



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO.12 OF 2017

1. JOESPHER AUMA JACOB.....PLAINTIFF/APPLICANT

VERSUS

1. HASSAN BUNU

2. RASHID TULLA

3. ALI SULEIMAN OMAR

4. ABUBAKAR ATHUMAN

5. MOHAMED NASSIR

6. OMAR SALIM

7. FATUMA MOHAMED ABDI.....DEFENDANTS/RESPONDENTS

RULING

1. The application for determination is dated 14th February, 2017. It is brought under the provisions of Sections 1A, 1B, 3A and 18 of the Civil Procedure Act and Section 13 of the Environment and Land Court Act. The applicant is seeking orders to have the suit Mombasa CMCC No.89 of 2013 transferred to the Environment and Land Court at Mombasa for trial and disposition.

2. The grounds upon which the application is based are that:

a) The magistrate's court does not have jurisdiction to deal with the said suit as it relates to title and possession of land.

b) Under Section 13 (1) of the Environment and Land Court Act, this court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) of the Constitution.

c) The learned trial magistrate has issued directions to the effect that he does not have jurisdiction to hear the said suit as it relates to land.

3. The application is supported by the affidavit of Ratemo Enock, counsel for the applicant who depones

that at the time of filing the said suit in January 2013, the Transitional Provisions vide Gazette Notice No.16268 provided that the magistrates courts were to continue to hear and determine all cases relating to environment and the use of and occupation of and title to land (whether pending or new). He further deposed that following the decision reached in **MALINDI HIGH COURT PETITION NO.7 OF 2014, KIBWANA ALI AND OTHERS –VS- SAID HAMISI MOHAMED AND OTHERS**, there has been uncertainty in the trial and dispositions of land cases before the magistrate’s courts. He also deposed that the learned trial magistrate has issued directions to the effect that the matter be transferred to the proper court.

4. The application was supported by the interested parties but was opposed by the Respondents who filed a Replying Affidavit sworn by Omar Salim, the 6th respondent. The 6th Respondent has deposed that the suit having been filed in a court which had no jurisdiction was a nullity ab initio and there was nothing capable of being transferred. It was also deposed that the suit was filed in breach of statute.

5. The parties’ advocates made oral submission in which they mainly reiterated the contents of their respective affidavits.

6. I have considered all the issues raised in the application and the submissions. In Constitutional Petition No.3 of 2016, at the High Court at Malindi, the court held that Section 2 of the Statute Law (miscellaneous Amendment) Act 2015 in relation to the jurisdiction of the subordinate courts in respect of matters relating to environment and use, occupation of and title to land is inconsistent with Article 162 (2) of the Constitution, and therefore null and void. However, the Court of Appeal in Civil Application No.65 of 2016, granted an interim order of stay of execution and implementation of the judgment given in Malindi High Court Petition Case No. 3 of 2016.

7. In my view, the interim order of stay resulted in matters returning to the position they were before the judgment in Petition No. 3 of 2016 was given. It is therefore my understanding that all land cases already filed in the magistrate courts do remain in those courts until the appeal against the Malindi High Court decision is heard and determined.

8. In his application, the applicant has stated that the trial magistrate has issued directions to the effect that the matter be transferred to this court. However, no such directions were shown to me and therefore it is hard to tell whether such directions were issued or not. It is also my view that, even if such directions were given by the magistrate, the same could have no legal basis in view of the orders already given by the Court of Appeal.

9. The applicant has also stated in his application that magistrate’s court does not deal with the suit as it relates to title and possession of land. He even cited section 13 (1) of the Environment and Land Court Act which gives this court original and appellate jurisdiction over such cases in accordance with Article 162 (2) of the Constitution. If the magistrate’s court did not have the pecuniary jurisdiction to hear the matter as admitted, then there is nothing to transfer. I agree with the submissions made by the counsel for the Respondents that if the matter was filed in a court with no jurisdiction, the suit was a nullity ab initio and there was nothing capable of being transferred as the suit itself was a nullity. I am persuaded by the holdings in the authorizes cited, that is **SARAH CHELAGAT SAMOEI –VS- MUSA KIPKERING KOSGEI & ANOTHER (2013) eKLR** and **CHARLES WAINANA NJEHIA –VS- BARCLAYS BANK OF KENYA (2006) eKLR** in which a similar issue was dealt with.

10. For the foregoing reasons, I do reach a finding that this application is without merit. Consequently, I decline to transfer Mombasa CMCC No.89 of 2013 from the magistrate’s court to this court. The application is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Mombasa this 15th day of June 2017

C. YANO

JUDGE