



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC MISC. APP.NO.5 OF 2016

AGNES TERESA KWAKA.....APPLICANT

VERSUS

JAMES B. TOLO.....1ST RESPONDENT

MUNICIPAL COUNCIL OF KISUMU.....2ND RESPONDENT

RULING

1. **Agnes Teresa Kwaka**, the Applicant, by notice of motion dated 23rd April 2016 against **James B. Tolo** and **Municipal Council of Kisumu**, hereinafter referred to as 1st and 2nd Respondents respectively, seeks for the transfer of Kisumu CMCC No.164 of 2010, which is pending trial before the Chief Magistrate for trial and disposal by this court. The application is based on the three grounds on its face summarized as follows:

- a) The case has not been heard since its filing in 2010.
- b) That the issues to be determined falls within the jurisdiction of this court.
- c) That the interest of justice requires the suit to be transferred and heard by a court of competent jurisdiction.

2. The application is also supported by the affidavits of Peter Mwesigwa, advocate for the Plaintiff, sworn on the 25th April 2016 and 20th September 2016.

3. The application is opposed by the 2nd Respondent through grounds of opposition dated 3rd June 2016 summarized as follows:

- a) That Kisumu CMCC No.164 of 2010 was filed in a court without jurisdiction and hence there is no suit to be transferred.
- b) That pursuant to Articles 165 (5) and 162 (2) of the Constitution, this court has no jurisdiction to entertain this suit.
- c) That the application is misconceived, frivolous, an abuse of the court process and should be struck out with costs.

4. The application came up for hearing on the 3rd November 2016 when Mr. Mwesigwa and Mrs.

Onyango, learned counsel for the Applicant and Respondent respectively made their rival oral submissions.

5. The following are issues for the determination by the court;

- a) Whether the Applicant has made a case for the transfer of the suit pending in the Kisumu Chief Magistrate court to this court.
- b) What orders to issue
- c) Who pays the costs of the application.

6. The court has carefully considered the grounds on the notice of motion, grounds of opposition, oral rival submissions and concluded as follows:

- a) That this court was established through the Environment and Land Court Act No.19 of 2011 which came to operation on 30th August 2011 pursuant to the dictates of **Article 162 (2) (b)** of the constitution 2010, that was promulgated on 27th August 2010.
- b) That a perusal of the copy of the plaint dated 12th April 2010 through which Kisumu CMCC No.160 of 2010 was commenced, shows that it was filed on or about 27th April 2010 which was several months before the creation of this court as shown in (a) above.
- c) That this court was operationalized in October 2012 with the appointment of the first Judges. The Chief Justice issued practice directions in **Gazette Notice No.5178** of 28th July 2014 pursuant to the **sixth schedule Part 5 Section 22 and Article 161(2)(a)** of the Constitution 2010, and **Section 24 and 30 (1) and (2)** of the Environment and Land Court Act, **Sections 5(1) and (2)(c)** of the Judicial Service Act No.1 of 2011 to guide the transition. The provision of Rule 8 of the said directions provides as follows:

“8. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.”

d) That it follows that Kisumu CMCC N0.160 OF 2010, having been filed in the lower court, even before the creation, establishment and operationalization of this court must continue to be heard and determined by that court. That should any of the parties be of the view that the court before which the matter is pending has no jurisdiction, then the trial court should be moved as appropriate. That the option of transferring the suit to a court with Jurisdiction is not available to Applicant in view of the superior courts decisions on the exercise of discretion under **Section 18 of the Civil Procedure Act Chapter 21 Laws of Kenya**. The following two decided cases suffices;

a) Ndykak Investments Limited –V- Joseph Irungu Kinoro [2006] eKLR.

b) Omwoyo –V- African Highlands & Produce Com. Ltd [2002] KLR 698.

That the superior courts have taken the position that the courts discretion to transfer a suit from one court to another under **Section 18 of Civil Procedure Act** can only be exercised where the court the suit was pending and the one it is being transferred to have jurisdiction in the matter.

e) That the main ground that the Applicant pursued in their submissions was that the lower court was taking too long to commence the hearing of the case. That however, there is no evidence availed to this court on whether the Applicant has ever set the suit down for hearing or the number of adjournments granted by the lower court and the reasons thereof. The Applicant has therefore failed to establish a case for transferring the lower court case to this court.

7. That having found as above, it follows that the notice of motion dated 28th April 2016 is without merit and is dismissed with costs. It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2017

In presence of;

Applicant Absent

Respondents Absent

Counsel Mr. Mwesigwa for Applicant

 Mrs. Onyango for the 2nd Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017

22/2/2017

S.M. Kibunja Judge

Mr. Oyugi court assistant

Parties absent

Mr. Mwesigwa for Applicant

Mrs. Onyango for 2nd Respondent

Court: Ruling delivered and dated in open court in presence of Mr. Mwesigwa and Mrs. Onyango for the Applicant and 2nd Respondent respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017