



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC MISCELLANEOUS APPLICATION CASE NO. 09 OF 2018

DALCO TRADING LTD.....PLAINTIFF/APPLICANT

VERSUS

KIMAITA IMATHIU.....1ST RESPONDENT

LAWRENCE N. MUGAMBI.....2ND RESPONDENT

MOHAMED HASHAIN JAMA.....3RD RESPONDENT

LAND REGISTRAR, THARAKA NITHI COUNTY.....4TH RESPONDENT

RULING

1. This application is dated **11th December, 2018** and seeks orders:

1. That the order of the hon. Judge made on the 29th November, 2017 transferring High Court ELC No. 191 of 2017 to Marimanti where it was given number PMCC No.48/2017 be reviewed and set aside.
2. That this honourable court do order that Marimanti PMCC No. 48/2017 be transferred to this honourable court for hearing and eventually disposal.
3. That the costs of this application be costs in the cause.

2. The application has the following grounds:

- a. That this court on its own motion and on the basis of the sale agreement of 2009 determined that the lower court has pecuniary jurisdiction to determine this suit.
- b. That plaintiff undertook a valuation of the suit property and the open market value of the same is in excess of Kshs.20,000/=. Indeed inclusive of the present investment it is over Kshs.25,000,000/=.
- c. The High Court and not the lower court has the appropriate jurisdiction to deal with this suit.

3. The application is buttressed by the supporting affidavit of Patrick Karani which states:

I, PATRICK KARANI of P. O. Box 3115-00100 NAIROBI, within the Nairobi City County of the Republic of Kenya do hereby make oath and state as follows:

1. That I am a director of the plaintiff company herein who is fully conversant with all the matters in issue herein and therefore competent to swear this affidavit.
2. That in early March, 2017 I caused the institution of this suit and in the process I expressly informed the plaintiff's advocates on record then M/S Ndubi Ondubi & Associates that the market value of the suit land was in excess of Kshs.20,000,000= and this informed the decision to file this suit before this honourable court.

3. That it is the month of June, 2018 that I became aware that the suit had been transferred to the lower court. That when I instructed the present advocates on record for the plaintiff, the advocates requested that I sanction the undertaking of a valuation of the suit property by a professional valuer which I did and he compiled a report dated 29th September, 2018. In this regard I annex herewith and marked 'PK1' copy of a supplementary affidavit filed in the lower court on 11th October, 2018.

4. That on 11th October, 2018 the plaintiff's advocates on record, the 1st and 2nd defendants advocates together with the counsel for the 4th defendant appeared before the honourable magistrate when it was determined that the lower court lacked the necessary pecuniary jurisdiction and accordingly stayed all proceedings. (Copy of the orders made are annexed herewith and marked "PK").

5. That it is in the best interests of justice that the PMCC No. 48 of 2017 – Marimanti be transferred to Chuka High Court for hearing and eventual disposal. That I have herewith annexed the copies of the pleadings in the lower court all in bundle and marked 'PK 3'.

6. That what is deponed to herein is true to the best of my knowledge save as herein stated.

4. The 1st and 3rd respondents filed replying affidavits in opposition to the application.

5. The application was canvassed by way of written submissions.

6. The applicant's written submissions are reproduced in full herebelow. Any spelling or other mistakes may only be ascribed to the applicant's advocates, if they exist. The submissions state as follows:

THE APPLICANT'S WRITTEN SUBMISSIONS

My lord the Notice of motion application before this Honourable court is dated 11th Dec.2018 and it seeks:

"1.That the order of the Hon Judge made on the 29th November, 2017 transferring **High Court ELC NO.191 of 2017 to MARIMANTI** where it was given number **PMCC NO. 48 of 2017** be reviewed and set aside.

2. That this Honourable Court do order that **MARIMANTI PMCC NO. 48 of 2017** be transferred to this Honourable Court for hearing and eventual disposal.

3. That the costs of this application be costs in the cause."

◆Your lordship this suit was instituted in this Honourable court but when it came up for directions on 29th November 2017, this Honourable court directed that the suit be transferred to Marimanti Law courts for hearing and disposal.

◆It is to be observed that at the time of the making of the order of transfer of suit to the Lower Court, there was no formal application to this effect viz. to transfer the suit.

◆In the suit filed, and at page two (2) of the application filed on 2nd March 2017 the counsel for the plaintiff and upon instructions indicated that the value of the suit land was in the "range" of Kshs. 20,000,000 million.

◆That the suit was transferred to Marimanti Law Courts and Proceedings as evident from the bundle annexed to the application in issue took place.

◆That sometimes in July 2018 the plaintiff instructed the present Advocates on record to come on record and appropriate paperwork was done and filed in court on 31st July 2018.Necessary parties were added to cover the causes of action disclosed.

◆That instructions to have the suit land valued by professional valuers were given on 27th July 2018 and the appropriate valuation report was formally prepared on 29th Sept 2018 (See pages 3 and 5 of the application).The suit land was bought in 2009 for 5,600,000/= and after a decade it was valued at 21,600,000/=.

◆That the appropriate supplementary affidavit dated 9th October 2018 was filed in court (Lower Court) on 11th October 2018(See page1 of the application before this court) and the lower court on 11th October 2018 ruled that it could not proceed to hear the matter and directed that the matter be placed before this court for the review of this Honourable Court's order of 27th November 2017 (See page 16c of the bundle). The lower court admitted want of pecuniary jurisdiction

◆That the applicant moved this court on 11th December 2018 and the matter was set for inter-parties hearing on 18th December 2018 when the court directed that the matter be heard on 26th March 2018 and further directed parties to file their respective papers within certain timelines the last order being that responses be in the court file certainly not later than four days to 26th march 2019.

◆That after Christmas vacation it was realized by the applicant that the appropriate further amended plaint and the appropriate page of the valuation report had not been annexed to the application now before court and promptly a letter enclosing the missing pertinent papers/proposed pleadings and dated 14th January 2019 was done, filed in court on 24th January 2019 and served upon Murango Mwenda & Co. Advocates and the Attorney General the following day(25th January 2019).This was to enable the counsel for the respondents incorporate the same in their responses. All these were in the lower court file when the orders by the lower court of 11th October 2018 were made.

◆A supplementary affidavit sworn on 20th March 2019 and Filed in court on 21st March 2019 duly annexed the said letter of 14th January 2019 and nothing more and upon service of the same counsel for the 1st and 2nd Respondents indicated expressly that he had no issue with the same.

◆It is evident from the proposed further amended plaint that :

◆the plaintiff prays in the alternative the money value of the suit land which is placed at Kshs.21,600,000/=

◆special damages of Kshs2,713,642/=

◆other claims which bring the total claim by the plaintiff at over Kshs.25,000,000/=

◆That the pecuniary jurisdiction of the lower court is now raised to Kshs.20,000,000/= but the Magistrate in charge of Marimanti informed all the parties and in open court on 11th October 2018 that his pecuniary jurisdiction is Kshs.15,000,000/=

◆The amendments to plaint have not come to an end the defendants having never filed defences.

The respondents were served with the present application. Mr. Murango for the 1st and 2nd Respondents filed his response on 26th March 2019 and it is clear that:

◆The contents of paragraphs 4 and 7 of the replying affidavit are incorrect in the face of the pleadings.

◆does not address the question of jurisdiction which is the primary matter before court.

◆does not address the professional valuation report as it should viz. by a counter- professional valuation report. Indeed he says at paragraph 11 of the replying affidavit:

“That if indeed the applicant is serious about the valuation, he should allow a court appointed valuer to do the valuation.”

◆the respondents did not apply to have the court appoint a valuer. Indeed it is not the duty of this court to do so.

◆the respondents were not denied the opportunity to do their own valuation if they so desired

◆the respondents have delved into the merits of the application pending before the lower court when the matter before this court is whether or not the lower court is possessed of the appropriate pecuniary jurisdiction. These (issues of merit) are matters to be canvassed once this court pronounces itself on this application.

◆the parties as in the amended and further amended plaint are more than in the plaint.

◆the issue of the alleged res judicata is a matter the respondents can still raise when this matter is placed before this court upon transfer.

◆the matters raised in the pleadings are very weighty.

Over-view

My lord weighing the material placed before this Honourable Court by the applicant, it is reasonably apparent that the lower court lacks the requisite pecuniary jurisdiction to entertain the matters raised or to be raised in this suit. The objections do not sufficiently or at all rebut the applicant's position.

Case-Law and Statute:

Your lordship, under “part 11” of the Civil Procedure Act and in particular sections 5 and 12 the Act provides:-

Section 5:

“Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of civil nature excepting suits of which its cognizance is either expressly or impliedly barred.”

section12:

“Subject to the pecuniary or other limitations prescribe by any law, suits-

The case- law (1) Misc. Application No.16 OF 2017 (NAROK) Amani Mara ltd –vs_ Shelina Suleiman and (2)

Lilian “S” –vs- Caltex Oil Kenya (1989) KLRI. In both these cases the courts upheld that jurisdiction is everything and without it the court must down its tools. The Civil Procedure Act is as shown above express: The Marimanti Lower Court does not meet the threshold whatever has previously taken place before it notwithstanding.

We therefore humbly urge your lordship to allow the application before this Honourable court.

DATED at NAIROBI this 2nd day of May, 2019

MOSES N. SIAGI & COMPANY

ADVOCATES FOR THE PLAINTIFF

7. The 1st and 2nd Respondents’ submissions are reproduced in full herebelow. Any spelling or other mistakes may only be ascribed to the parties’ advocates, if they exist.

1ST& 2ND RESPONDENTS’ SUBMISSIONS TO MOTION 11/12/2018

The applicant’s Notice of Motion dated 11/12/2018 is opposed. The 1st and 2nd respondents seek to rely on the affidavit of the 1st respondent dated 25/3/2019 and filed in court on the 26/3/2019

The application seeks two substantive reliefs :-

- 1) the order of the court transferring the suit to Marimanti be reviewed and set aside***
- 2) That PMCC NO 48 of 2017 be transferred from Marimanti to this court for trial.***

The reason for given in support of this motion is that the applicant commissioner a valuation of the suit land, which shows that the suit land is valued over Kshs 25,000,000/=, which is in excess of the lower court’s monitory jurisdiction.

Firstly, the order transferring the ELC NO 191 of 2017 to Marimanti was made by this Honourable Court on the basis of the pleadings by the parties herein. Parties are bound by their own pleadings. The plaintiff exhibited sale agreements which show that the value of the subject matter falls within the jurisdiction of the lower court. On the basis of the pleadings, the court made the order of transfer, and nothing has been shown by the applicant that would enable the court to depart from its earlier position.

The application seeks a substantive relief of review, but there is no reference to the relevant order for review proceedings. Matters review are governed by order 45 of Civil procedure Rules. The order sets out the criteria and the consideration that are to apply in an application for review, which are:-

- i. A party must be aggrieved by an order, sought to be reviewed.***
- ii. Discovery of new and important matter, which after exercise of due diligence, was not within the knowledge of the applicant***
- iii. Mistake or error apparent on record.***
- iv. Any other sufficient reason***

The applicant has not attempted to establish the existence of any of the above in the body of the motion or in the affidavit. Instead, the applicant has attempted to side step the mandatory requirements of order 45 of the Civil procedure Rules by relying on Section 1A, 1B, 3A,18 and 63 of the Civil Procedure Act, which do not directly deal with matters review.

We urge you to find that the applicant has failed to satisfy the court that a review is deserving.

The other reason why the review should not issue is that the application is not made in good faith. After the transfer of the case to Marimanti Law Court, the applicant submitted himself to the jurisdiction of the court. He argued his application for injunction before the magistrate at Marimanti. He lost the application soon thereafter he submitted himself to the jurisdiction of the court again and filed another application for injunction, dated 30/7/2018. It is only after the respondent filed their own grounds of opposition pointing out that the matter was res-judicata, that the applicant hatched a plot to have the matter transferred so that he could get a chance to try an order of injunction. Even that, not before he secured an order from the same court for temporary injunction

The conduct of the applicant is one that makes the respondents believe that the so called valuation commissioned by the applicant was **intended and** was exaggerated for the purposes of filing the application for transfer.

The pleadings and the documents available and on record clearly show that, the land was sold to the 2nd defendant at the price of Kshs 8,100,000/=. The applicant or his valuer does not explain how the land achieved appreciation from Kshs 8,100,000/= to Kshs 25,000,000/= within a span of less than 2 years. The whole application is a fraud.

The court in order to discover fraud involved, is at liberty to order a valuation be carried out by a government valuer to ascertain the actual value of the land. This way, the court will be in a position to determine whether the magistrate has the jurisdiction to hear the matter or not

Otherwise, we pray that the application be dismissed with costs to the respondents

DATED AT MERU THIS 23RD DAY OF APRIL, 2019

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE 1ST & 2ND DEFENDANTS

8. The 3rd respondent's submissions are reproduced in full herebelow. Any spelling or other mistakes may only be ascribed to the 3rd respondent's advocate, if they exist.

3RD DEFENDANT'S/RESPONDENT'S WRITTEN SUBMISSIONS IN OPPOSITION TO THE APPLICANT'S APPLICATION DATED 11TH DECEMBER, 2018

Your Lordship, it is our humble submission that the Application dated 11th December, 2018 is an afterthought and the same has no merits.

Your Lordship, the application seeks the prayers:-

1. That the Order of the Honourable Judge made on the 29th November, 2017 transferring High Court Elc No. 191 of 2017 to Marimanti where it was given number PMCC NO. 48 OF 2017 be reviewed and set aside.
2. That this Honourable Court Order that Marimanti-PMCC No. 48 of 2017 be transferred to this Honourable Court for hearing and eventual disposal
3. That the costs of this supplication be costs in the cause.

The 3rd defendant has opposed the said application and has filed a replying affidavit dated 23rd April, 2019 and filed in court on 24th day of April, 2019.

We urge the court to consider the contents of the 3rd defendant's replying affidavit which inter-alia state that the applicant having prayed for orders of injunction and the application having been dismissed the applicant ought to have filed an appeal but it has not done so.

Your Lordship, the applicant having filed the suit and the court having exercised its discretion to transfer the case to Marimanti Law Courts.

We submit that that there are no grounds to review the Orders in the court. The pleadings are also clear that the 2nd defendant bought the subject matter plot at the price of Kshs. 8,100,000/= and hence there is no evidence to demonstrate that the value of the land has appreciated to the sum of the alleged Kshs. 25,000,000/= .

It is our submission as submitted by the 1st and 2nd respondents that the applicant has not satisfied the benchmarks and legal principles which are required before an Order of court can be reviewed.

Further, and more important the applicant has not annexed the court order or decree which it is seeking to be reviewed and to that extent the application is incompetent and the same is therefore bad in law.

We support our submissions we rely on the holding in the case of:- **M'IKIUGU M'MURITHI & 2 OTHERS V/S JASPER M'NKANATA M'MURITHI MERU-HCCC NO. 21 OF 1989**

It is our humble submission that the applicant having filed the suit and the court having considered the pleadings which are on record it was

bound by its pleadings without any relevant valuation report, the applicant is bound by its pleadings which the law cannot allow the applicant to depart from the same.

We support our submissions by relying on the case of:-

HENRY MWOBOWIA V/S MUTHURI KARAUARI & ANOR MERU-HCCC NO. 104 OF 1991

In the upshot, we submit that the application dated 11th December, 2018 is an afterthought since the authenticity of the valuation report by Highlight Consultants Ltd is also in doubt.

We pray that the application dated 11th December, 2018 be dismissed with costs to the respondents.

We so humbly pray

DATED AT MERU THIS 29TH DAY OF APRIL, 2019

FOR: KIOGORA ARIITHI & ASSOCIATES

ADVOCATES FOR THE 3RD RESPONDENT/DEFENDANT

9. The 4th Respondent's submissions are reproduced in full herebelow. Any spelling or other mistakes may only be ascribed to 4th respondent's counsel, if they exist.

4TH RESPONDENT'S WRITTEN SUBMISSIONS

Your lordship we have perused the application by the applicant which is dated 11th December 2018.

We also hasten to point out that, on 11th October 2018 when we appeared before the lower court, we did peruse the supplementary affidavit together with the proposed further amended plaint. Our position then, as can be seen from the proceedings in the lower court, was that the pleadings then on record clearly disclosed beyond doubt, that the claim by the then plaintiff now applicant in this Misc. Application, exceeded the pecuniary jurisdiction of the lower court by close to ten (10) million Kenya shillings.

We have also perused the responses filed by the 1st, 2nd and 3rd respondents' advocates and clearly they have not exhibited any professional valuation report to counter the professional valuation report filed by the applicant. In the upshot we have no objection to the application as filed by the applicant.

Dated at Meru this 7th day of May, 2019

J. M KIONGO

SENIOR LITIGATION COUNSEL

FOR HON ATTORNEY GENERAL & DEPARTMENT OF JUSTICE

10. I have considered the pleadings filed by all the parties. I have perused the authorities cited or proffered by the applicant and the 3rd defendant. I find no need to regurgitate the principles enunciated by those authorities as they are elaborated upon in the apposite submissions (op.cit) which have been reproduced in full in the submissions.

11. I agree with the 1st, 2nd and 3rd respondents that the applicant is bound by his pleadings. From those pleadings, it is pellucid that the lower court has jurisdiction to hear and determine the apposite suit. I note that an application for injunction was dismissed and that a prayer for amendment of the original plaint was denied. As such the subject suit remains as was framed in the original plaint. That being the case, all the orders issued, either by this court or by the lower court, prior to the filing of this application are extant.

12. I opine that were it not for this application which was filed six months ago, the hearing and determination of this case may have been concluded. I feel that escalating the assertions and positions taken by the parties in this matter will serve as a vehicle to delay the hearing and determination of the suit in question. This will go against the principal objective of the Environment and Land Court Act which is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes.

13. Section 13 of the Environment and Land Court Act grants this court original and appellate jurisdiction to hear and determine Land and Environment matters. I opine that this power should be exercised in a very careful manner and indeed sparingly. I find it necessary to employ my discretion in this matter and hear and determine this matter.

14. The following orders are issued:

a) Former ELC 191 of 2017 at Chuka and now PMCC No. 48 of 2017 at Marimanti will, forthwith, be brought to this court for

hearing and determination.

b) All orders issued prior to the delivery of this ruling remain in force.

c) Costs shall be in the cause.

Delivered in open court at Chuka this 29th day of May, 2019 in the presence of:

CA: Ndegwa

Kithaka h/b Murango Mwenda for the Respondent

Patrick Karani, Director Dalco Trading Ltd – Plaintiff

P. M. NJOROGE

JUDGE