



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 219 OF 2014

BENSON NGUNGI KIRONJO

(Suing on behalf of MUGWE CLAN).....**PLAINTIFF**

VERSUS

JOEL KITHAKA MARINGA

(Suing on behalf of NGUI CLAN).....**DEFENDANT**

AND

PETER MATHURI KARANI & 65 OTHERS.....**RESPONDENTS**

RULING

1. By a notice of motion dated 18th April 2019 expressed to be brought under **Section 91 of the Civil Procedure Act (Cap. 21)** the Defendant sought the following main orders:

- a) *An order for restoration of Blocks 131 and 136 within Gichiche Adjudication Section back to their original status as at 26th October 2006 as being owned by members of Ngui clan.*
- b) *That the titles which were issued pursuant to the court order dated 26th October 2006 be cancelled forthwith.*
- c) *That the Respondents do pay general damages for trespass and acts of waste with respect to the said Blocks.*

2. The said application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by the Defendant on 18th April 2019. The gist of the application was that the Respondents to the application acquired the various properties in Blocks 131 and 136 pursuant to a court order made by the Magistrate's court at Siakago on 26th October 2006 which was subsequently reversed by the High Court in *Embu HCCA No. 62 of 2009*. The Defendant therefore sought restitution in terms of **Section 91** of the **Civil Procedure Act (Cap. 21)**.

3. The Plaintiff filed a replying affidavit sworn on 13th May 2019 in opposition to the said application. It was contended that this court had become *functus officio* after delivery of judgement hence could not entertain the application. It was further contended that the instant suit concerned only Block 148 in Gichiche Adjudication Section hence the Defendant could not sneak it Blocks 131 and 136 which were not the subject of the suit. It was further contended that the Respondents whose titles were sought to be cancelled were never joined in the suit hence they could not be made parties after judgement. Finally, it was contended that the Defendant was aware all along of the subdivision and distribution of the two blocks amongst members of Mugwe clan and it would be too late to reverse the alienation after passage of over 10 years.

4. When the said application was listed for hearing on 19th November 2019 the Defendant's advocate made an oral application for transfer of the suit to the Magistrates' Court at Siakago for hearing thereof. It was contended that the said court was the court of "first instance" within the meaning of **Section 91** of the **Civil Procedure Act** which had jurisdiction to order restitution. The Defendant's advocate further contended that this court had no jurisdiction to entertain the application for restitution.

5. The Plaintiff's response to the application for transfer was that the court became *functus officio* upon delivery of judgement hence it should not entertain any further proceedings. The Plaintiff's advocate further submitted that the Magistrate's Court at Siakago had no jurisdiction to entertain the suit and that was the reason why the suit was transferred to the superior court in the first place. It was also submitted that the instant application did not fall strictly within the realm of **Section 91** of the **Civil Procedure Act** since additional reliefs

such as damages were being sought.

6. The instant ruling is therefore confined to the question of whether the suit should be transferred to the Magistrate's Court at Siakago as a court of first instance. The court has considered the nature of the Defendant's said application and the grounds upon which it is based. It is common ground that the instant suit emanated from the Magistrate's Court at Siakago. It is also common ground that the suit was transferred to the High Court for trial and disposal upon determination of the appeal against the orders of the Magistrates' court dated 26th October 2006.

7. The Defendant's application for restitution was based upon **Section 91** whereas the application for transfer was based upon **Section 18** of the **Civil Procedure Act**. **Section 91** of the said Act stipulates as follows:

“(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).”

8. The Defendant contended that an application for restitution ought to be handled by the court of first instance. By court of “first instance” is meant the court which passed the original decree or order which was subsequently overturned or reversed. In the instant matter, there is no doubt that the original decree or order was passed by the Magistrates court at Siakago Law Courts. There is also no doubt that the said order or decree was set aside by the High Court which also transferred the suit to itself for trial and disposal. Accordingly, the court is of the opinion that the Magistrates court at Siakago is the court of first instance for purpose of restitution within the meaning of **Section 91 of the Civil Procedure Act**.

9. The Defendant also relied upon **Section 18** of the **Civil Procedure Act** which stipulates 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 proceeding 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 proceeding pending in any court subordinate to it, and thereafter—

(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 or dispose of the same; or

(iii) Retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

10. The court is vested with wide discretion to transfer a suit from the subordinate court to itself and vice versa. It may try and dispose the suit itself or it may re-transfer it either to a different subordinate court or even back to the same subordinate court. The court is of the opinion that it has jurisdiction either under **Section 18** of the **Civil Procedure Act** or under its inherent power to order a transfer of the suit back to Siakago Law Courts for purposes of the application for restitution. The mere fact that the Defendant has sought other prayers in addition to restitution does not mean that the prayers which fall within the scope of restitution should not be considered by the court of first instance. It shall also fall within the jurisdiction of the court of first instance to determine the fate of those additional prayers.

11. The court does not agree with the Plaintiff's submissions that the doctrine of *functus officio* is applicable to an application for restitution. The Defendant has filed the application because the order of the Magistrates' Court dated 26th October 2006 was set aside or reversed by the High Court on appeal. In those circumstances, the court will not be trying or determining afresh matters which have already been decided in a previous suit but simply entertaining an application for restitution within the meaning and intendment of **Section 91** of the **Civil Procedure Act**. If the Plaintiff's contention is that no issue of restitution has arisen in this matter, then that would still be a matter for consideration by the court of first instance.

12. The upshot of the foregoing is that the court is satisfied that the instant application for restitution ought to be heard by the court of first instance which passed the order of 26th October 2006 which was subsequently set aside by the High Court. Consequently, the court makes the following orders:

a) The pending proceedings herein are hereby transferred to the Magistrate's Court at Siakago for disposal of the Defendant's notice of motion dated 18th April 2019.

b) The matter shall be re-transferred back to the Environment and Land Court at Embu upon disposal of the said application.

13. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **6TH DAY** of **FEBRUARY 2020**.

In the presence of Ms. Mutegi for the Plaintiff and Mr. Njagi for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

06.02.2020