



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

MISC APP NO. 37 OF 2016

ALLY B OMONDI.....PLAINTIFF

VERSUS

JOAB O AWINO a.k.a SAMUEL O. OWINO.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 14th November 2016 brought under Article 162 (2) (b) of the Constitution of Kenya, the Environment and Land Court Act, Section 2 of the Land Laws (Amendment) Act, 2016 and Sections 1A, 1B, 3A and 18 (1) (b) of the Civil Procedure Act. The applicant is seeking an order to have Mombasa SRMCC No.2529 of 2002, Joab Otieno Owino a.k.a Samuel Otieno Owino –vs- Ally B. Omondi transferred to the Environment and Land Court for trial and disposal.
2. The application is made on the grounds on the face of it and supported by the affidavit of Ally B. Omondi, the applicant sworn on 14th November 2016. The applicant deposes that he is the defendant in Mombasa SRMCC No.2529 of 2002 in which he also has a counter-claim. He deposes further that the dispute in that suit relates to ownership and possession of land. He also deposes that the suit in the magistrate's court is part heard where the plaintiff had closed his case and the applicant had even called four witnesses. The applicant deposes that he is seeking advice from his advocate as to whether there is need for him to call his 5th and last witness or close his case and parties file written submissions after which the court proceeds to write judgment. The applicant states that when the suit was filed, the constitution of Kenya, 2010 had not been promulgated and the Environment and Land Court had not been established. The applicant further deposes that any jurisdiction the magistrate's court had on land matters was removed by the provisions of section 2 of the Land Laws (Amendments) Act, 2016.
3. The respondent was served with the application but did not file any response to it, so the application was not opposed.
4. During the hearing of the application, the counsel for the applicant relied on the grounds on the face of the application and the contents of the supporting affidavit and urged the court to allow the application as the same is not opposed.
5. I have carefully considered the pleadings herein and the affidavit filed in support of the application. The only issue for determination is whether the magistrate's court has no jurisdiction to determine Mombasa SRMCC No.2529 of 2002.

6. The case that the applicant seeks to transfer was filed in the magistrate's court in the year 2002. The Constitution of Kenya, 2010 was promulgated on 27th August, 2010. Article 262 of the Constitution provides for the transitional and consequential provisions and section 22 of the sixth schedule provides as follows:

“ All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this constitution or as directed by the Chief Justice or the Registrar of the High Court.”

The Environment and Land Court is established under Article 162 (2) (b) of the Constitution and was set up with the enactment of the Environment and Land Court Act No.19 of 2011 which commenced on 30th August 2011. Section 30 of the Environment and Land Court Act contains transitional provisions as follows:

30 (1) all proceedings relating to the environment or to the use and occupations and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may after the court is established refer part-heard cases, where appropriate, to the court.

7. It is clear from the above transitional provisions both under the constitution and the Environment and Land Act that cases could still continue being heard in those other courts.

As a matter of fact, Section 30 (2) is clear that after the Environment and Land Court is established, the Chief Justice may refer part-heard cases, where appropriate, to the court.

8. Pursuant to the powers conferred to the Chief Justice by Section 24 of the Environment and Land Act, the Chief Justice issued practice directions and paragraph 7 of the practice directions dated 9th November 2012 states as follows: -

“ Magistrates courts shall continue to hear and determine all cases relating to the environment and the use and occupation of and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction”

9. Subsequent amendments to the Land Laws conferred jurisdiction on magistrates courts on matters relating to land but the same were declared unconstitutional by the High Court, in particular in **CONSTITUTIONAL PETITION NO.3 OF 2016 MALINDI LAW SOCIETY –VS- AG & 4 OTHERS**. However, the court of Appeal in Civil Application N.65 of 2016 granted an interim order of stay of execution and implementation of the judgment in the said petition.

10. The proceedings in Mombasa SRMCC No.2529 of 2002 indicate that the last defence witness testified on 6th October 2003. The applicant has indicated that he is contemplating having his case closed at this stage and what would be left is for parties to file written submissions and the court writes judgment.

11. In view of the court of appeal decision referred to above, I find that the magistrate's court still has the jurisdiction to determine the case. Consequently, I decline to transfer Mombasa SRMCC No.2529 of 2002 to this court. It is my finding that this application is without merit and the same is dismissed.

Dated, signed and delivered at Mombasa this 13th day of JUNE 2017.

C. YANO

JUDGE

.....for the applicant

.....for the respondent