



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC MISC APPLICATION NO. 104 OF 2019

GEORGE NDEGWA MWANGI.....1ST PLAINTIFF/APPLICANT

JEREMIAH KUBAI KIAMBATA.....2ND PLAINTIFF/APPLICANT

CYRUS NGANGA GATEHL.....3RD PLAINTIFF/APPLICANT

MBURU GAITHORI NDUATI.....4TH PLAINTIFF/APPLICANT

VERSUS

RUTH WAKAPA.....1ST DEFENDANT/RESPONDENT

KINGS DEVELOPERS LIMITED.....2ND DEFENDANT/RESPONDENT

JOSEPH LEMAYAN WAKAPA.....3RD DEFENDANT/RESPONDENT

LIFE RESTORATION CENTRE CHURCH.....4TH DEFENDANT/RESPONDENT

THE LAND REGISTRAR NGONG.....5TH DEFENDANT/RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....7TH DEFENDANT/RESPONDENT

RULING

What is before me for determination is the Applicants' Notice of Motion application dated the 29th October, 2019 brought pursuant to Article 159 (2) (d) of the Constitution, Section 1A, 1B, 18 (b) (i) of the Civil Procedure Act and Order 51 Rule 1 and 2 of the Civil Procedure Rules. The Applicants seek for the transfer of Ngong ELC No. 76 of 2019 George Ndegwa Mwangi & 3 Others V Ruth Wakapa & 7 others to this Court. The Application is premised on the grounds that the Senior Principal Magistrate's Court does not have pecuniary jurisdiction to hear this matter and no prejudice will be suffered by the Defendants if this application is allowed. Further, that it is in the interest of justice for this matter to be transferred so that it can be heard and determined by a competent court.

The application is supported by the affidavit of Jennifer Watiri Munenge the Advocate acting for the Applicants where she confirms that that suit land is located in Ongata Rongai Area, Kajiado County. She confirms that the Environment and Land Court in Ngong on the 24th October, 2019 pronounced itself that it does not have pecuniary jurisdiction to hear and determine the suit.

The 1st and 3rd Respondents filed a Notice of Preliminary Objection dated the 25th November, 2019 where they averred that the Honourable Court lacks jurisdiction to hear the application and the suit offends the statutory provisions of the law particularly sections 18 and 19 of the Land Registration Act as well as Section 18 of the Civil Procedure Act. They contend that the issues raised and orders sought in Ngong ELC No. 76 of 2019 George Ndegwa Mwangi & 3 Others V Ruth Wakapa & 7 Others which the Applicants seek to transfer to this Court can only be determined in an Application for Judicial Review or an Appeal. Further, that the suit sought to be transferred to this Court is Sub Judice as there is a suit on the same subject matter pending determination in Kajiado ELC Case No. 60 of 2019 Joseph Lemaiyan Wakapa & Another Vs Mburu Gathiori Nduati & Another. They insist the application is otherwise frivolous, vexatious, an abuse of the court process and the Affidavit in support thereof has failed to disclose material facts.

The 2nd Respondent opposed the application by filing Grounds of Opposition dated the 19th November, 2019 and a replying affidavit sworn by SUNITA PATEL its Senior Manager. Its main contention is that the Application as filed offends the mandatory provisions of law and

legal procedure. It insists that the main issue raised in ELC No. 76 of 2019 being a boundary dispute, the same should have been first filed before the Land Registrar Kajiado North as provided under section 19 of the Land Registration Act. It avers that the order for transfer of a suit from one court to another cannot be made unless the suit was in the first instance brought to a court which had competent jurisdiction to try it. Further, that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have the pecuniary and/or territorial jurisdiction to try it. It reiterates that the application is a non-starter and that the High Court cannot exercise its power of transfer of the subject suit from the lower Environment and Land Court at Ngong to a superior Environment and Land Court at Kajiado. Further, that the High Court does not have jurisdiction over matters relating to environment and land. It states that the subject suit is sub judice as there is a suit on the same subject matter pending determination in Kajiado ELC Case No. 60 of 2019 Joseph Lemaiyan Wakapa, & Ruth Wakapa V Mburu Gathiori Nduati & Another. Further, that one of the neighbours to the Plaintiffs had earlier on in the year 2016 filed a suit Nairobi ELC Case No. 1050 of 2016 Peter Gitau V Ongata Rongai Christian Church & 6 Others which was dismissed on 19th June, 2019.

The 4th, 5th, 6th and 7th Defendants failed to file a response to oppose the instant application. The Applicants, 1st, 2nd and 3rd Respondents filed their respective submissions to canvass the instant application.

Submissions

The Applicants in their submissions reiterated their claim and relied on section 18 of the Civil Procedure Act and averred that this Court has jurisdiction to deal with this matter. They further relied on the following decisions: **Joseph Mururi Vs Godfrey Gikundi Anjuri (2012) eKLR**; **Wycliffe Mwangaza Kihugwa Vs Grain Bulk Handlers Limited (2014) eKLR**; **Kagenyi Vs Musirambo & Another (1968) EA 43** and **Grace Thogori Komo Vs Dan Njagi Ndwiga (2013) eKLR** to buttress their arguments. The 1st and 3rd Respondents submitted that the Court did not have jurisdiction to hear and determine this matter as it was a boundary dispute. They relied on section 18 and 19 of the Land Registration Act as well as the decisions of **George Kamau Macharia V Dexka Limited (2019) eKLR**; **William Gacani Mbaria V Charles Kirihi Mbui (2018) eKLR**; **Cornelius Sylvano Muchilwa & 3 Others V Kenya National Highways Authority (2019) eKLR**; **Owners of the Motor Vehicle 'Lillian 'S' V Calex Oil (Kenya) Ltd (1989) KLR 1** and **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR** to support their argument. They further submitted that this suit is subjudice as the same subject matter involving the same parties claiming through them is pending for determination. They relied on the decisions of **Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR**, **Mwangi Stephen Muriithi V Daniel T. Arap Moi & Another (2017) eKLR** and **Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another (2012) eKLR** to support these arguments. The 2nd Respondent submitted that the subject suit has not satisfied the requirements for transfer. It relied on the decisions of **Equity Bank Limited V Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR**, **Owners of the Motor Vehicle 'Lillian 'S' V Calex Oil (Kenya) Ltd (1989) KLR 1**; **Phoenix of EA Assurance Company Limited V s. M. Thiga t/a Newspaper Service (2019) eKLR**, **Macfoy v United Africa Co. Ltd (1961) 3 All ER 1169**, **Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another (2012) eKLR**, **Boniface Waweru Mbiyu V Mary Njeri & Another (2005) eKLR** and **Charles Omwata Omwoyo Vs African Highlands & Produce Co. Ltd (2002) eKLR** to buttress its arguments. It further submitted that the High Court cannot transfer a suit from a subordinate court to another superior court and relied on the cases of **Wycliffe Mwangaza Kihugwa Vs Grain Bulk Handlers Limited (2014) eKLR**, **James Davies Njuguna V James Chacha (Sued as Chairman Parklands Sports Club) & 3 others (2013) eKLR** to buttress its arguments. It insisted that the Applicants' application as filed on record remains directed to the High Court not the Environment and Land Court. It further submitted that the subject suit should be handled by the Land Registrar as it is a boundary dispute and relied on the decisions of **Jane Njeri Arthur V Joseph Mwaura Njoroje (2019) eKLR** and **Azzuri Limited V Pink Properties Limited (2018) eKLR**. It also submitted that the subject suit is subjudice as there is the same subject matter pending determination in **Kajiado ELC No. 60 of 2019 Joseph Lemaiyan Wakapa, Ruth Wakapa & Another Vs Mburu Gathiori Nduati & Another**.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 29th October, 2019 including the respective parties' affidavits, Grounds of Opposition, Notice of Preliminary Objection and parties' Submissions, I note the 1st, 2nd and 3rd Respondents have brought in other issues including the fact that the subject suit is subjudice and dealing with a boundary dispute. However, at this juncture I wish to point out that the only issue for determination is whether Ngong ELC No. 76 of 2019 George Ndegwa Mwangi & 3 Others V Ruth Wakapa & 7 others should be transferred to this Court. I will hence not delve into the other issues raised.

The Applicants sought for transfer of Ngong ELC No. 76 of 2019 George Ndegwa Mwangi & 3 Others V Ruth Wakapa & 7 to this Court, which prayer was opposed by the 1st, 2nd and 3rd Respondents. From the title of the miscellaneous cause, it refers to the High Court which issue the 2nd Respondent has pointed out that the record remains directed to the High Court and not the Environment and Land Court. The Applicants noted the mistake and in their submissions explained that the matter was however filed in the Environment and Land Court. Except for the averments from the Respondents on the subject matter of the suit which the Applicants seek to transfer, the Applicants failed to annex the Complaint and Defences and or the purported Order from Court where it had declined to hear the Ngong Case intimating it did not have pecuniary jurisdiction to do so. I concur with the 1st and 3rd Respondents that the Affidavit in support of the application does not disclose material facts and evidence touching on the nature and content or basis and/ or grounds raised in the suit which the Applicants seek to have transferred. Insofar as Respondents contend that the suit sought to be transferred relates to a pending matter in this court being **Kajiado ELC No. 60 of 2019 Joseph Lemaiyan Wakapa, Ruth Wakapa & Another Vs Mburu Gathiori Nduati & Another**, without the pleadings filed in the **Ngong ELC No. 76 of 2019 George Ndegwa Mwangi & 3 Others V Ruth Wakapa & 7 others** presented in Court, I am unable to decipher if the said Ngong Case is sub judice and whether the issues therein relate to a boundary dispute.

Based on my analysis above and as the application stands, I find it incomplete and will proceed to strike it out with costs to the 1st, 2nd and 3rd Respondents.

Dated signed and delivered via email this 12th day of May 2020.

CHRISTINE OCHIENG

JUDGE