



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L MISC. CIVIL APPLICATION NO. 21 OF 2017**

**DAVID LUTTA MUSUMBA MAKOKHA.....APPLICANT**

**VERSUS**

**ESTHER CHEROP SAINA.....DEFENDANT**

**RULING**

The application before court is dated 27.9.2017 filed by *David Lutta Musumba Makokha* against *Esther Cherop Saina*. The applicant seeks direction that Eldoret CMCC No. 411 of 2014 be transferred to the Environment & Land Court for final hearing and determination and that upon issuance of the order, Eldoret Hccc No. 115 of 2006 which determined the issues of ownership of the suit parcel of land be placed before the Judge for determination on how the matter should proceed after transfer. The application is premised on grounds that the subject matter in Eldoret CMCC No. 411 of 2014 is land which is a preserve of this honourable court and that the issue of ownership of the suit land forming the subject of the above suit has already been determined in favour of the applicant vide Eldoret Hccc No. 115 of 2006. The only issue pending determination is use of the suit parcel of land known as Eldoret Municipality Block 14/320 as the respondent is still in occupation as a tenant. The orders issued on 19<sup>th</sup> April, 2012 allowing the respondent to be in occupation have since been spent and the respondent is subsequently in arrears of payment of rent to the detriment of the applicant.

The applicant alleges that there was inadvertence in filing a new suit before the Chief Magistrate's Court vide Eldoret CMCC No. 411 of 2014 by the former advocates on record, M/s Nyairo & Company Advocates in view of the establishment of the Environment and Land Court and that the Environment and Land Court is the appropriate court to ensure enforcement of the decree in force.

The applicant laments that the rent payable by the respondent continues accruing at the expense of the applicant hence the need for the matter to be transferred to this honourable court for final determination. That no prejudice will be occasioned on the respondent in view of the fact that the issue of ownership has since been determined. That ends of justice will be met if the orders sought herein are granted as prayed.

In the supporting affidavit, the applicant states the Respondent herein filed HCCC NO. 115 of 2006 against him when he sought to have her evicted from ELDORET MUNICIPALITY BLOCK 14/320 which he had purchased by public auction. That the issue of ownership of the above suit land was subsequently determined in his favour vide the decree issued on 19<sup>th</sup> April, 2012. That after the issuance of the above decree and after fully complying with the orders thereto, he later instructed his former advocates, Nyairo & Company Advocates to seek eviction orders against the Respondent when she failed to remit rent to him as and when the same fell due after which they filed ELDORET CMCC NO. 411 OF 2014.

That he has since instructed his current advocates on record M/s Isiaho Sawe & Company Advocates to pursue the said eviction orders on his behalf after he fell out with his former advocates. That upon perusal of the pleadings in ELDORET CMCC NO. 411 OF 2014 in light of the decree issued in HCCC NO. 115 OF 2006, his Advocate on record, Ms. Isiaho Sawe informed him that since the subject matter of the said suit was use of land, the same fell within the jurisdiction of this honourable court hence rendering the instant application necessary. That in light of the advice above, he believes the subject matter in ELDORET CMCC NO. 411 OF 2014 is a preserve of this honourable court.

The only issue pending determination is the use of his land known as ELDORET MUNICIPALITY BLOCK 14/320 on which the Respondent is still in occupation as a tenant.

The applicant states that orders issued vide the decree of 19<sup>th</sup> April, 2012 allowing the Respondent to be in occupation of his land have since been spent as the Respondent is subsequently in arrears of payment of rent to his detriment. That he now wishes to have the Respondent evicted from his land in view of noncompliance of payment of rent, which orders can only be granted by this honourable court in the best interest of justice.

That he now believes in view of the jurisdiction as indicated by M/s Isiaho Sawe that there was inadvertence in filing a new suit before the Chief Magistrate's court vide ELDORET CMCC NO. 411 OF 2014 by his former advocates on record, M/s Nyairo & Company Advocates in view of the establishment of the Environment and Lands Court.

According to the applicant, the Environment and Lands Court is the appropriate court to ensure enforcement of the decree in force and/or issue appropriate orders in the best interest of justice. That rent payable to him by the Respondent continues to accrue at his expense hence the need for the matter to be transferred to this honourable court for final determination. That no prejudice will be occasioned on the Respondent in view of the fact that the issue of ownership has already been determined. That ends of justice will be served by allowing the instant application and granting the orders sought as prayed. That all his efforts and/or pleas to the Plaintiff to pay rent have been futile hence rendering the institution of this application necessary in the best interest of justice. He believes that the Respondent has taken advantage of the silence in execution the decree in failing to comply by paying rent as provided for by law.

He is apprehensive that should the orders he seeks vide this application not be issued as prayed, he stands to be greatly prejudiced. That he has been informed by his advocate on record which information he verily believes to be true that this honourable court has the unfettered discretion to grant the orders sought which discretion he urges it to so exercise. This application has been made promptly and in absolute good faith. The respondent will not be prejudiced in any way if the orders sought are granted as the issue of ownership has already been determined.

The respondent, Esther Cherop Saina filed a replying affidavit stating the Applicant in his reply to amended defence which was filed on 1<sup>st</sup> April, 2015 pleaded that the trial court in this case the Chief Magistrate's court had jurisdiction to entertain the suit and that the claim before the court was for rent arrears and not ownership.

The Applicant had further reiterated in the said reply to defence and defence to counter-claim that the suit Eldoret HCCC No. 115 of 2008 was separate and distinct from Eldoret CMCC No. 411 of 2014 which he now seeks to have transferred to the Environment & Land Court and that on 5<sup>th</sup> November, 2014, the Applicant's former advocate wrote to the Chief Magistrate's Court and copied to her Advocates a letter attaching practice directions to the effect that Magistrate's Courts had jurisdiction to hear and determine cases relating to the environment and use of land.

She is further informed by her Advocates which information she verily believes to be true that the Applicant has confirmed that in fact the issue of ownership is not in dispute as the same was settled in the Judgment in Eldoret HCCC No. 115 of 2006 delivered on 14<sup>th</sup> December, 2011 and as such, the Application for an order of transfer of the pending suit is ill advised.

She stands to be greatly prejudiced as the suit sought to be transferred being Eldoret CMCC No. 411 of 2014 has very much progressed and the Applicant had already testified.

She is further advised by her Advocates on record that the Court of Appeal in Law Society of Kenya Nairobi Branch —vs- Malindi Law Society & Others (2017) eKLR delivered a Judgment on 19<sup>th</sup> October, 2017 quashing the Malindi Petition Judgment which had found that the Magistrate's Court did not have jurisdiction to entertain environment and land court matters.

That as such, the suit Eldoret CMCC NO. 411 of 2014 is properly before the trial court and should not be transferred. The Applicant has not demonstrated that the magistrate's court lacks the pecuniary jurisdiction over the sum claimed in the plaint as filed, nor that the alleged rent accrued is beyond that court's pecuniary jurisdiction. The Applicant has not presented before this court the Plaint filed in Eldoret CMCC NO. 411 of 2014 to enable this court fully comprehend the claim as against the recent judgment of the Court of Appeal. That it is not true that she has taken advantage of the silence of execution of the decree.

She is the beneficiary of the decree and there exists warrants of arrest in execution against the Applicant whose execution has been frustrated by the applicant who currently resides out of the country. The further affidavit by the applicant states that he has settled the decretal amount ordered by the trial court. He demonstrates how he has remitted the payments.

I have considered the application, supporting and supplementary affidavit sworn by the applicant, the replying affidavit by the respondent and do find that the 1<sup>st</sup> issue is in respect of the transfer of the Eldoret CMCC No. 411 of 2011 for final hearing and determination before the court. I do find that the applicant's contention that the suit before the Lower Court is res-judicata can be heard by the said court. The Lower Court has jurisdiction to determine whether the suit before it is based by section 7 of the Civil Procedure Rules, Cap. 21, Laws of Kenya that provides:

In that regard, the doctrine of *res judicata* is set out in the **Civil Procedure Act** at **Section 7** as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

The **Civil Procedure Act** also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

***“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.***

***Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or***

*admitted, expressly or impliedly, by the other.”*

In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction.

It the court seized of the matter that can declare a suit to be *res judicata* and in this case the Magistrates Court.

The issue of ownership has been determined by the High Court the only pending issues are the rent arrears.

It is trite law that the Magistrate’s Court who have been gazette to hear matters touching on use, occupation and title to land have jurisdiction to hear the said matters save where their jurisdiction is limited by provision on pecuniary jurisdiction. Section 26 the Environment and Land Act was amended by insertion of a new provision as indicated hereunder. The amendment is underlined.

**“26. *Sitting of the Court***

***(1) The Court shall ensure reasonable and equitable access to its services in all Counties.***

***(2) A 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.***

***(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.***

***(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —***

***(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and***

***(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.***

***(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.***”

The Magistrates’ Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15<sup>th</sup> December 2015. It was to commence on 2<sup>nd</sup> January 2016. Section 9 of that Act deals with claims in employment, labor relations claims; land and environment cases and provides that:

**“A magistrate's court shall —**

**(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —**

**(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(ii) compulsory acquisition of land;**

**(iii) land administration and management;**

**(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**(v) environment and land generally.**

From the foregoing, it has not been demonstrated by the applicant that the Magistrates Court lack the jurisdiction to hear and determine this dispute as it falls within matters envisaged by section **26 of the Environment and Land Act** and **section 9 of the Magistrates Court Act**. I do find the application to be misconceived and is dismissed with costs.

**Dated and delivered at Eldoret this 20<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**