damages.***

2. In paragraph 19 of the plaint, the plaintiff pleaded that there existed another suit in respect of the same cause of action in the Chief Magistrate Court at Milimani, Nairobi, to wit, **Milimani CMCC Number 12728/2005**. She contended that she instituted this duplicate suit because the Constitution of Kenya 2010 had divested magistrate courts of jurisdiction to adjudicate land disputes.

3. Subsequently, on 9/6/2019, the plaintiff brought a notice of motion dated 8/6/2017 seeking the

following orders:

- 1) *That this application be certified urgent and heard exparte in the first instance.*
- 2) *That pending the hearing and determination of this application interpartes, temporary injunction be and is hereby issued restraining the 6th defendant from proceeding with the construction on Plot No 97 and or LR No 24884/60.*
- 3) *That pending the hearing and determination of the suit the 6th respondent is hereby restrained by temporary injunction from proceeding with construction on pieces of land known as Plot No 97 and or LR 24884/60.*
- 4) *That this honourable court be pleased to transfer Milimani Chief Magistrate's Court Civil Suit No 12728 of 2005 to this honourable court for hearing and determination.*
- 5) *That in the alternative, this honourable court do stay the Milimani Chief Magistrate's Court Case No 12728 of 2005 pending the hearing and determination of the suit.*
- 6) *That the cost of this application be borne by the respondents.*

4. The plaintiff contended in the application that she was the lawful owner of Land Reference Number 24884/60 having purchased it as an unsurveyed parcel of land designated as Plot Number 97. She added that the 1st to the 5th defendants had colluded in the Year 2005 and had demolished the foundation which she had erected on the suit property. This action prompted her to file **Milimani CMCC No 12728 of 2005** where she obtained interim orders. She further contended that she filed Nairobi **ELC No 320 of 2007** but subsequently withdrew it. She urged the court to grant her the orders itemized in the application.

5. The application was opposed by the 1st, 2nd and 3rd defendants through a preliminary objection dated 12/10/2018 and a replying affidavit sworn by the 3rd defendant on 17/1/2018. They contended that the suit herein is *res judicata* and or *res subjudice* because: (i) there subsists **Milimani CMCC No 12728/2005** filed by the plaintiff herein in respect of the same cause of action; and (ii) the plaintiff previously instituted **Nairobi High Court Misc Civil Case No 430 of 2008** in which she sought prayers similar to prayers 4 and 5 in this suit. They contended that the suit herein and the application were an abuse of the court process. The 1st, 2nd and 3rd defendants further contended that the plaintiff's contention that she purchased the suit property from the 1st defendant on 22/10/2003 was manifestly false because the 1st defendant was not yet registered and did not therefore exist. They added that the land which the plaintiff is claiming belongs to the 6th defendant.

6. I have considered the application, the grounds of opposition, and the parties' submissions. What emerges from the materials placed before this court is that the 1st, 2nd and 3rd defendants have raised the issue of the jurisdiction of this court to entertain this suit while there subsists a prior suit in the Chief Magistrate Court relating to the same cause of action. The law requires me to dispose that question of jurisdiction before dealing with any other question in the application [see **Owners of the Motor Vessel "LillianS" v Caltex Oil (Kenya) Limited [1989]KLR**

7. There is common ground that at the time of bringing this suit, there subsisted **Nairobi CMCC 12728/2005**, relating to the same cause of action and seeking the same reliefs. The plaintiff/applicant contended that she brought this suit because the Constitution of Kenya 2010 had divested magistrate courts of jurisdiction to adjudicate land disputes. He added that magistrate courts do not have powers to cancel land titles.

8. Whereas there was uncertainty regarding the jurisdiction of magistrate courts to adjudicate land disputes under the Constitution of Kenya 2010, that uncertainty was settled by the Court of Appeal through a judgment rendered on 19/10/2017 in **Law Society of Kenya Nairobi Branch V Malindi Law Society Branch & Others [2017] eKLR**. The Court of Appeal held that Parliament can, through

legislation, properly confer upon magistrate courts jurisdiction to adjudicate land disputes. Put differently, pursuant to legislation, magistrate courts have jurisdiction to hear land disputes.

9. The plaintiff further contended that a magistrate court does not have jurisdiction to revoke a title to land. I do not agree with that view. The Environment & Land Court Act which operationalized Article 162(2) (b) of the Constitution contains the following framework on the jurisdiction of magistrate courts.

***“26(4) Subject to Article 169(2) of the Constitution, the magistrate appointed under subsection (3) shall have jurisdiction and power to handle***

***a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and***

***b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrate Courts Act”***

10. It is clear from the plain reading of the above framework that magistrate courts have jurisdiction to adjudicate disputes relating to title to land. In discharging that mandate, magistrate courts are expected to uphold or invalidate litigants’ titles to land. In my view, the contention that a magistrate court does not have jurisdiction to cancel a title is a misconception. I do not think Parliament intended to create a scenario where it would grant a magistrate court power to hear and determine disputes relating to a land title but at the same time deny that magistrate the power to revoke, cancel or annul the title in dispute. That would be an absurd scenario.

11. In light of the above findings, I come to the conclusion that Nairobi **CMCC Number 12728/2005** which relates to the same cause of action as the suit herein and which preceded this suit subsists in a court of competent jurisdiction. Unless the pecuniary jurisdiction of the court is now ousted by the fact of appreciation of the value of the suit property, the Magistrate Court should deal with the dispute before it. There is therefore no basis for sustaining a duplicate suit in the Environment and Land Court.

12. The net result is that this suit which is a duplicate of **Nairobi CMCCC N0 12728/2005** cannot be sustained. However, because there was legal uncertainty on the jurisdiction of magistrate courts to handle land disputes prior to October 2017, I will not condemn the plaintiff to pay costs of this suit.

### **Disposal Orders**

13. In light of the above findings, I make the following disposal orders relating to the jurisdiction of the court to entertain this suit.

***a) The suit herein is struck out on the ground that there subsists a prior suit by the plaintiff relating to the same cause of action, to wit, Nairobi CMCCC Number 12728/2005.***

***b) Each party shall bear their own costs of this suit.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JANUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Omao for the Plaintiff

Mr Nyaribo for the 6th Defendant

Court clerk: June Nafula