REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 15 OF 2016

PAMOJA WOMEN DEVELOPMENT PROGRAMME…...….1ST PLAINTIFF

JULIUS CHEGE MUIRURI.....2ND PLAINTIFF

PATRICK KAMINJA KIMAN.....3RD PLAINTIFF

BETH NYAMBURA MUGO.....4TH PLAINTIFF

VERSUS

JACKSON KIHUMBU WANGOMBE.....1ST DEFENDANT

MURAHANDIA DEVELOPMENT COMPANY LIMITED…..2ND DEFENDANT

RULING

1. The issue presented in the present application is a simple but profoundly consequential one: Can the High Court transfer a matter filed before it which the Plaintiff subsequently determines is a matter related to the environment and use, occupation of and title to land and should therefore be adjudicated in the Environment and Land Court pursuant to Article 162(2) of the Constitution?

2. The Plaintiff in this matter approached the Court by way of a Plaint dated 22/09/2016. In it they seek two main prayers:

> (a) "Specific performance of the loan facility contract dated 11/05/2010 and a declaration that the 1stPlaintiff is the legal owner of certificate no. 010 Plot No. 107C part of LR No. 5805/2 Phase VI, Kamiti Corner Estate and/or alternatively without prejudice to prayer (a) above, the 1st Defendant pays the sum of Kenya Shillings six million fourty five thousand and three hundred and fifty (kshs. 6,045,350) from 19/09/2016 with interests until payment in full.
>
> (b) Permanent injunction do issue restraining the 1st and 2nd Defendants by themselves, their servants or agents or otherwise howsoever from selling, charging or whatsoever disposing Plot No. 107C Part of 5805/2 until determination of this suit."

3. Simultaneously, the Plaintiffs filed a Notice of Motion under Certificate of Urgency praying for certain interlocutory reliefs. The Defendant, through their duly appointed advocates, Guandaru Thuita & Co. Advocates, responded with a Notice of a Preliminary Objection filed in Court on 10/10/2010. In the main, the Preliminary Objection raises objection to the jurisdiction of the Court pointing out that the main issue raised in the suit relates to the ownership and possession of Plot No. 107C within LR No. 5805/2 and, as such, the matter belongs to the Environment and Land Court pursuant to the provisions of Article 162 and 165 of the Constitution as read together with section 13 of the Environment and Land Court Act.

4. Faced with this Notice of Preliminary Objection, the Plaintiffs advocates immediately responded with the present Application. It is dated 25/10/2016 and requests that this Court be pleased to transfer this suit to the Environment and Land Court.

5. The Application is opposed. The Defendants filed seven grounds of opposition. The gist of the grounds is singular: the suit was filed in the wrong forum and is therefore a nullity and cannot betransferred to any other court. The only remedy for the Plaintiffs, the Defendants insist, is for the Plaintiffs to withdraw the current suit, pay costs and re-file it in the proper court. Further, the Defendants argue that there is no known procedure in the Civil Procedure Act permitting the transfer of a matter from a High Court to a Court of Equal Status. The only procedure known, which the Plaintiffs purported to rely on, is section 18 of the Civil Procedure Act. However, that section only permits the High Court to transfer cases from subordinate courts; it cannot apply to the transfer of suits from the High Court to Equal Status Courts.

6. Mr. Thuita appeared for the Defendants during the oral hearing of the Application. He reiterated the points stated above and urged me to dismiss the Application primarily because, he argued, I cannot transfer a nullity: a case filed in a court without jurisdiction.

7. Mr. Thuita might as well have cited the famous case of ***Kagenyi vs. Musiramo*** **[1968] EA 43** where Sir Udo Udoma, CJ, in interpreting section 18 of the Ugandan Civil Procedure Act which is *para materia* with our section 18 CPA, made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. The *Kagenyi case* has been followed in many cases in Kenya in ***Omwoyo v African Highlands & Produce Co Ltd*** **(2002) 1 KLR 698** and ***Joseph Karisa Katsoma & 3 Others v Samuel Charo Marabu*** **(2005) eKLR.**

> The core ratio of the decision still represents good law. However, I believe its scope has been whittled down by our emerging jurisprudence on the need to do substantive justice and ensure access to justice in all access without undue subservience to technicalities as commanded by Article 159 of the Constitution and stipulated in sections 1A and 1B of the Civil Procedure Act.

9. The question presented, then, is singular and straightforward: can the High Court transfer a suit to the Environment and Land Court?

10. The parties did not cite to me any authorities to support their respective positions. However, I am aware of some decisions of the High Court that have held that much as sections 1A and 1B of the Civil Procedure Act has softened the rigidity of the *Kagenyi Case* stranglehold, the High Court cannot transfer suits to Equal Status Courts. Three such cases include: ***Rob De Jong & Another –Vs- Charles Mureithi Wachira [2012] eKLR, Joseph Mururi v Godfrey Gikundi Anjuri [2012] eKLR*** and ***Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited [2014] eKLR.***

11. It is true that my perspective on the question of when the High Court can order a transfer of a suit filed in the "wrong" court has evolved. In 2012, in a case filed in Machakos, I took the hard-line position – following *Kagenyi Case* – that a suit filed in the "wrong" magistrates' court could not be saved and had to be struck out. That was a case that implicated section 18 of the CPA. More recently, in ***Esther Mugure Karegi v Penta Tancom Ltd (Kiambu Civil Misc. App. No. 19 of 2016***, my attitude evolved and ordered the transfer of such a suit. One of the reason for the evolution in my thinking is the shift in our jurisprudence towards more functional as opposed to formalist approach to questions of jurisdiction. I explained this evolution in the ***Esther Mugure Karegi Case*** thus:

> I would agree that the liberating light of the provisions of Article 159(2) of the Constitution interpreted liberally and generously would inform our interpretation of sections 14, 15 and 18 of the Civil Procedure Act. To my mind, freeing the interpretation from the constraints of technicality and eager to do substantive justice would lead to a conclusion that sections 14 and 15 are procedural sections aimed at guiding parties on the appropriate place for suing. Suing in the "wrong" court as far as geographical location is concerned does not, however, necessarily make the suit a "nullity." Such a suit may be a suitable candidate for transfer under section 18 of the Civil Procedure Act to

the appropriate Court. It is important to point out, however, even under this liberal interpretation not all suits will be automatically transferred. Among other things, in my view, the High Court will consider the reasons for filing the suit in the "wrong" court in the first place. Where there is evidence of bad faith or improper motives, for example, the Court may refuse to transfer such a suit and leaving it to endure objections under section 16 of the Civil Procedure Act.

12. The question for me, therefore, is whether I should follow these High Court decisions or take a different stance since I am not aware of any decision by the Court of Appeal directly on the issue and the parties before me did not cite any.

13. I begin with two background questions: what was the intention of Kenyans in creating the two Article 162(2) Courts? Second, if section 18 of the Civil Procedure Act was being written now, how would it read? I make the preliminary point thatsection 18 of the CPA neither permits nor prohibits the High Court to transfer suits to the Equal Status Courts. Therefore, one can only rely on the section by analogy.

14. Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

15. Kenyans' objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not havethe requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit. I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith. There has been no allegation or showing that the Plaintiff acted in bad faith here. Indeed, it is the Court and the Defendants who raised the issue for the first time and upon reflection the Plaintiff concluded that jurisdiction probably lies in the Environment and Land Court. They then, without any delay, made the current application.

16. I agree there is ***no substantive concurrent jurisdiction*** shared between the High Court of Kenya and the two Article 162(2) Equal Status Courts. Indeed our Constitution advertently aimed to isolate the jurisdiction of the Equal Status Courts and prohibit the High Court from exercising jurisdiction in areas of specialisation of these Courts. However, I believe the constitutional architecture provides for ***incidental concurrent jurisdiction***. For example, there is no longer any serious questions that the two Equal Status Courts have case-wide jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialisation even if those issues normally fall outside their jurisdiction. This is the reason Equal Status Courts can deal with any issues raised respecting the violation of the Bill of Rights for example.

17. In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be

adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.

18. It is, of course, quite possible to abuse and misuse this incidental concurrent jurisdiction. Hence, it must be exercised with caution and always with the conscious reminder that every Court must beware that jurisdiction is bequeathed by the People of Kenya and as such it is usurpation of the Constitution to aggrandize the Court's jurisdiction using judge-craft or innovation.

19.At the same time, however, Courts must act to give our Constitution meaning and life that is keeping with the lived realities of Kenyans. To paraphrase a famous American legal aphorism which found its orality in the stirring dissent of Justice Robert H. Jackson in ***Terminiello v City of Chicago, 337 U.S.1 (1949)***, our Constitution is not a suicide pact. Like Justice Jackson in expressing apprehension that a rigid and dogmatic reading of the US Bill of Rights might destroy the very society it was meant to govern, we must worry here that an ultra-formalistic reading of the constitutional bequests of jurisdictions to various Courts could easily lead to much substantive injustice and a return to mechanical jurisprudence that Kenyans loathed in the pre-2010 period of our constitutional adjudication. **We must, to paraphrase Justice Jackson again, temper doctrinaire logic on the jurisdiction issue with a little practical wisdom**.

20. For me, that practical wisdom which we must bring to the strident doctrinaire logic that seemingly flows from Article 162(2) is one that permits the High Court in circumstances and context such as the one in this case to transfer it to the Environment and Land Court where primary jurisdiction lies. I believe that there is no constitutional subversion in the act of channelling the suit to the rightful Court. If anything, this furthers access to justice and eschews the use of technicalities as the golden pivot for adjudicating disputes. I find no categorical bar in the Constitution to this form of redemptive jurisprudence to prevent substantive injustice.

21. As stated above, I would readily accept that section 18 of the Civil Procedure Act does not apply to transfer of cases from the High Court to Equal Status Courts and vice versa. However, that does not, in my view, settle the matter. The High Court is still vested with inherent authority and inherent (incidental) jurisdiction to transfer certain suits which have been filed in good faith in the High Court to Equal Status Courts even in the absence of a specific statutory text bequeathing such powers to the High Court. This is in keeping with the Constitutional commandment to do substantive justice without undue obsession with technicalities.

22. Consequently, I would exercise the inherent jurisdiction of the Court to allow the present application. However, while I have held that there is no evidence of bad faith on the part of the Plaintiffs in filing the matter in the High Court, it is also true that the Defendants have been inconvenienced and have been forced to incur extra costs for having to entertain the present application due to the action by Plaintiffs in filing the matter in the High Court. It is, therefore, only fair that the Defendants should be compensated for their costs for this Application.

23. The orders, then, shall be as follows:

(a) The suit to wit Kiambu High Court Civil Suit No. 15 of 2016 shall be transferred to the Environmental and Land Court in Nairobi.

(b) The Defendants are awarded the costs of this application.

24. Orders accordingly.

Dated and delivered at Kiambu this 5th day of December, 2016.

JOEL NGUGI

JUDGE