



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

MISCELLANEOUS APPLICATION No. 527 OF 2015

IN THE MATTER OF NAKURU CMCC No. 712A OF 2008

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT

**JOINTLY READ TOGETHER WITH SECTION 18 OF THE CIVIL PROCEDURE ACT CAP 21
LAWS OF KENYA**

**HELLENA CHESEREM (suing as the wife and personal
representative of the estate of AUGUSTINE KIPTOO**

CHESEREM (DECEASED).....APPLICANT

VERSUS

JOEL K. TOROITICH.....1ST RESPONDENT

DENNIS KAMUREN.....2ND RESPONDENT

DISCTRICT SURVEYOR, NAKURU.....3RD RESPONDENT

LAND REGISTRAR, NAKURU.....4TH RESPONDENT

RULING

1. This ruling is in respect of applicant’s Notice of Motion dated 27th October 2015. The application seeks the following orders:

1. Spent

2. THAT this court be pleased to issue an order transferring NAKURU CMCC NO. 712A OF 2008 (HELLENA CHESEREM VS JOEL K. TOROITICH OTHERS) [sic] from the Chief Magistrate’s Court to this honourable court (The Environment and Land Court of Kenya at Nakuru)

3. THAT costs of this application be provided for.

2. The application is supported by the affidavit of the applicant. She deposes that she filed the suit sought to be transferred on 8th August 2008 seeking a declaration that the suit property named in the said suit belongs to the estate of Augustine Kiptoo Cheserem (Deceased) and an injunction to restrain the 1st and

2nd respondents from interfering with the suit property. That subsequently on 10th November 2010, she filed an amended plaint pursuant to which the 3rd and 4th respondents herein were joined to the suit as defendants and also sought an additional order directing the 3rd and 4th respondents to amend their records in respect of KAMPI YA MOTO/KAMPI YA MOTO BLOCK 1(MOROP) to be in consistence with the plaintiff's occupation of KAMPI YA MOTO/KAMPI YA MOTO BLOCK 1/94. She further deposes that though the subordinate court had jurisdiction as at 8th August 2008 when the suit was filed, the prayer for amendment of the map ousted the jurisdiction of the court.

3. The application is opposed by the 1st and 2nd respondents through the replying affidavit of Joel K. Toroitichsworn and filed on 26th April 2016. The 1st and 2nd respondents contend that the applicant has not come to court with clean hands and that the subordinate court did not have jurisdiction.

4. Parties agreed to dispose of the application by way of written submissions. The applicant filed her submissions on 20th March 2017 while the 1st and 2nd respondents filed theirs on 7th July 2017.

5. It has been argued on behalf of the applicant that following amendment of the plaint and the introduction of the prayer for amendment of the map on 10th November 2010, the jurisdiction of the subordinate court was ousted. In support of this contention, the applicant cited the provisions of Article 162(2)(b) of the constitution and section 13 of the Environment and Land Court Act, 2011.

6. On his part counsel for the 1st and 2nd respondents argued that this court lacks jurisdiction to transfer the suit to itself since the suit was in the first place filed in a court without jurisdiction. Further, that having been filed in the subordinate court prior to the establishment of this court, the case should be determined in the subordinate court.

7. I have considered the application, the submissions and authorities cited by both sides. The suit concerns the parcels of land known as KAMPI YA MOTO/KAMPI YA MOTO BLOCK 1(MOROP) and KAMPI YA MOTO/KAMPI YA MOTO BLOCK 1/94. Issues of ownership, use and occupation of the said parcels are raised in the suit.

8. The suit was filed on 8th August 2008 prior to the promulgation of the Constitution of Kenya 2010 and the enactment of the Environment and Land Court Act, 2011. This court was established pursuant to the provisions of Article 162(2) (b) of the constitution and section 4 of the Environment and Land Court Act, 2011. Pursuant to section 13 (1) of the said Act, the court has jurisdiction to determine all disputes concerning the environment and use, occupation of and title to land. Though the Act came into operation on 30th August, 2011 it was not until 3rd October 2012 when the pioneer judges of the court were appointed and gazetted. The court commenced operations on 5th November 2012 when the pioneer judges were sworn into office and posted to various stations across the country.

9. To ensure seamless progress of matters that were pending in court as at the effective date of the Constitution of Kenya 2010, section 22 of the Sixth Schedule of the constitution 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.

10. Similarly, section 30(1) of the Environment and Land Court Act, 2011 provides:

All proceedings relating to the environment or to the use and occupation 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.

11. Pursuant to the provisions of section 30(1) of the Environment and Land Court Act, 2011 the Chief

Justice issued Practice Directions vide Gazette Notice No. 5178 of 2014. Paragraph 6 of the said Practice directions is in the following terms:

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. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts.

The Practice directions remain in force.

12. It is manifest that both the filing of the suit and the amendment of 10th November 2010 were done in the subordinate court before this court was operationalized. It has not been shown how the amendment pushed the matter beyond the jurisdiction of the Chief Magistrate's Court. Other than the supposed ouster of jurisdiction by virtue of the amendment, no other reason has been advanced in support of the application for transfer of the suit.

13. Since the matter was pending before the Chief Magistrate's Court as at the effective date of the Constitution of Kenya 2010 and as at the date this court commenced operations, the above quoted provisions apply fully. The Chief Magistrate's Court should continue hearing the matter to conclusion. Though I have discretion to order transfer of the matter to this court, I see no reason to do so in a situation where the matter can be competently dealt with by the Chief Magistrate's Court. Good sense and prudent management of judicial resources dictate that the matter ought to be heard and determined by the Chief Magistrate's Court.

14. In the end, Notice of Motion dated 27th October 2015 is dismissed. Each party to bear own costs. Parties to expeditiously prosecute NAKURU CMCC NO. 712A OF 2008 (HELLENA CHESEREM VS JOEL K. TOROITICH & OTHERS) before the Chief Magistrate's Court at Nakuru.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Kinuthia holding brief for Mr. Karanja for the applicant

Mr. Otieno holding brief for Mr. Wambeyi for the respondents

Court Assistant: Gichaba