



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 56 OF 2019

(FAST TRACK)

OMAR DHADHO.....PLAINTIFF

-VERSUS-

1. MOHAMED MASOUD

2. COUNTY GOVERNMENT OF TANA RIVER.....DEFENDANTS

RULING

1. The Application for determination is the Notice of Motion dated 25th April 2019 and filed on 29th April 2019 by the 1st Defendant seeking to have this suit transferred to the Environment and Land Court Malindi for trial and disposal. The grounds upon which the application is based are: -

1. That the suit property is situated at Hola within Tana River County.

2. That the nearest court within whose jurisdiction the suit property is situated is the Environment and Land Court at Malindi and not this court.

3. That this court lacks the geographical jurisdiction to entertain the plaintiffs case in view of the fact that the suit property is situated within the local limits of the jurisdiction of the Environment and Land Court at Malindi and not this court.

4. That the defendants and the witnesses reside at Hola where the suit property is situated.

5. That having this suit heard in Mombasa instead of the nearest Environment and Land Court at Malindi will occasion unjust expenses of transport and injustice to the defendants and the witnesses.

6. That there is no justification in law for the case to be heard at Mombasa when there exists an Environment and Land Court at Malindi with competent jurisdiction to entertain the case.

7. That the plaintiff is engaging on forum shopping.

2. The Application is supported by the affidavit of Mohamed Masoud, the 1st Defendant sworn on 25th April 2019 which mainly reiterated the grounds in support of the motion.

3. The Application is opposed by the plaintiff through grounds of opposition dated and filed on 23rd May 2019. It is the Plaintiff's contention that the Application is incompetent and an abuse of the court process. That this court has jurisdiction to hear the suit and all suits within the Republic of Kenya. The Plaintiff avers that there will be no prejudice caused to any of the parties if the application is heard in Mombasa and that although Malindi may be near, it is more expensive and tasking for parties to be in Malindi and stay there for the purpose of this suit since Hola- Mombasa is a direct route and means to Mombasa.

4. The Application was canvassed by way of written submissions. The 1st defendant filed his submissions dated 5th August 2019 on 6th August 2019 while the Plaintiff filed his submissions dated 23rd September 2019 on even dates.

5. I have considered the application, the pleadings on record and the submissions filed as well as the authorities cited. The only issue I have to determine is whether the suit should be transferred from this court to the ELC Malindi for trial and final determination. In doing so, I have to consider the principles of law in an application of this nature.

6. In the case of Owners of Motor Vessel “Lillian S” –v- Caltex Oil Kenya Limited (1989) KLR 1, Nyarangi JA stated as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. In this case, I have to deal with the issue of jurisdiction of this court to transfer a suit from itself to another Environment and Land Court (ELC) and vice versa. The ELC is established under the ELC Act No. 19 of 2011 pursuant to Article 162 (2)(b) of the constitution. Section 4(3) of the ELC Act provides as follows:

“The court shall have and exercise jurisdiction throughout Kenya and shall pursuant to Section 26, ensure reasonable and equitable access to its services in every county.”

“(1) The court shall ensure reasonable and equitable access to its services in all counties.

(2) the 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.”

8. In exercise of the powers conferred by the sixth scheduler part 5 Section 22 and Article 161(2) (a) of the Constitution of Kenya and in pursuance of Section 24, Section 30(1) and (2) of the ELC Act among others, the Chief Justice vide Gazette Notice No.5178 dated 25th July 2014 made practice directions following the establishment of Environment and Land Courts. Note 1 of those practice directions provides that in the exercise of its authority and jurisdiction, the court shall at all stages of any trial be guided by Article 159 of the Constitution, Section 1A and 1B of the Civil Procedure Act and Section 3 of the ELC Act “so as to facilitate

a) Just, b) expeditious, c) proportionate and d) accessible resolution of disputes”. Note 14 of those directions provides as follows:

“14. All new cases relating to the environment and the use and occupation of, and title to land not falling under paragraph 8 above, shall be filed in the nearest Environment and Land Court for hearing and determination by the said court and must be within the purview of the jurisdiction conferred upon the Environment and Land Court with particular regard to the jurisdictional limitation set under Article 262 (2)(b) of the Constitution and Section 13 of the Environment and Land Court Act No.19 of 2011.”(emphasis mine).

9. In the case of **Hugzhou Agrochemical Industries Ltd –v- Panda Flowers Limited (2012) eKLR** Odunga, J stated as follows:

“ I agree that there is only one High Curt in the Republic of Kenya sitting in different stations. I also agree that there being only one High Court the term “transfer” does not apply to one High Court Registry to another”

While concurring with the decision of the learned judge and borrowing his words, I wish to state that there is only one ELC in the Republic of Kenya sitting in different stations. I also agree that there being only one ELC the term transfer does not apply to one ELC registry to another. However, although there is only one court in Kenya which sits in different stations as directed by the Chief Justice, it is not forbidden for a judge of ELC sitting in one location to order a transmission or allocation of a case file before him or her to another judge sitting in another station.

10. Order 47 Rule 6 Rule 6 of Civil Procedure Rules provides as follows:

1) Every suit whether instituted in the Central office or in District registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

2) The court may of its own motion or on an application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court: provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.

11. The overriding objective provided for under Sections 1A and 1B of the Civil Procedure Act and the inherent power of the court under Section 3A are meant for the attainment of justice to parties who come to court. The court is therefore under statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings at a cost affordable by the respective parties. To achieve this, the court is entitled, where it deems appropriate, to direct that a matter filed in one place be heard by the same court sitting at a different place. The decision whether or not to order transfer depends largely on the facts and the circumstances of a particular case.

12. In the present case, it is not disputed that the subject matter of this suit is situated in Tana River County. Indeed the 2nd Defendant is the County Government of Tana River. I have perused the plaint herein. The 1st Defendant is also said to be working for gain and living in Hola which is within Tana River County. Section 12 of the Civil Procedure Act provides that a suit is to be instituted in the court within the local limits of whose jurisdiction the property is situated while Section 15 provides that suits shall be instituted where the defendant resides or cause of action arises. There is no denial that the nearest ELC from Tana River County is Malindi. The plaintiff's argument that although Malindi may be near, it is more expensive does in my view not hold water. In my view, no good reason has been given why the suit was filed in Mombasa and not in Malindi

13. Being guided by Note 14 of the practice directions in Gazette Notice No. 5178 of 25th July, 2014 referred to above and the law, and while not transferring this case to the ELC at Malindi as sought, I direct that this suit be heard by the ELC sitting in Malindi. Accordingly, this file will be transferred to the ELC Registry at Malindi where further proceedings will be undertaken. In view of the fact that both the courts have jurisdiction over the matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF DECEMBER 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Karina holding brief for Shujaa for 1st Defendant

Ms. Okumu holding brief for Magolo for the Plaintiff/Respondent

No appearance for 2nd Defendant

Yumna Court Assistant

C.K. YANO

JUDGE