



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC 719 OF 2017

(FORMERLY KISII ELCC NO.137 OF 2014)

JOSEPH OTIENO MIDIGO.....PLAINTIFF

VERSUS

MOSES ODHIAMBO OSANO sued as the legal representative of the

Estate of the late JOSEPH OSANO OTIENO.....1ST DEFENDANT

PENINA AUMA ALANDO.....2ND DEFENDANT

MARGARET AOKO OKUNA.....3RD DEFENDANT

RULING

1. The 2nd defendant/applicant through Ouma Njoga and Company Advocates brought an application by way of Notice of motion dated 19th January 2018 under Order 51 (1) of the Civil Procedure Rules, Sections 3A and 18 1 (a) of the Civil Procedure Act, Section 9 (a) of the Magistrate's Court Act 2015, Sections 26 (3) & (4) of the Environment and Land Court Act, 2011, Gazette Notice No. 11936 dated 8th December 2017. He is seeking the following orders :-

a. THAT this Honourable court be pleased to withdraw the suit herein from the Environment and Land Court and transfer the same to the Senior Principal Magistrate;s Court at Oyugis

b. THAT the costs of this application be in the cause.

2. The application is anchored on the 2nd applicant's supporting affidavit sworn on 18th January, 2018 and Kenya Gazette Notice No. 11936 of 8th December, 2017. The application is also premised on five (5) grounds on the face of the application. The grounds include. that the subject matter of this suit is situated in Oyugis in Homa-Bay County and that the SPM's Court Oyugis has requisite jurisdiction to hear and determine the matter.

3. The 2nd applicant averred, inter alia, that the plaintiff/respondent's claim is with regard to ownership, registration and sale of the suit land LR NO. Central Karachuonyo/Kogweno Oriang/648. That following the publication of Gazette Notice No. 11936 of 8th December, 2017, the SPM's court at Oyugis has jurisdiction to entertain land matters and that the transfer of the suit will be convenient to all parties involved and will not occasion to any party undue hardship or expenses and that it will be in the interest of justice.

4. The respondent who is represented by Achilla T.O. and Company Advocates apposed the application by his replying affidavit sworn on 31st July, 2018. He averred, among other things, that the applicant has failed to demonstrate that SRM currently presiding Oyugis SPM's Court has the requisite jurisdiction over the matter which is customary trust in nature. That this honourable has territorial jurisdiction over land dispute in both Migori and Homa-Bay Counties and that the application is just meant to delay and derail expeditiously, just and final determination of this dispute.

5. The 1st and 3rd respondents did not file any response to the application.

6. By a plaint dated 27th March,2014 the plaintiff has sought a declaration that he is entitled to and is the rightful owner of the suit land as well as cancellation of the title deed and that a new one be issued in his name and costs of the suit. The plaintiff claims that he was a

younger brother to the 1st defendant's deceased father, Joseph Osano Otieno who died on 1st September 2013. That the said deceased Joseph Osano Otieno who was the eldest son of the late Otieno Midigo, who died in the year 1955, held the suit land in trust for the plaintiff who was then a minor. The plaintiff alleges fraud on the part of the 1st defendant's deceased father in respect of the suit land.

7. The 2nd and 3rd defendants denied the plaintiff's claim in their statements of defence dated 14th May, 2014 and 13th May 2014, respectively. The 2nd defendant further termed the plaintiff's suit time barred as the 2nd defendant was registered as the owner of the land in 1989 and that the plaint is incurably defective. Both the 2nd and 3rd defendant's sought dismissal of the suit with costs.

8. The 1st defendant did not file his statement of defence within the prescribed period of time or at all.

9. In his reply to the 2nd defendant's statement of defence dated 29th May 2014, the plaintiff reiterated the contents of his plaint and denied that the 2nd defendant was a bonafide purchaser for value without notice as to the defects on the title to the suit land. That by East Karachuonyo Land Dispute Tribunal's findings of 25/10/2010, the plaintiff and the 1st defendant's deceased father were advised to refer their dispute over the suit land to Oyugis Principal Magistrate's Court for resolution.

10. On 23rd April, 2018, the court directed that the parties argue the application by written submission, see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 (a) of the Environment and Land Court Practice Directions, 2014**. In that regard, only the 2nd defendant counsel filed and served his submission dated 29th April 2018.

11. Learned counsel for the 2nd defendant submitted in support of the application and identified two (2) issues for determination as follows:-

i. Whether the Senior Principal Magistrate court at Oyugis has jurisdiction to hear and determine this matter.

ii. Whether this matter should be transferred to the Senior Principal Magistrates court at Oyugis?

12. Counsel relied on authorities namely the Black's Law Dictionary, 8th Edition the case of **Owner's of Motor Vessel Lilian "S" – Vs. Caltex Oil (1989) KLR** and the case of **Malindi Law Society –Vs. AG & 4 Others (2016) eKLR** on jurisdiction of courts. He further cited **Section 9 (a) of the Magistrates, courts Act, 2015, Section 26 (3) and (4) of the Environment and Land Court Act 2011, Section 18 (1) (a) of the Civil Procedure Act Cap 21 and Article 169 (2) of the Constitution of Kenya, 2010** to back up his submissions to the application.

13. I have examined with care the entire application, the replying affidavit, the pleadings and submission by the 2nd defendant's counsel. The twin issues for determination are the ones disclosed in the submissions by learned counsel for the 2nd defendant and I do embrace them in this matter accordingly.

14. The Black's Law Dictionary 10th Edition defines the term "**jurisdiction**" as follows:-

"A court's power to decide a case or issue a decree."

15. Admittedly, the issue of jurisdiction is a matter of law. Indeed, jurisdiction goes to the root of litigation as per the celebrated decision in the **Owners of Motor Vessel Lilian "S" (supra)** and as recently emphasized by the Supreme Court of Kenya in the case of **Republic-v- Karisa Chengo and 2 others (2017) eKLR**.

16. Moreover, it is trite law that jurisdiction of a court flows from either the Constitution or statute or both; see **Samwel Kamau Macharia & Anor –v- Kenya Commercial Bank Ltd and two others (2012) eKLR**.

17. I note from the pleadings and submissions on record that the plaintiff's claim is with regard to ownership and or title to the suit land. I am conscious of the meaning of "**Proprietor,**" interest conferred by registration and rights of a proprietor at **Sections 2, 24, and 25 of the Land Registration Act, 2016 (2012)** respectively. I also take into account the issuance of title to land under **Sections 26 and 30 of the Land Registration Act, 2012**.

18. The 2nd defendant claims that they are bona fide purchasers for value without notice of any defect in the title to the land allegedly held in trust for them by the plaintiff. They further claimed that they were strangers to the plaintiff's allegations in the suit.

19. Section **80 of the Land Registration Act, 2016 (2012)** provides for the court's discretion to order rectification of the proprietor's title to land. The instant claim is hinged on the registration of a title to land and creation of trust thereon. In **Mwangi & Anor –v- Mwangi (1986) KLR 328**, it was held that such registration is a creation of the law and one must look into the consideration surrounding the registration in order to determine whether it was envisaged that a trust should be created. Trusts including customary trust are overriding interests under **Section 28 (b) of the Land Registration Act, 2012** and the magistrate's court have jurisdiction to entertain the claim by virtue of the magistrates' courts Act, 2015.

20. **Article 162 (2) (b) of the Constitution of Kenya, 2010** creates this court with the requisite jurisdiction. Section 13 (1) of the Environment and Land Court Act, 2015 (2011) provides for original and appellate jurisdiction of this court.

21. **Sections 26 (3) and (2) of the Environment and Land Court Act 2015 (2011) as read with Section 9 (1) of the Magistrates courts Act,**

2015 provide for jurisdiction to designated magistrate's courts in respect of matters of civil nature like the instant dispute. Appeals to the said Magistrate's courts lie to this court. This court is aware that there are such designated magistrates at Oyugis Senior Principal Magistrate's court.

22. Under **Section 19 (2) of the Environment and Land Court Act 2015 (2011)**, this court is bound by the procedure laid down by **the Civil Procedure Act (the CPA). Section 18 (1) (a)** of the Civil Procedure Act (Cap 21) empowers this court to transfer suit from one court to another including the designated magistrates' courts.

23. Borrowing from the above authorities, the nature of the instant suit and **Articles 3 (6) and 48 of the Constitution of Kenya, 2010** on access to justice, I find the application full of merits. The 2nd defendant applicant has demonstrated that the orders sought in the application are for grant by this court.

24. Accordingly, I allow the 2nd defendants/applicants application dated 19th January 2018 in terms of orders (a) and (b) sought therein.

25. Mention for directions before a designated magistrate at Oyugis Senior Principal Magistrate's Court on 19/12/2018. The parties be notified accordingly.

DATED , Signed and **Delivered** this **13th** day of November 2018.

G. M. A. ONGONDO

JUDGE

Present

Tom Maurice – Court Assistant