



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. MISC APP NO 6 OF 2018

(FORMERLY AWARD NO. 36 OF 2011)

(FORMERLY MISC APP NO. 35 OF 2017)

ESBON KIURA BEN.....1ST PLAINTIFF
NJERU KAVINDI.....2ND PLAINTIFF
NJERU W. WACHIMBA.....3RD PLAINTIFF
MUSA JOSEPH.....4TH PLAINTIFF
TIRUS NJIRU KIRIMUI.....5TH PLAINTIFF

VERSUS

STANLEY NJERU NJOKA (CHAIRMAN
GITARE PRIMARY SCHOOL).....1ST DEFENDANT
NJERU D. JUSTUS (HEAD TEACHER
GITARE PRIMARY SCHOOL).....2ND DEFENDANT
ISHIBAN M. NYAGA (VC).....3RD DEFENDANT
MARY NJERI MUGO.....4TH DEFENDANT
DANIEL MURIITHI.....5TH DEFENDANT
PETER MUGENDI.....6TH DEFENDANT
ELIJAN NJIRU.....7TH DEFENDANT
HARRISON NJIRU.....8TH DEFENDANT
CHARITY MURUGI.....9TH DEFENDANT
JANE NGUNGI ZAPHANIA.....10TH DEFENDANT
TRUPHOSA MURUGI.....11TH DEFENDANT

RULING

and **all enabling provisions of the law**, the Defendants sought the following orders;

- a) *That this application be certified as urgent and service be dispensed with in the first instance.*
- b) *That the honourable court be pleased to stay the execution/review, lift and or discharge the order to the Land Registrar Embu issued on 7th July 2017 where the Land Registrar, Embu was ordered to remark the boundaries of plots No. Kagaari/Kanja T.199-204 and the road separating them from land parcel Kagaari/Kanja/505 and consequential orders issued thereof.*
- c) *That further and in the alternative this court be pleased to stay the proceedings before the Chief Magistrate in CC Misc App 35 of 2017 pending determination of this application.*
- d) *That this honourable court be pleased to withdraw the suit pending in the Chief Magistrate's Court in Embu No. Misc 35 of 2017.*
- e) *That this honourable court be pleased to transfer the said suit to this court for purpose of disposing the same or giving directions on the matter.*
- f) *Costs of this application be provided for.*

2. The said application was based upon the several grounds enumerated on the face of the motion. The gist of the grounds was that the Plaintiffs had obtained an illegal and irregular decree before the Chief Magistrate's Court; that the decree was obtained whilst an appeal was pending before the *Eastern Provincial Land Disputes Appeals Committee* (hereinafter *the Appeals Committee*); that the Defendants were trying to execute or enforce the said decree; and that the Chief Magistrate's Court had no pecuniary jurisdiction to hear the matter since the value of the property in issue was Kshs 53.8 million.

3. The said application was supported by an affidavit sworn 18th May 2018 by Margaret Njoroge who is the state counsel on record for the Defendants. The said affidavit reiterated and expounded upon the grounds set out in the motion. It was contended that the Plaintiffs had obtained an irregular decree before the Chief Magistrate's court because the award of the *Land Disputes Tribunal* (hereinafter *the Tribunal*) was adopted whilst there was an appeal pending before the Appeals Committee and whilst there was an order for stay of execution of the award in existence.

4. It was further contended on behalf of the Defendants that the parties herein have been to various courts in the past but none of those courts had conclusively determined the matters in controversy. It was further contended that unless the Defendants were given a chance to prosecute their appeal, they and the school on whose behalf they were sued would suffer irreparable damage.

5. The Plaintiffs filed a notice of preliminary objection dated 25th May 2018 and a replying affidavit in opposition to the said application. The Plaintiffs raised the following grounds of preliminary objection;

- a) *The application is incompetent and for striking out, because the counsel on record for the Defendants, who are the applicants, has sworn the supporting affidavit on contentious matters.*
- b) *The application (miscellaneous application No. 35 of 2017 – formerly High Court Miscellaneous Application No. 113 of 2015) is properly before the Honourable Chief Magistrate, as per the ruling by Justice Boaz Olao dated 1st February 2017 (copy attached).*
- c) *A ruling by the said honourable Chief Magistrate on the application is pending and will be delivered on 30th July 2018 and the parties should await the same, then appeal if aggrieved.*
- d) *It is not appropriate or ethical for the Defendants to predict (see ground (j) of the notice of motion) that the ruling will be in favour of the Plaintiffs and for that reason apply for the Chief Magistrate to be stopped from delivering it and for the application to be transferred to this court.*
- e) *The original application (High Court Miscellaneous Application No. 113 of 2015) was for contempt of court, not a land matter.*
- f) *Contrary to the averments in the supporting affidavit under reply, the Plaintiffs' original suit (Award Case No. 36 of 2011) was against the encroachment by the Defendants on six plots belonging to the Plaintiffs and whose total area is 0.75 of an acre or less, valued in total at less than Kenya shillings five (5) million. Therefore the same would fall within the pecuniary jurisdiction of the Chief Magistrate.*
- g) *The application herein is res judicata, the subject matter thereof having been heard and determined before, under various headings, by a court or courts of competent jurisdiction, including the superior courts, both in Kerugoya and in Embu.*

6. The 5th Plaintiff, Tirus Njiru Kirimui swore a replying affidavit on 28th May 2018 in opposition to the said application. The gist of the said affidavit was that the Defendants' said application was misconceived, frivolous and lacking in merit. It was stated that what was pending before the CM's court was an application to punish the Defendants for contempt of court which was a matter property within the competence of that court.

7. It was also contended that the entire school land which measures about 12 acres was not the subject of the dispute before the Tribunal or

the CM's court. It was the Plaintiff's case that only the Plaintiffs' Plot Nos. *Kagaari/Gitare/T.199 – 204* measuring about 0.75 acres and whose proximate value was about Kshs 5 million were in issue.

8. The Plaintiffs also contended that the previous management of the school had openly admitted in previous proceedings that they had encroached upon the Plaintiffs' plots and even offered to compensate them in monetary terms. It was the Plaintiffs' case that the Defendants had lost in a judicial review application whereby it had challenged the award of the Tribunal and that they had also abandoned their appeal before the Appeals Committee which was, in any event, filed out of time.

9. With leave of court, the Defendants filed a further affidavit sworn on 14th June 2018 by Elias Kinoti Rwambi, the Headmaster of Gitare DEB Primary School. The said affidavit substantially reiterated the contents of the supporting affidavit sworn by Margaret Njoroge on 18th May 2018. The headmaster challenged the jurisdiction of the Tribunal to make the award and also faulted it for failing to properly evaluate the evidence before it.

10. By consent of the advocates for the parties, it was directed that the Plaintiffs' notice of preliminary objection and the Defendants' notice of motion dated 18th May 2018 be canvassed through written submissions. The record shows that the Defendants filed their submissions on 14th June 2018 whereas the Plaintiffs filed theirs on 28th June 2018.

11. The court has considered the Defendants' notice of motion dated 18th May 2018, the Defendants' further affidavit sworn on 14th June 2018, the Plaintiffs' notice of preliminary objection dated 25th May 2018 as well as the Plaintiffs' replying affidavit sworn on 28th May 2018. The court has also considered the respective written submissions filed on behalf of the parties. The court is of the view that the following issues arise for determination;

- a) Whether there is merit in the Plaintiffs' preliminary objection dated 25th May 2018.
- b) Whether the Defendants have made out a case for transfer of Embu *CMCC Misc App No. 35 of 2017* to this court.
- c) Whether the Defendants have made out a case for stay of execution, review or discharge of the orders issued by the CM's Court on 7th July 2017.

12. The nature of a preliminary objection was described in the often quoted case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969] E.A 696** as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

13. The court has considered the seven (7) points of preliminary objection raised in the Plaintiffs' notice dated 25th May 2018. The court is of the opinion that only the first point constitutes a preliminary objection properly so called. The rest of the objections are not pure points of law which can be determined on the basis that all the facts pleaded by the Defendants are correct. They would require an investigation of some facts. The same would apply to the objection on *res judicata* since the elements of *res judicata* have to be determined on a factual basis.

14. The court shall, therefore, deal with the objection relating to the supporting affidavit sworn by the Defendants' counsel. The court has considered the cases of **Kisya Investments Ltd & Another Vs Kenya Finance Corporation Ltd, Nairobi HCCC No. 3504 of 1993 and Kenya Horticultural Exporters (1997) Ltd Vs Transami Kenya Ltd, Nairobi HCCC No. 1405 of 1999** which were cited by the Plaintiffs.

15. Although in the said authorities the two courts struck out the affidavits which were sworn by advocates, this court is unable to follow those authorities. They are not binding on this court and the court hereby departs from them for the following reasons. First, those decisions were rendered before the **Constitution of Kenya 2010** was promulgated and before the **Environment and Land Act, 2011** was enacted. **Article 159 1(d) of the Constitution of Kenya and section 19 (2) of the Environment and Land Court Act** obligate this court to administer justice without undue regard to technicalities of procedure. This court is bound to uphold that higher calling. Second, if the state counsel chooses to step from her privileged position by deposing to evidentially matters, that is really her own problem, and not the problem of the Plaintiffs. The Plaintiffs are at liberty to apply for her cross-examination on the contents of her affidavit. Third, the court is of the view that the alleged anomaly has been remedied by the Headmaster of Gitare Primary School filing a further affidavit which essentially covered the matters contained in the impugned supporting affidavit. Fourth, even if the court was inclined to strike out the supporting affidavit, the court would still have granted leave to the Defendants to file a fresh affidavit in view of the overriding objectives contained in **sections 1A and 1B of the Civil Procedure Act (Cap 21)**. The Plaintiffs' preliminary objection on the propriety of the supporting affidavit is therefore overruled.

16. The 2nd issue is whether the Defendants have made out a case for transfer of the proceedings pending before the Chief Magistrate's Court to this court. Although the court agrees that it has jurisdiction and the discretion to transfer the proceedings in issue, the court is not satisfied that the Defendants have demonstrated any good reason for such transfer.

17. Assuming the Defendants' allegations to be true, the court is not satisfied that the mere fact that the decree before the Chief Magistrate's court was illegally or irregularly obtained would be a ground for transfer of proceedings. The mere fact that the Defendants may have a pending appeal against the award of the Tribunal would not warrant a transfer of those proceedings to this court. The court is of the opinion that if there are any flaws or defects in those proceedings, the proper mode of challenging them is either by way of appeal to a higher judicial

forum or a review before the same forum. The alleged illegalities and irregularities cannot be remedied simply by a transfer of those proceedings.

18. The Defendants asked the court to grant the orders sought in their application in order to allow them pursue their pending appeal. The court is not persuaded that an appeal cannot be pursued or prosecuted unless the proceedings for contempt of court in Chief Magistrate's court are transferred to this court. There is no indication that the Defendants have taken any steps to have the appeal itself transferred to this court for hearing and disposal since the date of filing in 2011 or thereabouts. The court is alive to the fact that transfer of those proceedings to this court would not constitute an appeal either against the impugned decree or the award of the Tribunal.

19. The court is satisfied for reasons given by the Hon Justice Boaz Olao in his ruling dated 1st February 2017 in *Embu High Court Misc Appeal No. 113 of 2015* that the Chief Magistrate's Court is competent to handle and determine the application for contempt of court which the judge transferred to that court. No sufficient cause has been shown why that order should be disturbed before conclusion of those proceedings.

20. The court has also considered the issue of pecuniary jurisdiction of the Chief Magistrate's Court to handle the proceedings pending before it. The court has considered the affidavits, exhibits and documents on record in this matter. The Plaintiffs' claim before the Tribunal was in respect of the 5 plots which they claimed the Defendants' school had encroached upon. They were not claiming any part of the school land registered as *Title No. Kagaari/Kanja/505*. The total acreage of the 5 plots is about 0.75 ha. In those circumstances, the court is not satisfied that the value of the subject matter in dispute is Kshs 53.8 million as alleged by the Defendants.

21. The 3rd issue is whether the Defendants have made out a case for stay of execution, review or discharge of the orders made by the Chief Magistrate's court on 7th July 2017. The court similarly finds no basis for those orders. The order for stay of execution cannot be entertained by this court unless there is a pending appeal before this court challenging those orders. The orders for review or discharge are also misconceived since under the provisions of **Order 45 Rule 1 of the Civil Procedure Rules**, an application for review should be directed to the court which issued the orders and not an appellate court.

22. The material provisions of **Order 45 Rule 1 of the Civil Procedure Rules** provide that;

“1 (1) Any person considering himself aggrieved –

a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

23. In the circumstances, the court finds no merit in the Defendants' notice of motion dated 18th May 2018 and the same is for dismissal. The court consequently makes the following orders;

a) The Plaintiffs' notice of preliminary objection dated 25th May 2018 is hereby dismissed with costs.

b) The Defendants' notice of motion dated 18th May 2018 is hereby dismissed in its entirety with costs to the Plaintiffs.

c) It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22ND day of JANUARY, 2019

In the presence of Mr Kamunyor for the Plaintiffs and Mrs Njoroge for the Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

22.01.19