



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC SUIT NO. 14 OF 2013

BERNARD ONKUNDI OTUNGO
BARNABAS KIPRONO BWAMBOK
KEFA NYAMONGO OENGA
DANCAN OCHIENG OYARO
KENNETH ODUOL ESAU
JAMES KAMBO MUTHUSI
PLAINTIFFS

=VERSUS=

CREEK MARKETING AND DEVELOPPMENT LTDDEFENDANT

RULING

1. The application for determination is the one dated 28th September 2016 and brought under the provisions of order 51 rule 1 of the Civil Procedure Rules and section 18 of the Civil Procedure Act. The plaintiffs/applicants seeks for an order that;

“This court be pleased to transfer this case to the Environment & Land Court sitting at Malindi for purposes of hearing and determination.”

2. The application is supported by the grounds on the face of it which includes inter alia that the subject property is situated in Kilifi County within the jurisdiction of Malindi Environment & Land Court. Secondly that the defendant will not suffer any prejudice if the suit is transferred to Malindi. The application is further supported by the affidavit sworn by the 1st plaintiff.

3. Mr. Benard Onkundi Otungo deposes that he is advised by his advocate on record that this suit ought to have been filed in Malindi because the property in dispute is situated in Kilifi County. He deposed further that while hearing a previous application on 10th June 2015, this court intimated that the suit ought to be transferred to Malindi. And picking from this statement, they sent to the defendant’s advocate consent drafted to transfer the suit. The defendant’s advocate declined to sign the consent thus necissating the filing of the present application. The plaintiffs also depose that Malindi has less backlog compared to Mombasa hence this case would be heard timeously if the same was transferred to Malindi.

They urge the court to grant the orders sought.

4. The application is opposed by the defendant vide a replying affidavit sworn on 5th October 2016. The defendant deposes that both parties herein admitted the jurisdiction of this court as per the pleadings filed. Secondly that this court has heard and determined two applications therefore by filing this application, the plaintiffs are engaging in forum shopping. Further the defendant deposed that Mombasa is the most convenient place to try this suit because

i) The land transaction the subject of this dispute was negotiated and finalised in Mombasa

ii) The Suitland is located at Mtwapa Creek which is 25 kilometres from this court. (MSA court)

iii) The matter is ready for hearing as the pre-trial directions has been done

iv) There is a similar matter pending vide MSA HCC 609 of 2011 where parties are the same.

5. The parties then orally submitted. Mr. Ngure advocate for the plaintiff submitted that the subject matter is situated in Mtwapa within Kilifi County. Consequently the suit should be filed within the local limits of the court as provided for under section 12 of the Civil Procedure Act. That we should be guided by the law and not convenience of the parties.

6. Mr. Njoroge advocate for the defendant on his part submitted that this is the most convenient court to hear the matter as the defendant's witnesses are based in Nairobi. That the suit premises along Mtwapa Creek is on the borderline and Mombasa is nearer in terms of distance. Lastly that there is another suit no. HCC 609 of 2011 which during pre-trials they (defendant) had requested to be heard together with this one. Further that the plaintiffs have not offered any good reason why the suit should now be transferred. Mr Njoroge cited case law of **Daniel Kimani Moseka vs Japheth Arthur Mwangi (2012) eKLR and Lydia Abura vs Usonik Farm Purchase Co-operative SACCO (2014) eKLR** in support of his submissions.

7. I have considered the pleadings and submissions rendered. The key reason why the plaintiffs seek to transfer this suit to Malindi Environment & Land Court is because the suit property is situated in Mtwapa that falls within the geographical jurisdiction of the Malindi Environment Land Court. Secondly that this Court (MSA) has more backlog of cases than Malindi; therefore the suit will be concluded timeously if transferred to Malindi. I am in agreement with the plaintiff that the law provides for the suit to be filed in the local limits of the nearest high court registry. The plaintiffs are the ones who filed this matter in the Mombasa registry. They have not given this court the reason which formed their thinking at the time of filing this suit in this registry yet they were alive to the provisions of section 12 of the Civil Procedure Act.

8. Be that as it may, article 159 (2) of the Constitution provides for access to justice and speedy disposal of disputes. The submission that Mtwapa Creek is 25 kilometres from Mombasa court while it is approx. 100 kilometres from Malindi court is indeed true. The defendant has said its witnesses are all in Mombasa. The plaintiff did not disclose the location of their witnesses. In terms of realising the spirit of the Constitution as regard access, Mombasa Court would then be the nearer one between the two courts.

9. The plaintiffs also raised the issue of this court having more backlog as compared to Malindi. Indeed this is true. However with the recent appointment of more Environment and Land Court Judges and the posting of two additional judges to Mombasa, this reason offered by the plaintiffs is not compelling to warrant the transfer.

10. Lastly the defendants have submitted that there is a matter involving the same parties vide HCC 609 of 2011 which they had sought to be mentioned alongside this matter on 22nd September 2016. The intention being to request to have the two suits heard together. The plaintiffs have not sought to transfer this other case to Malindi. The Plaintiffs have also not denied that the subject matter in no hcc 609 of 2011 is related to this suit. Given the possibility that the two suits may be consolidated, it would be

premature to transfer this suit now before a decision is made that both suits shall proceed independently.

11. For the reasons given herein above, I find the application for transfer as lacking in merit and dismiss the same. I order that each party will bear their respective costs of the application.

Dated and Delivered at this 24th day of January 2017

A. OMOLLO

JUDGE