



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC 169 OF 2017

MIQDAD ENTREPRISES LIMITED PLAINTIFF

-VS-

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. The Application under consideration is the Defendant's Notice of Motion dated 13th June, 2107 in which the Applicant is seeking mainly for orders that this suit be transferred to Malindi Environment and Land Court where **Malindi ELC Case No.90 of 2017 – Juja Coffee Exporters Limited – vs – National Bank of Kenya Limited** is pending for final determination and disposal and that for Case Management purposes and in order to achieve the overriding objective, the two cases be mentioned in Malindi for further directions.

2. The Application is brought under Order 47 Rule 6(1)(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and is supported by the grounds listed on the face of the Application and the Affidavit of Paul Munyao, Advocate for the Defendant sworn on 13th June 2017 and a Supplementary Affidavit sworn on 31st July 2017. Briefly, the Applicant avers that the Suit Property known as **LAND TITLE NUMBER LAMU/BLCOK IV/2** which is the subject matter in this suit is located in Lamu which is within the local jurisdiction of the Court in Malindi and that the Suit Property and the series of transactions in the suit herein form the subject matter of another case, being **Malindi ELC Case No.90 of 2017- Juja Coffee Exporters Limited – vs- National Bank of Kenya Limited** which was filed way before the suit herein. That the Plaintiff in the suit herein was aware of the existence of **Malindi ELC Case No.90 of 2017** before filing the suit herein. The Defendant further avers that the orders being sought in **Malindi ELC No.90 of 2017** and the orders being sought in this suit are directly contradictory and mutually exclusive. It is further stated that there is in existence a court order in the Malindi case which restrains the auction that is the subject matter of this suit and that it is only fair that the Judge who made the restraining orders determines whether the auction sale was valid. It is the Applicant's contention that hearing the two cases before the same Judge would prevent the prospect of having conflicting decisions on the same subject matter being rendered by different Courts which could potentially lead to judicial embarrassment. It is further contended that there is no compelling reason advanced by the Plaintiff in order to justify the Plaintiff's choice of filing this case in Mombasa and that no prejudice will be suffered by the parties in both suits if the orders sought are granted. While not disputing that this Honourable Court, whether stationed in Mombasa or Malindi or elsewhere within the Republic of Kenya has jurisdiction to hear and determine the suit, the defendant avers that Rule 14 of the **Gazette Notice Number 5178** being practice directions on proceedings in the Environment and Land Court, 2014 dictates that all new cases relating to the Environment and use and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination.

3. The Application is opposed by the Plaintiff through a Replying Affidavit sworn by Abdi Maalim Dayib, the Plaintiff's director on 30th June 2017 in which it is deposed inter alia, that it is the Defendant that needs to make out a strong case to the satisfaction of the Court why a suit filed in a court with jurisdiction should be tried at a different location. The Plaintiff avers that the auction sale of the suit property took place in Mombasa and the Plaintiff and its witnesses are both based in Mombasa while the Defendant carries on business in Mombasa. It is the Plaintiff's contention that the Environment and Land Court in Malindi is within the administrative boundaries of Kilifi County and not Lamu County and that since the Suit Property is not within the administrative boundaries of either the court sitting in Malindi or Mombasa, convenience and costs become the key considerations and that costs of attending court in Malindi is quite high compared to attending court in Mombasa. The Defendant further contends that the fact that the Judge sitting in Malindi has already made some orders which are alleged to have been violated, and since there is only one judge of ELC in Malindi its rights to a hearing before an impartial judge is severely undermined by a transfer. The Plaintiff further states that there is a real possibility that the Honourable Judge in Malindi may be more inclined to enforce obedience of the orders made by himself and lose sight, inadvertently or otherwise, of the law governing the very distinct issues of law raised in the present suit. That since the present suit and the suit in Malindi are filed in courts of equal jurisdiction, each court is entitled to decide each case without appearing to bind each other or appearing to 'embarrass' the Court as the Defendant suggests, and that in any event, even If this suit is transferred to Malindi and heard by the same Judge, that Judge is entitled to reach independent conclusions on each suit and whatever conclusions reached, each party has a right of appeal. It is also the Plaintiff's contention that there is no risk of any embarrassing or contradictory order being issued in the two suits since the Plaintiff in the Malindi case has not sought any cancellation or setting aside of the sale. It is the Plaintiff's case that the Defendant's Application is unmerited, misguided and should be dismissed with costs.

4. On 18th July 2017 directions were granted that the motion be canvassed by way of Written Submissions. The Defendant/Applicant filed their submissions on 11th August, 2017 while the Plaintiff/Respondent filed theirs on 28th August 2017. They both reiterated the contents of their respective affidavits.

5. I have duly considered the application, the Affidavits and Pleadings on record, the submissions filed and the authorities cited. The Application is brought under Order 47 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The only issue I have to deal with is whether this suit should be transferred from this court to the court in Malindi for final determination and disposal. In doing so I have to consider the principles of law in an Application of this nature.

6. In the case of the **Owners of Motor Vessel "Lillian S" – vs- 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."

In this regard, I have to first deal with the issue of jurisdiction of this court to transfer a suit from itself to another Environment and Land Court and vice versa.

7. The Environment and Land Court is established under the **Environment and Land Court Act No.19 of 2011** pursuant to Article 162 (2)(b) of the Constitution. Section 4(3) of Environment and Land Court Act provides as follows:

(3) 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.

Section 26 of the Act provides as follows:

(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 Schedule Part 5 Section 22 and Article 161 (2)(a) of the Constitution of Kenya 2010, and in pursuance of Section 24, Sections 30(1) and (2) of the Environment and Land Court 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 Environment and Land Court 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 **Hangzhou Agrochemical Industries Ltd –vs- Panda Flowers Limited (2012)eKLR** which has been cited by both the Defendant and the Plaintiff in their respective submissions, Odunga, J stated as follows:

“I agree that there is only one High Court 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...”

I concur with the decision of the learned Judge and borrowing his words, I wish to state that there is only one Environment and Land Court in the Republic of Kenya sitting in different stations. I also agree that there being only one Environment and Land Court the term “transfer” does not apply to one ELC Registry to another. 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 of the Civil Procedure Rules provides as follows:

1) Every suit whether instituted in the Central office or in a 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 the 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 present Application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act which provide as follows:

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the

just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.

1B (1) For the purposes of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following –

a) The just determination of the proceedings

b) The efficient disposal of the business of the court;

c) The efficient use of the available judicial and administrative resources;

d) The timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties, and

e) The use of suitable technology.

3A Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

12. The overriding objective provided for under Sections 1A and 1B 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 a 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 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. What then are the circumstances under which the Court may direct that a matter filed in a particular Court registry be heard in a different place?

13. It is well established principle of law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court that the Application ought to be granted. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground though it is a relevant consideration. Various authorities and the law require that the Court should also consider such factors as the motive and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the question of expense the interest of justice and possibilities of undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.

14. In the present case, it is not disputed that the subject matter of this suit is situate in Lamu County. It is also not disputed that there are two cases touching on the Suit Property, one being **Malindi ELC No. 90 of 2017** and this case. The defendant is the common party in the two cases. It is the defendant's position that the two cases are so intertwined that if the matters were to proceed independently and at the same time before the ELC Registry at Malindi and in the ELC Registry at Mombasa, then there exists a real risk that the Court in Mombasa may decide issues of fact and/or law which are before the Court in

Malindi and vice versa. On its part, the Plaintiff contends that the two cases are completely different and that although the question that will be dealt with in the two cases is the effect of a sale proceeding when there is in place a conditional Court Order made in the presence of advocates for the Defendant but not communicated to the Defendant or the auctioneer, the resolution of that question would be similar regardless of the Judge deciding the matter. The Plaintiff therefore does not see the possibility of conflicting decisions. Moreover the Plaintiff's view is that the transfer of this case would put the Judge in Malindi in a position where he has to defend his impartiality, given that he had already issued orders in the Malindi case.

15. I have perused the Plaintiff herein. One of the reliefs the Plaintiff seeks is a declaration that the Defendant has no power in law to reverse, cancel, vary or recall an auction sale once a bid has been accepted, Memorandum of Sale signed and a certificate of sale issued. In paragraph 9 of the Plaintiff, the Plaintiff avers that the Defendant's basis for threatening to cancel the sale and recall the Memorandum of Sale is said to be the existence of an order issued on 24th April, 2017 in **Malindi ELC No.90 of 2017** which is said to have been brought to the Defendant's agent's attention after the sale had been conducted and concluded. The Plaintiff avers that it was not aware of those orders.

16. I have also perused a copy of the Plaintiff in **Malindi ELC No.90** of 2017 which is attached to the Defendant's Application. The same challenges the Defendant's Power of sale of the Suit Property. There is also attached an order staying the sale of the Suit Property issued by the Judge in Malindi on 24th April 2017. There is no denial that from the Law and facts outlined above, both Courts have jurisdiction over this matter. The Judge in Malindi has already made some orders which are alleged to have been violated. The Plaintiff's fears that its right to a hearing by an impartial judge is severely undermined by a transfer are in my view unfounded. In paragraph 6(d) of its Replying Affidavit, the Plaintiff agrees, and rightly so, that the Court in Malindi can still reach an independent conclusion in the matter. Since the issues in the two cases are intertwined, it is only fair that these two matters be dealt with by one registry.

17. Additionally the suit property is in Lamu County which is near the Court in Malindi in the premises and 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 authorities, and while not transferring this case to the Environment and Land Court at Malindi as sought, I direct that this suit be heard by the Environment and Land Court sitting in Malindi. Accordingly, this file will be transferred to the Environment and Land Court 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 23rd day of January 2018.

C. YANO

JUDGE