

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 05/2017

STEPHEN MWANIA MULI.....PLAINTIFF

VERSUS

MAKUENI COUNTY GOVERNMENT.....DEFENDANT

RULING

1. There is before one a notice of motion application expressed to be brought under **section 1A, 13, 3A and 18** of the **Civil Procedure Act** and order **51 rule 1** of the Civil Procedure Rules and all enabling Provisions of the law for orders that **Makueni PMCC no. 60 of 2016** the suit herein be transferred to **Nairobi Environment and Land Court** for hearing and final determination, that the orders issued on **10th March, 2016** in **Makueni PMCC no.60 of 2016** do remain in force pending the hearing and final determination of this application with costs of the application being in the cause.

2. The application is predicated on the grounds on its face and is supported by the affidavit of **Stephen Mwanja Mulu**. The application is opposed by the defendant/Respondent vide his grounds of opposition dated **02/07/2016** and filed in court on **22/07/2016**.

3. On **06/04 /2017** both parties agreed by consent to dispose off the application by way of written submissions which they had already filed prior to the recording of the consent.

4. The counsel for the plaintiff/applicants submitted that this application was necessitated by the case of **Malindi Law Society –VS- the Attorney General and others in Malindi petition No. 3 of 2016** which held that subordinate courts lack jurisdiction to hear and determine matters relating to the environment and land. He went on to submit that by virtue of **section 2** of the Land Registration Act and **section 13** of the Environment and Land Court Act, only the Environment and Land Court has jurisdiction to determine issues raised by this application. He further submitted that by virtue of **section 18** of the Civil Procedure Act, this court has jurisdiction to transfer a suit from or to a subordinate court and cited several authorities in support of his submissions.

5. Further, the Applicant's counsel submitted that the orders issued in **Makueni PMCC no. 60 of 2016** were never extended by the Subordinate Court when the matter came up for interpartes hearing on **12/04/2016** since the court cited **Malindi petition no. 3 of 2016**. The counsel added that as a result of non-extension of the interim orders, the applicant is worried that his property on land parcel **Makueni /Unoa/1416** may be demolished by the Respondent at any time and this would cause the Applicant to suffer irreparable damage since his suit would be rendered nugatory. The counsel urged the court to give effect to the overriding objective in **section 1A (2)** and **1B(2)** of the Civil Procedure Act since nothing should limit the inherent powers by the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. On its part, the Respondent stated that it is opposed to the application just it did like to the suit which was filed in the Principal Magistrate's court. The Respondent counsel submitted that before the matter in **Makueni PMCC 60 of 2016** was stood over generally, it raised a preliminary objection on jurisdiction of the court to try land and environment matters.

He added that the Respondent further raised the issue of competence of the suit given that no statutory notice was ever served upon it by the Applicant as is required by the Government Proceedings Act. The counsel pointed out ruling on these two weighty questions is yet to be determined and in the Respondent's view, the application is an attempt to defeat the due process.

6. The Respondents counsel went on to submit that whereas this court has jurisdiction to transfer a suit from a court subordinate to it, the transfer can only take place if the court from which it is being transferred had jurisdiction to try the case in the first instance. He added that **Makueni PMCC 60 of 2016** was filed in a court that lacked jurisdiction and as a such, there would be no suit to transfer. The counsel cited several authorities in support and urged the court to dismiss the application with costs.

7. I have read the application together with the supporting affidavit. I have also read the grounds of oppositions filed by the Respondent. I have also read a submission that were filed by both parties and my findings as follows;

Firstly, I am in agreement with both advocates that this court has jurisdiction under **section 18** of the Civil Procedure Act to transfer a suit from or to a subordinate court.

Secondly, I am also in agreement with the Respondent's counsel that where a suit is filed in a court that lacks jurisdiction, there may be no suit to transfer.

8. The above being the case, what this court expected to do?

No doubt, **Malindi High Court Petition no. 3 of 2016** suspended various provisions of the law that granted Magistrates courts jurisdiction to hear and determine matters related to environment and land. However, the Court of Appeal in **Civil Application no. 65 of 2016 - The Law Society of Kenya Nairobi Branch VS Malindi Law Society and 6 others** issued an interim order of stay of execution and implementation of the judgment given on **11/11/2016** in **Malindi petition number 3 of 2016** pending the hearing of the application that was filed at the Court of Appeal. To the best of my knowledge, no final determination has been arrived at in the application pending at the Court of Appeal. The application raises matters that are of public interest. The implication of the orders made by the Court of Appeal is that the very provisions that **Malindi petition No. 3 of 2016** sought to suspend are operational. Prudence demands that we await the decision of the Court of Appeal on the issue of whether or not magistrates courts have jurisdiction to hear and determine matters relating to land and environment so as to avoid wasting precious judicial time. I say so notwithstanding the fact that the order of stay granted by the Court of Appeal does not in any way bar this court from entertaining this application. As observed in my ruling, the very provisions of the law that **Malindi petition No. 3 of 2016 sought** to suspend are now operational and is for this reason I hold that the application before me lacks merit. Same is dismissed with costs to the Respondent.

Signed, Dated and Delivered this 26th day of April, 2017

C.G MBOGO

JUDGE