



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT THIKA

E.L.C. CASE NO. 5 OF 2017

MARGARET WAIRIMU MAGUGU.....PLAINTIFF/APPLICANT

(SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE ARTHUR K. MAGUGU)

VERSUS

KARURA INVESTMENT LIMITED.....1ST DEFENDANT/RESPONDENT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT/RESPONDENT

KAMWERE & ASSOCIATES.....3RD DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....5TH DEFENDANT/RESPONDENT

RULING

The Plaintiff herein, **Margaret Wairimu Magugu** (Suing as the Administratrix of the Estate of the **Late Arthur K. Magugu**) filed this suit at Thika Environment & Land Court on **19th January, 2017** and sought for various prayers, Among the prayers sought are:-

- (i) .A declaration that the Subdivision of L.R. No. 12422/204 was fraudulently, irregularly and unlawfully undertaken.**
- (ii). A declaration that any other subsequent subdivision accruing from the subdivision of L.R. No. 12422/204, herein being L.R. No. 12422/318 and L.R. No. 12422/319 is a nullity.**
- (iii). An order directed to the 2nd Defendant ordering him or her to revoke and cancel L.R No. 12422/318 and L.R. No. 12422/319.**

Simultaneous to the Complaint, the applicant filed a **Notice of Motion** even dated and sought for temporary injunction against the Respondents to restrain and prohibit them, jointly and severally or through their agents or/or servants from entering, taking possession, trespassing and/or evicting the applicant from all the Land known as **L.R. No. 12422/319**, pending the hearing and determination of the application and suit. Further that the **OCS, Muthaiga Police Station** be ordered to oversee the enforcement of the Orders herein.

When the Suit was filed on **19/1/2017**, this Court was not sitting and from the Court record, the file was placed before the Duty Judge at **Milimani ELC - Okongo J**, who observed that he had dealt with a similar matter involving the parties herein and had issued Orders in favour of the 1st Defendant. With the above observation, the Duty Judge certified the matter urgent, declined to grant any Interim Orders and directed the matter to be heard before me on **26/1/2017**.

The matter was eventually brought before me on **6th February 2017**, when counsels for the 1st and 3rd Defendants intimated to the court that they had a Preliminary Objection to raise. The court directed that the Preliminary Objection be canvassed first on **23rd February, 2017**.

On 23rd February, 2017, Mr. Machira for the 3rd defendant submitted that this Court lacks power to entertain this matter before it because the Court lacks territorial Jurisdiction to entertain the suit. He argued that it was a requirement of law that any land matter should be filed at the nearest Environment & Land Court. He submitted that the suit property is situated at **Karura area near C.I.D . Headquarters in Nairobi (Muthaiga area)** which is about 6-7 Kilometres from Nairobi City Centre and Milimani ELC. However this Court is about 35 Kms from the suit property and therefore Thika Environment & Land Court is not the nearest Environment & Land Court. Mr. Machira further submitted that this suit ought to have been filed in Nairobi. He referred the Court to Section 14 of the **Practice Directions** issued by the Chief Justice on **25th July 2014** vide gazette Notice No. 5178, which states that:-

“All new cases relating to the environment and the use and occupation of and title to Land--- shall be filed in the nearest Environment and Land Court for hearing and determination of the said court”.

It was his submission that because the suit premises is in Nairobi County and not Kiambu County, it ought to have been filed at the appropriate Court. He urged the court to transfer the suit to Milimani Environment & Land Court . Mr. Machira further relied on section 12 of Court Procedure Act.

Mr. Nganga, for the 1st Defendant also submitted that jurisdiction is primary to anything else and if the Court lacks jurisdiction, then it should down its tool. He also relied on **section 14 of the Practice Directions** issued by the **Chief Justice on 25th July 2014** and section 12 of the Civil Procedure Act and submitted that where the suit is over immovable property, it should be filed within the local jurisdiction. Therefore since the suit property herein is in Nairobi and not Kiambu County, it ought to have been filed in the appropriate Environment & Land Court which is Milimani Environment & Land Court. Mr. Nganga further submitted that all the parties herein and their Advocates reside and practice in Nairobi and there would be no prejudice occasioned to the Plaintiff if the suit is transferred to Nairobi.

Mr. Kamau for the 2nd and 4th Defendants/Respondents urged the Court to be guided by overriding objective of Environment & Land Court Act provided for by **Section 3** which states that the Court should ensure that the matters before it are decided in a **just, expeditious, proportionate and accessible** resolution of disputes. He submitted that the proper Court to hear and determine this matter is **Milimani Environment & Land Court**, as having the matter in this court will not achieve the overriding objective of the Environment & Land Court Act. He referred the Court to ELC Case No. 764 of 2013.

Mr. Wahome for the 5th Respondent supported the arguments, advanced by the counsels in support of the Preliminary Objection.

The **Preliminary Objection** was opposed by Plaintiff/applicants and Mr. Ndegwa for the applicant submitted at length on why the **Preliminary Objection** should be dismissed. He submitted that the Preliminary objection as raised did not meet the criteria of what constitute a Preliminary Objection as stated in the case of **Mukisa Biscuit Manufacturing Company Ltd Vs West End Distributors Ltd Civil Appeal No. 9 of 1969(1969 E.A)**.

It was his submissions that the Preliminary Objection raised was not capable of terminating the

proceedings at once. He also submitted that since the Court has been urged to transfer the suit to Nairobi, its jurisdiction has not been challenged. He also relied on the case of “**Motor Vessel Lilian**”, where the court held that jurisdiction is everything and without it, the Court cannot make any other move but rests its tool. It was his contention that in this matter, the court has not been asked to down its tool but just to transfer the suit to Nairobi and therefore the Court’s Jurisdiction has not been challenged. It was his further submissions that what the Court has been asked to deal with are discretionary issues and those are not facts of Law as the issue at hand is dealing with convenience.

Mr. Ndegwa further submitted that the court has inherent jurisdiction to deal with the matter and any gazette Notices that purports to oust or fetter the jurisdiction of the Court should be disregarded. He further submitted that the Preliminary Objection herein does not raise pure points of law which have been pleaded and if argued as Preliminary objection may dispose off the suit. It was further submitted that the findings herein may not terminate the suit but may only transfer it for convenience. He also urged the Court to be guided by Articles 10 and 40 of the Constitution. Further that while interpreting **Section 12 of the Civil Procedure Act**, the Court should be alive to the provisions of **Article 48 of the Constitution** on Access to Justice. To him, this Court was set up by the Chief Justice to assist in expeditious disposal of cases but did not confer territorial jurisdiction. It was also submitted that this Court being a creature of Parliament, is not bound by Section 12 of the Civil Procure Act, but is only bound by the rules, thereon Mr Ndegwa further submitted that there was no reason why geographical jurisdiction should be used to oust the jurisdiction of this court. He urged the court to deal with Substantive justice as provided by **Article 159 of the Constitution** without regard to Procedural technicalities. He further submitted that the Practice Directions by the Chief Justice are subordinate to the Constitution. He therefore urged the Court to dismiss the Preliminary Objection as it has no merit and only deals with an issue of discretion and does not raise pure points of law.

Mr. Kago in opposition to this Preliminary Objection distinguished the authorities that had been cited by the Advocates, in support of the Preliminary Objection. Mr. Mwangi also urged the Court to disallow the Preliminary Objection and submitted that **Environment & Land Act** does not stipulate that this court shall be bound by the Civil Procedure Act. He also submitted that this Practice Directions issued by the Chief Justice in the **year 2009** cannot guide this Court which is a creature of the **New Constitution of 2010**

Mr. Machira reiterated that since Jurisdiction is everything, they could not have raised the other issues of merit since the jurisdiction is challenged. He further reiterated that this Court has no territorial jurisdiction and should transfer the matter to the appropriate Court. To him, the issue of jurisdiction was a pure point of law and not a matter of discretion. He also submitted that access to justice can be achieved in the Court that has jurisdiction. Further that Courts function on the issue of jurisdiction but not convenience.

Mr. Nganga in response submitted that access to justice must be exercised in a reasonable manner and Section 19 of **Environment & Land Act** states that this Court is bound by the provisions of Civil Procedure Act and Rules. Though the Court has original jurisdiction, it should also consider territorial jurisdiction and what they have raised is not a technical matter but very fundamental issues. He urged the Court to uphold the Preliminary Objection and transfer the matter to Milimani Environment & Land Court.

This court has now carefully considered the argument for and against the Preliminary Objection as submitted ably by all the advocates. It is not in doubt that **L.R. No. 12422/319** is situated in **Nairobi County**. I have seen all the relevant documents relating to this parcel of land and the documents refer to **Nairobi County** or **Nairobi City** County. I have also noted in the Court file that **Justice Okongo** observed that he had dealt with another matter involving the parties herein and had even granted orders in favor of the 1st Defendant. That was the reason why he declined to grant any interim orders, in favour of the Plaintiff/applicant. At that juncture, the court should have noted that this is a matter that falls under the territorial jurisdiction of Milimani Environment & Land Court and should have directed that the matter be heard in Milimani ELC and either be heard together with the other matter dealing with the same parties and /or be consolidated.

However, that was not done and this matter was directed to be heard in Thika Environment & Land Court. The Defendants have raised the issue of territorial (Geographical) jurisdiction and have submitted that the appropriate Court to hear and determine this matter is Milimani Environment & Land Court. The Defendants have indeed raised the issue of territorial jurisdiction. The Plaintiff has submitted that what is raised by Defendants is not a Preliminary Objection but any issue requiring discretion of the Court. Whether the issue raised herein is a Preliminary Objection which raises pure points of law or a matter requiring discretion of the Court, it is an issue of jurisdiction and all the parties are in agreement that the issue of jurisdiction is paramount and should be dealt with first by the Court and should be raised at the earliest opportunity. See the case of **Ndimu Vs Ndimu and Another (2007) (EA 269** where the Court held that:

“A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue straight away”.

Further in the case of **Owners and Master of Motor Vessel “Joey” Vs Owners and Masters of the Motor Tugs “Barbara and Steve “B”, CAK (2008) IEA 367**, the Court held that:

“It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there could be no basis for continuation of proceedings pending other evidence. A Court of law downs its tool in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. “It is for that reason that a question of jurisdiction once raised by a party or by Court on its own motion must be decided forthwith on the evidence before the Court”

Since the defendants have raised the issue of jurisdiction at this early stage, it is important that this Court deals with it first. What is not in doubt is the fact that the Defendants are not challenging the original and/or inherent jurisdiction of this Court. The Defendants are challenging the territorial jurisdiction of the Court. The Defendant have submitted that this Court is bound by the provisions, of Section 12 of the Civil Procedure Act which states at 12(a) that:-

“Subject to the pecuniary or other limitations prescribed by any Law suits- for the recovery of immovable property with or without rent or profits; where the property is situate in Kenya shall be instituted in the Court within the local limits whose jurisdiction the property is situate”

However the Plaintiff/applicant have submitted that this Court is only bound by the Civil Procedure Rules and not the other Provisions of the Civil procedure Act.

This Court has however considered the provisions of Section 19(2) of the Environment & Land Act, has noted the same provides that **“the Court shall be bound by the Procedure laid down by the Civil Procedure Act”**.

It is therefore misleading for the applicant to submit that only the Civil Procedure Rules are applicable to this court and not the other Provisions of the Civil Procedure Act.

Given that this Court is bound by the procedures laid down by the Civil Procedure Act, then section 12(a) of Civil Procedure Act applies herein. The suit property herein is situated in Nairobi and it ought to have been filed in the court within the local limits of that property. The Court falling within the local limits thereof is **Milimani Environment & Land Court**.

Indeed all the advocates herein are in agreement that Environment & Land Court is a creature of the new Constitution 2010. In pursuant of the provisions of the Constitution 2010, the Chief Justice formulated Practice Directions on proceedings in the Environment and Land Court. This was done vide gazette Notice No. 5178 on 25th July, 2014. Section 14 of the said Practice Directions states that:

“All new cases relating to the environment and the use and occupation of and title to land--- shall be filed in the nearest ELC for hearing and determination by the said Court”

This court being bound by the said Practice Directions finds that the nearest ELC in relation to this suit *property* is Milimani Environment & Land Court. The plaintiff/applicant has not given reasons, why she chose to file this matter in Thika Environment & Land Court which is about 35 Kilometres from the suit property whereas the suit property is in Nairobi County and there is an ELC in Nairobi (Milimani). Even if we are to look at the convenience of the parties, Milimani ELC would be more convenient to all the parties herein. The Plaintiff also talked about access to Justice. In the circumstances of the case and given that the suit property is situated in Nairobi County and not Kiambu County, then parties would easily access Justice in Nairobi rather than in Thika which is several kilometers further than Milimani Environment & land Court.

The Plaintiff/applicant has not shown any Prejudice that she would suffer if the suit herein is directed to be heard in Nairobi, **Milimani Environment & Land Court** where the suit property is situate as that is the Court which is within the local limits of where the property is situated. Though the Constitution 2010 and the Environment & Land Court Act give the Court the original jurisdiction throughout Kenya over matters falling under the purview of ELC Act, the court finds that in furtherance of the overriding objective as provided by Section 3 of the ELC Act, the appropriate Court to hear and determine this matter is Milimani ELC. The Court is also bound by the Provisions of Section 12(a) of the Civil Procedure Act and therefore the Court within the local limits herein is Milimani ELC.

Further for convenience of all the parties involved and their witnesses, the matter herein should be heard and determined in Milimani Environment & Land Court. In the case of of Jazira Agencies, Nairobi Ltd Versus Dolphine Stationers Ltd Mombasa HCC No. 477 of 1998, The Court held that

“The Court has powers under its inherent jurisdiction to relocate a case from one High court to another and the facts to be taken into account are convenience, expeditious disposal, expense and hardship”

Though in the above case. “The court’ referred to is the High Court, Article 162 (2)(b) of the Constitution created Environment & Land Court with **equal status** as that of the High Court. Given that the Environment & Land Court is also bound by the provisions of the Civil Procedure Act, the Court finds that it has inherent jurisdiction to relocate a case from one Environment & Land Court to another in order to facilitate the overriding objective provided by Section 3 of Environment & Land Court Act and also being guided by section 14 of the Practice Directions issued by the Chief Justice on 25th July, 2014.

Having now carefully considered the argument for and against the Preliminary Objection as advanced by all the advocates, herein, the Court finds that the objection raised by the Defendants is merited and therefore finds that this suit falls under the local limits of Milimani ELC. For the above reasons, the court directs that this suit be transferred forthwith to the nearest ELC for hearing and determination and the nearest ELC within the local limits of the Suit property is Milimani ELC.

Consequently, this suit is forthwith transferred to Milimani ELC for hearing and determination.

It is so ordered.

Dated, Signed and delivered this 2nd March, 2017.

L. GACHERU

JUDGE

2/3/2017

In the Presence of

Mr. Orege, Mr Mwangi, Mr. Kago, Mr. Mburu & Mr. Ndegwa for Plaintiff/Applicant.

Mr. Nganga 1st Defendant/Respondent

Mr. Kamau 2nd & 4th Defendants/Respondents

Mr. Nganga holding brief for Mr. Machira 3rd Defendant/Respondent

Mr. Kamau holding brief for Mr. Wahome 5th Defendant/Respondent

Court: Ruling read in Open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

2/3/2017

Mr. Ndegwa : Can the court directs that the matter be mentioned before the Presiding Judge, Milimani for directions on the hearing.

L. GACHERU

JUDGE

2/3/2017

Mr. Nganga: I concur. The request is reasonable.

L. GACHERU

JUDGE

2/3/2017

Mr. Kamau : I am agreeable to taking a mention date.

L. GACHERU

JUDGE

2/3/2017

Court: Matter be mentioned on 8th March, 2017 before the acting Presiding Judge Environment & Land Court Milimani for further directions.

L. GACHERU

JUDGE

2/3/2017