



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 81 OF 2019 (OS)

FRANCIS KIMAIYO KIPLAGAT.....APPLICANT

VERSUS

JOHN KIPRUTO KIPSANG.....RESPONDENT

RULING

This ruling is in respect of an application 26th August 2019 by the applicant seeking for the following orders:

- a) Spent
- b) Spent
- c) This Honourable court order a stay of proceedings in Iten E&L Case Number 6 of 2019 – John Kipruto Kipsang v Francis Kimaiyo Kiplagat pending hearing and determination of this suit.
- d) This Honourable court order that Iten E&L Case Number 6 of 2019 – John Kipruto Kipsang v Francis Kimaiyo be transferred and consolidated with the case herein.

APPLICANT’S CASE

The applicant filed submissions on 19th May 2020.

He submitted that the applicant’s claim over the suit land (E/MARAKWET/KESSUP “B”/352) is adverse possession. He cited section 38(1) of the Limitation of Actions Act and submitted that only this court has jurisdiction to hear claims on adverse possession. To buttress this point, he referred to sections 4 and 13 of the Environment and Land Court Act. By virtue of statute the magistrate court has no jurisdiction to handle claims whose nature is adverse possession.

The applicant submitted that it would be futile to proceed with the Iten case as the magistrate has no jurisdiction to handle matters on adverse possession. As per section 18(1)(b) of the Civil Procedure Act the court has the power to transfer the file. He also cited the case of Nyati Security Guards Ltd. V Municipal Council of Mombasa (2000) eKLR on the issue of consolidation of matters. He submitted that there are common questions of facts and law and the rights and reliefs claimed in both arise from the same transaction.

On costs he submitted that it is trite law that costs follow the event.

RESPONDENT’S CASE

There were no submissions on record for the respondent. However, there is a replying affidavit on record for the respondent. He deponed that the applicant was being untruthful in failing to disclose that there was a pending suit over the suit property. The present suit was filed 5 months after the suit in the Magistrates’ Court in Iten.

It is the respondents’ position that the application be dismissed with costs.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the Magistrates Court has jurisdiction to handle the claim and whether the court should transfer and consolidate the cases.

On the issue as to whether the Magistrates' Court has jurisdiction to handle adverse possession claims, the Magistrates' Court Act confers jurisdiction on the Magistrates' court at section 9. Section 9(a) of the Magistrate's court provides;

A Magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

Section 13 of the Environment and Land Court Act, 2011 provides;

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

Section 26 of the Environment & Land Act provides;

26. Sitting of the Court

(1) The Court shall ensure reasonable and equitable access to its services in all Counties.

(2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.

(3) 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 country.

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.

The applicant did not raise the issue that the Magistrate was not duly gazzetted to handle environment and land matters. The only issue raised is the jurisdiction of the Magistrates' court to handle adverse possession matters. It is evident that section 26 of the Environment and Land Act gives Magistrates court jurisdiction to handle suits relating to land disputes.

There are two schools of thought on the issue as to whether Magistrates have the mandate to handle claims of adverse possession. The school

of thought that the Magistrates court has no jurisdiction stems from the fact that claims of adverse possession must be filed vide Origination Summons which is the preserve of the High Court. Section 38 of the Limitation of Actions Act provides as follows

On the issue whether the court should transfer the suit from the lower court for consolidation with this suit, the court has the powers to transfer suits from subordinate courts, which power is conferred by section 18(1)(b) of the Civil Procedure Act where it is stated;

(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.

In the case of **Nyati Security Guards & Services LTD. V Municipal Council Of Mombasa (2004) eKLR** the court held;

Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -

- 1. some common question of law or fact arises in both or all of them; or*
- 2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or*
- 3. for some other reason it is desirable to make an order for consolidating them.*

The suit in the Magistrate's Court was filed on 26th March 2019 as per the fast track plaint annexed as JKK-4 and the subject matter is the title of land known as ELGEYO MARAKWET/KESSUP/B' 352. The present suit was filed in June 2019, five months after the magistrate's court case in Iten E&L Suit 6 of 2019 and the subject matter of the same is the suit land in the Magistrate's case.

I find that the application has merit and therefore order that Iten E& L case No 6 of 2019 be transferred to Eldoret Environment and Land Court for consolidation and hearing and determination.

DATED and DELIVERED at ELDORET this 9TH DAY OF JULY, 2020

DR. M. A. ODENY

JUDGE