



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 495 OF 2017

ISMAEL EBOSO MUSINYA.....PLAINTIFF/RESPONDENT

VERSUS

MARKO JUMA AKHONYA

EZEKIEL MUDAMBA.....DEFENDANT/APPLICANT

RULING

The application is dated 18th December 2017 and is brought under sections 3 and 3A of the Civil Procedure Act and order 45 rule 1 & 2 of the Civil Procedure Rules and Articles 162 (2) a, and 165 (5) b of the Constitution seeking the following orders;

1. That the firm of M/s. Amasakha & Co. Advocates be granted leave to come on record for the plaintiff herein.
2. That the proceedings and judgment/decree herein be and are hereby set aside and/or reviewed for having been made without jurisdiction.
3. That the costs of this application be provided for.

The applicant submitted that, the dispute herein involved land parcel No. Butso/so/Shikoti/627. That the proceedings herein were concluded by Hon. S. Chitembwe – J. who is a judge of the High Court. That am aware that judgment was delivered on 12/5/2015 when the Constitution of Kenya was in force. That am advised by my lawyers on record which advise I verily believe to be true that the constitution under article 162 (2) c of the Constitution establishes the land and environment court as the court to hear and determine matters relating to land. That am further informed that Article 16 (5) of the Constitution expressly ousts the jurisdiction of the High Court to hear and determine matters relating to ownership and occupation of land. That it therefore follows that the court that heard and determined my case had no jurisdiction and the proceedings and the resultant judgment and/or decree is null and void. That am therefore aware that judgment of 12/5/2015 is null and void for having been made contrary to the provisions of the Constitution. That am further advised by my counsel on record that the issue of jurisdiction cannot be conferred and that a court of law cannot assume jurisdiction that it does not have. That it is therefore for the benefit of all the parties hereto that this dispute be resolved by a court mandated by the Constitution to determine land matters. That the decree in issue cannot be enforced as it was made without jurisdiction.

The applicant submitted that, the jurisdiction of the High Court to handle Environment and land matters has been expressly ousted by the Constitution. Jurisdiction can neither be arrogated nor conferred. At the time the High Court was handling this matter Parliament had established the Environment and Land Court. The Environment and Land court Act 2011 came into operation on 30/8/2011. The Supreme Court in the case of **Kamau Macharia & Another vs. KCB Limited & 2 others (2012 EKCR)** said:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. The court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot allocate to itself jurisdiction exceeding that which is conferred upon by the law”.

Equally the Supreme court in the matter of interim independent electoral Commission Constitutional Application No. 2 of 2011 held that where the Constitution and the statute exhaustively provides for the jurisdiction of a court of law. The court must operate within the Constitutional (legal limits). It cannot expand its jurisdiction through judicial draft or innovation.

The High Court exceeded its jurisdiction beyond what is legally conferred to it and they urge the court to find and set aside the proceedings and decree. The above principals were also caused by Justice Mwita – J, in Kakamega H.C. Civil Appeal No. 12 of 2016 between Bilha Medeva Buluku- vs Everlyne Kanyyere at pages 37.

As regard contempt to court the plaintiff/present applicant is not in contempt of court. The respondents have various options to execute the

decree as provided for under order 22 of CPR. The application for contempt of court is thus misguided and ought to be dismissed with costs. The defendants can also apply to have the Deputy Registrar of the court to execute transfer documents on their behalf and more so. There is no evidence that the judgment debtor was presented with transfer documents and he declined to sign. However as already stated the decree in issue is annulity and incapable of being executed.

The respondent submitted that from the provisions and practice directions, all Judgments and Rulings pending before the High Court shall be delivered by the same Court and that all part-heard cases pending before the High Court shall continue to be heard and determined by the same court. It is not therefore possible to allude and or allege that the court lacked jurisdiction to hear and determine this matter for want of jurisdiction. They pray that the application be dismissed with costs.

This court has carefully considered both the applicants and the respondent's submissions. Prayer (a) of the application was spent. The application is grounded on the annexed affidavit of ESMAIL EBOSO MUSINYA. That the judgment was delivered by the High court. That this was on 12/5/2015 long after the establishment of the land court. That the judgment and/or decree is against the provisions of Articles 162 (2) and 165 (5) (b) of the Constitution. That equally the proceedings leading to the judgment are null and void. That this matter ought to be heard denovo before a court of competent jurisdiction.

I have perused the court file and I find that this suit was filed against the Defendant/Respondent In the year 2003 vide Originating Summons. The Plaintiff/Applicant was heard in 2011 before establishment of the Land Court and judgment delivered in 2015.

Art 162(2) b of the Constitution states that parliament shall establish courts with the status of the high court to hear and determine disputes relating to the environment, and the use and occupation of, and title to land.

Parliament proceeded and enacted Environment and Land Court Act in the year 2011 which Act established the Land and Environment Court in Section 24 of the said act provides that;

“The chief Justice shall in consultation with the court make rules for determination of admissibility by the court of proceedings pending before any court or tribunal.”

Section 30(1) of Land and Environment Court Act 2011 provides a transition clause which states that:

“All proceedings relating to the environment or to the use and occupation and title to land pending before any court or local tribunal of competent Jurisdiction shall continue to be heard and determined by the same Court until the Environment and Land Court established under this Act comes into operation or as maybe directed by the Chief Justice or Chief Registrar.”

The Chief Justice proceeded to issue practice directions regarding transition of matters pending before the High Court vide Gazette Notice No. 5178 published on 28th day of July 2014. The notice states directive No 3 and 4 that all Judgments and Rulings pending before the High Court shall be delivered by the same Court and that all part-heard cases pending before the High Court shall continue to be heard and determined by the same court. As stated earlier, this suit was filed against the Defendant/Respondent In the year 2003 vide Originating Summons. The Plaintiff/Applicant was heard in 2011 before establishment of the Land Court and judgment delivered in 2015. The issue of contempt proceedings is not in this application and the same will not be considered. I find this application has no merit and I dismiss the same with costs.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE