



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT AND LAND CASE NO.88 OF 2017

MARGARET NASAKA SIMIYU & BILHA NALIAKA SIMIYU

suing as legal and personal representatives of the

Estate of MICHAEL SIMIYU SIBA.....PLAINTIFF/RESPONDENT

VERSUS

NICOLAS WANJALA.....1ST DEFENDANT

PENINAH BUKUSA.....2ND DEFENDANT

LILIAN MATING NAMASAKE.....3RD DEFENDANT

JAMES SINJA WALIAULA.....4TH DEFENDANT

JOSEPH NATEMBEYA KUSESI.....5TH DEFENDANT

THE LAND REGISTRAR BUNGOMA COUNTY.....6TH DEFENDANT

THE HON. ATTORNEY GENERAL.....7TH DEFENDANT

RULING

What calls for my determination in this ruling is the Notice of Motion dated 12th July 2018 and filed by the 1st, 2nd, 3rd, 4th and 5th defendants seeking the main order that this suit be transferred to the Senior Principal Magistrate's Court at Kimilili because the subject matter in this case is valued at below Ksh.8,000,000.

The application is based on the grounds set out therein and is also supported by the affidavit of **NICOLAS WANJALA** the 1st defendant. It is clear from the application that apart from the fact that the value of the land in dispute is Ksh.7,630,000 as per the valuation report prepared by **CHRISCA REAL ESTATES** and dated 12th April 2018 (annexture NW1), the 2nd defendant and some of the witnesses in this suit are elderly and it will be cumbersome and expensive to have them travel all the way to Bungoma to attend Court.

The application is opposed and the plaintiff has filed a replying affidavit dated 21st August 2018 which largely dwells on the history of the land parcels in dispute and how they resulted from a sub-division of land parcel No. **KIMILILI/SIKHENDU/705** which has now been secretly and fraudulently sub-divided to give rise to parcel No. **KIMILILI/SIKHENDU/1552** and thereafter to parcels No. **KIMILILI/SIKHENDU/2188, 2189, 2190 and 2191** (the suit land). All that is not relevant for purposes of this application. What is relevant is what the plaintiff has deponed in paragraphs 8,9 and 10 of the said replying affidavit in which he avers as follows:

8: "That our late father's land parcel number KIMILILI/SIKHENDU/1552 is more than Ksh.20,000,000"

9: "That the valuation annexed to the application is questionable as there are no boundaries on the ground the alleged titles having been created without any survey done on title number KIMILILI/SIKHENDU/1552."

10: "That I am further informed by my advocate which information I verily belief (sic) to be true that the order of rectification of the register which I seek in my claim herein can only be handled by the ENVIRONMENT AND LAND COURT established under the ENVIRONMENT AND LAND COURT ACT 2011 read together with Section 2 and Section

80 of the LAND REGISTRATION ACT 2012”.

When Counsel for the plaintiff and the 1st, 2nd, 3rd, 4th and 5th defendants appeared before me on 11th October 2018, it was agreed that the application be determined on the basis of the affidavits filed by the plaintiffs and the 1st defendant. I notice however that Counsel for the 1st, 2nd, 3rd, 4th and 5th defendants filed submissions on 24th September 2018. I shall ignore them in view of the clear directions given on 11th October, 2018.

I have considered the application and the rival affidavits.

As slated at the beginning of this ruling, the only order sought by the 1st, 2nd, 3rd, 4th and 5th defendants is the transfer of this suit to the Senior Principal Magistrate’s Court at KIMILILI. It is grounded on two reasons:

1. The value of the property in dispute is Ksh.7,630,000 as per the valuation report and therefore within the pecuniary jurisdiction of the Senior Principal Magistrate’s Court at KIMILILI.

2. The 2nd defendant and some of the witnesses are elderly and it will be cumbersome and expensive for them to travel to Bungoma.

It is common knowledge that the pecuniary jurisdiction of a Senior Principal Magistrate has now been enhanced to Ksh.15 million under the Magistrate’s Court Act 2015. It is also not in dispute that the KIMILILI COURT is indeed presided over by a senior Principal Magistrate **HON. D. ONYANGO** and that the land in dispute is situated at KIMILILI. It is clear from Section 12 of the **Civil Procedure Act** that any suit relating to immovable property in Kenya;

“...shall be instituted in the Court within the local limits of whose jurisdiction the property is situate”

It is also provided under **Section 1B(1)(d) of the Civil Procedure Act** that for purposes of furthering the overriding objectives of the Act, Courts shall handle matters before them for purposes of inter alia attaining;

“...the timely disposal of the proceeding, and all other proceedings in the Court at a cost affordable by the respective parties”
Emphasis added

The 1st defendant has deponed in paragraph 5 of his supporting affidavit that the 2nd defendant and some of the witnesses in this case are elderly and it will be cumbersome and expensive to have them travel to Bungoma. That has not been rebutted and it will surely be more affordable to have this suit heard at the Court nearest to the parties given the fact that some of them are elderly.

The 1st, 2nd, 3rd, 4th and 5th defendants have also availed a report by a valuer stating that the land in dispute is valued at Ksh.7,630,000. In an attempt to assail that report, the plaintiff has deponed in paragraph 9 of her replying affidavit that the said report is **“questionable”**. However, the plaintiff did not provide an alternative report showing that the value of the suit land is Ksh.20,000,000 nor state how the said report is **“questionable”** other than saying that there are no boundaries on the ground. On my part, I have looked at the said report. Not only is it detailed but the author **MR. PIUS ISAIYA KHAOYA** has also attached his current Practising Certificate issued under the **Valuers Act CHAPTER 532 LAWS OF KENYA** and a copy of the Kenya Gazette dated 23rd March 2018 in which he is listed as one of the Registered and Practising Valuers in Kenya. There is no reason whatsoever to doubt what is contained in that report and I accept it as a correct valuation of the suit land.

Finally, the Plaintiffs have averred that the order they seek include the rectification of the register which can only be handled by this Court. Rectification of the register is provided for under Section 80(1) of the Land Registration Act 2012 in the following terms:

“Subject to sub-section (2) the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

And following the amendment to Section 2 of the **Land Registration Act** in 2016, Court is defined as:

“...the Environment and Land Court established by the Environment and Land Court Act 2011 and other Courts having jurisdiction on matters relating to Land.” Emphasis added.

Similarly, Section 150 of the **Land Act** as amended now reads:

“The Environment and Land Court established in the Environment and Land Court Act and the subordinate Courts as empowered by any written Law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.” Emphasis added

Section 26(3) of the **Environment and Land Court Act** reads as follows:

“The Chief Justice may, by notice in the Gazette, appoint certain Magistrates to preside over cases involving environment and land matters of any area of the County”

HON. D. ONYANGO is one such Magistrate having been appointed on 1st March 2016 under **Gazette Notice No.1472** by the then **Chief Justice W. MUTUNGA**. It is also now clear that Section 9 of the **MAGISTRATE'S COURT ACT 2015** grants Magistrates the power to hear and determine a wide range of disputes relating to land and the Environment.

The up-shot of the above is that the application by the 1st, 2nd, 3rd, 4th and 5th defendants dated 12th July 2018 is well merited. I allow it and make the following orders.

1. This suit be and is hereby transferred to the Senior Principal Magistrate's Court at KIMILILI where it shall be mentioned before HON. D. ONYANGO SENIOR PRINCIPAL MAGISTRATE on 26th November 2018 for purposes of fixing a hearing date once the parties have complied with the pre-trial directions.

2. The Plaintiff shall meet the costs of the 1st, 2nd, 3rd, 4th and 5th defendants.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018

Ruling dated, delivered and signed in open Court this 15th day of November 2018 at Bungoma.

Mr. Kundu for Mr. Nyamu for 1st, 2nd, 3rd and 4th defendant – present

Ms. Wanjala for Mr. Bwonchiri for plaintiff – present

1st defendant present

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018