



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT KISUMU

MISCELLANEOUS APPLICATION NO. 19 OF 2018

CHARANJIT SINGH BHAMRA.....PLAINTIFF

-VERSUS-

LEONARD OCHIENG.....1ST DEFENDANT

SAMMY BRIAN ONGANGA.....2ND DEFENDANT

RULING

1. The Plaintiff filed the Notice of Motion dated the 29th November, 2018 on the 3rd December, 2018 seeking for the original H.C.C.C. No.466 of 2015 be transferred back to his court from the lower court; leave to further amend the plaint dated the 11th January, 2011 and costs. The application is based on the ground that the pecuniary jurisdiction of the lower court is not sufficient to meet the general damages claim. The application is supported by the affidavit of Harmesh Kumar Mahan, Advocate on the 29th November, 2018 in which he among others deponed to the following;

- a. That this court transferred the suit to the lower court for disposal.**
- b. That the value of the suit plot is Kshs.67,300.000 which is beyond the lower court jurisdiction.**
- c. That in view of the suit plots value, there is need to amend the plaint.**

2. The application is opposed by the 2nd Defendant through the replying affidavit sworn by Charles Onyango Onyango Advocate, among others deponing to the following:

- a. That all parties were represented during the mention of 19th November, 2018 when ELC No. 466 of 2015 was by consent transferred to Kisumu Chief Magistrate Court for hearing and final determination.**
- b. That the transfer order was properly done in view of the value of the suit subject matter as disclosed in the plaint dated 20th December, 2010 and amended on the 11th January, 2011 which is Kshs.3,270,000 and hence within the lower court's jurisdiction.**
- c. That the application to amend the plaint should have been made in the original record and not through a miscellaneous application.**
- d. That the Plaintiff has known over several years that the suit land Kisumu Municipality/Block 12/428 had been transferred to a third party before the filing of the suit and never sought to enjoin the third Party even in this application.**
- e. That the third party who is the registered proprietor of the suit land is the one who has done the developments thereon and the current value of the property incorporating those developments by a third party who is not a party in the proceedings should not be used to deny the Chief Magistrate's court jurisdiction.**

3. The application came up for hearing on the 21st February, 2019 when Mr. Maganga and Mr. Onyango, leaned counsel for the Plaintiff and Defendants made their oral submissions for and against the application respectively.

4. The following are the issues for the court's determination:

- a. Whether the lower court has jurisdiction to hear and determine the suit that the Plaintiff seeks to be returned to this court.
- b. Whether the valuation done on the suit land in 2018 has a bearing on the subject matter of the suit.
- c. Whether the Plaintiff has made a reasonable case for further amendment of the plaint.
- d. Who pays the costs.

5. The court has after considering the ground on the motion, the affidavit evidence, and written submissions came to the following determinations:

- a. That though the Plaintiff's motion seeks for an order transferring the suit back to this court, and leave to amend the amended plaint, the counsel only submitted on the first prayer for transfer. That the defendant's counsel rightly observed that the prayer to amend should be taken as abandoned, and the court is in agreement with that position. That in any case the correct forum to seek leave to amend the pleadings is the Chief Magistrate's Court where the suit is pending.
- b. That the Defendants deposition and submissions that the order of 19th November, 2018 transferring Kisumu ELC No. 466 of 2015 to the Chief Magistrate Kisumu was pursuant to a consent entered by counsel for the parties has not been rebutted and or challenged. That as there is no evidence tendered to show that consent had been obtained or made through misrepresentation, fraud, mistake or error attributed to any of the parties, then the court cannot review, vary or set it aside except through another consent by the parties and or their counsel on record. That it is apparent the 2nd Defendant, who is reportedly the 2nd defendant in suit, does not agree with that prayer and therefore there is no consent on the issue of transfer.
- c. That the Defendant deposition and submission that land parcel Kisumu Municipality/Block 12/428 had been registered in the name of a third party even before the filing of this suit has not been controverted or challenged by the plaintiff. That the Defendant at paragraph 12 of their replying affidavit and through counsel's submissions referred to documents number 3 and 4 in his list of documents dated 20th July, 2013 that shows the said land was transferred to the third party on the 31st July, 2008, which is over two (2) years before the suit was filed through the plaint dated 20th December, 2010. That even though prayers (a) and (b) are for specific performance and vacant possession of Kisumu Municipality/Block 12/248, those prayers would be unavailable to the plaintiff without having enjoined the person(s) actually registered with the land in the suit even if he was successful. That the valuation exercise that gave the plot value as Kshs.42,300,000 and the developments thereon as Kshs.25,000,000, making a total of Kshs.67,300,000 may not have any relevant to the other prayers in this suit.
- d. That as the Plaintiff has failed in all the prayers then the 2nd Defendant is entitled to costs of the application under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

6. That in the view of the findings above, the Plaintiff motion dated the 29th November, 2018 fails and is dismissed with costs.

It is so ordered.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 17TH DAY OF JULY, 2019.

In presence of;

Plaintiff Absent

Defendants Mr. Anyul for Maganga for Plaintiff

Counsel Mr. Orenge for Onyango for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE