



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC MISC. NO. 27 OF 2016

SHABBAN WANDERAAPPLICANT

(ASHIOYA & CO. ADV)

VERSUS

1. THE DIRECTOR GENERAL AGRICULTURE, FISHERIES & FOOD AUTHORITY

2. AGRICULTURE, FISHERIES & FOOD AUTHORITY.....RESPONDENTS

(LUBELLAH & ASS ADV)

R U L I N G

1. The application under consideration is a Notice of Motion dated 22/11/2016 filed here on the same date. It is brought under Order 51 Rules 1, 3, 4, 8, 10(1) of Civil Procedure Rules and Sections 3, 3A, and 63(e) of Civil Procedure Rules.

The Applicant - **SHABBAN WANDERA** – has brought the Application against the Respondents – the **DIRECTOR GENERAL, AGRICULTURE, FISHERIES & FOOD AUTHORITY and AGRICULTURE, FISHERIES & FOOD AUTHORITY** – and is seeking the following orders at this stage:

Prayer 2: That this honourable court do issue an order of transfer of BUSIA CMCC No. 151 of 2016 from the Lower Court for consolidation with BUSIA HC JR ELC No. 11 of 2015 which is materially related to the Lower Court suit.

Prayer 3: That costs of this application be provided for.

2. The ground advanced to support transfer are that the matter involves Land parcels Nos **SOUTH TESO/ANGOROMO/6242** and LR **SOUTH TESTO/ANGOROMO/8343** where the value is above what the Lower Court can handle; that this Court has jurisdiction to handle the matter; that the Lower Court cannot handle the issues raised before it; and that the Respondents would suffer no prejudice if the application is allowed. The supporting affidavit accompanying the application reiterate the grounds.

3. The Respondents opposed the application vide grounds filed on 8/12/2015. It was stated that the application is an abuse of the court process. It is meant, the Respondents averred, to circumvent the Respondents application dated 31/5/2016 which seeks to strike out the suit in the Lower Court. According to the Respondents, if that application is successful, there will be no suit to transfer. The suit

was also said to have been filed in a court without jurisdiction.

4. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 10/5/2017 and the point raised in the application is simple: The decision in **MALINDI LAW SOCIETY vs THE HON: ATTORNEY GENERAL and 5 others: PETITION No. 3 of 2016, MALINDI**, ousted the jurisdiction of the Lower Court and vested it in this Court. According to the applicant, that decision has not been varied and/or set aside.

5. The Respondents filed their submissions on 24/5/2017. According to the Respondents, the decision made at Malindi was stayed by the Court of Appeal vide Civil Application No. 64 of 2016 and Civil Application No. 65 of 2016 between the Law Society of Kenya, Nairobi Branch Vs Malindi Law Society and Others. It was the Respondents position also that the Lower Court had no jurisdiction at all even at the time of filing the suit and that being the position, the decision in **HOTTENSIA WANJIRU vs MESHACK NGOMO (2012) eKLR** is instructive. In that case the court cited with approval the decision in **KAGENYI vs MUSIRAMO and ANOV: [1986] EA 43** for the position that a case filed in a court without jurisdiction is not capable of being transferred to another court.

6. It was also submitted that the Respondents already have an application filed in the Lower Court to strike out the suit for want of jurisdiction. The Court was told to seek guidance from the case of **EQUITY BANK LIMITED vs BRUCE MUTIE MUTUKU T/A DIANI TOUR & TRAVEL; CIVIL APPEAL No. 13 of 2016** where the Court of Appeal faulted the High Court for entertaining an application for transfer and allowing it when a preliminary objection seeking to strike out the suit was pending in the Lower court. The Court of Appeal opined that the High Court should have referred the parties to the Lower court for hearing and determination of the preliminary objection.

7. Lastly, the Respondents wondered whether there can be consolidation of a Judicial Review matter with an ordinary suit. This was raised because the suit in the Lower Court is an ordinary civil case while what is before this Court is a Judicial Review matter. The transfer is sought to consolidate the two here. The Respondents observed that the Judicial Review herein is a suit *Sui generis* while the Lower Court matter is an ordinary suit. The two, the Respondents observed, cannot be consolidated.

8. I have considered the application, the response made, and submissions from both Learned Counsel. The truth is as stated by the Respondents. The Malindi case was stayed as stated. It was therefore wrong for the Applicant to seek reliance on it. As long as the stay is in force, that decision cannot be used.

9. It is also true that when an application to strike out the suit is pending in the Lower Court, the applicant cannot run away from that by trying to transfer the suit to this Court. He needs to address that application in the Lower Court and that is so because that application has the potential to end the suit given that the issue raised is one of jurisdiction. Equity Bank case (Supra) is an apt authority for this position.

10. More significantly however is the reason why the transfer is sought. The Applicant is seeking to consolidate an ordinary Civil Suit with a Judicial Review. That is like trying to mix water and oil. It is simply not possible. A Judicial Review matter is neither Civil nor Criminal. As pointed out by the Respondents, it is jurisdiction *Sui generis*. The other suit is an ordinary one and is governed by Civil Procedure Act and Rules. If the applicant had bothered to consider the two well, he would have realized that the two have different procedural approaches. The manner of hearing them is different and the applicable law is miles apart.

11. I have avoided to comment on the issue of whether transfer is possible concerning a suit file in a court said to have no jurisdiction because the application in the Lower Court could be one that will delve into precisely such an issue.

12. Overall however, the general thrust of the Respondents submission articulates the law in eloquent prose and this Court is in general agreement with the position taken. The application herein is therefore found unmeritorious and is hereby dismissed with costs.

Dated this 13th day of July, 2017

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

Respondent: