



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 226 OF 2015

FAIZA ABDALLAH SALID AL ARMY.....1ST PLAINTIFF

WARDA A. SAID AL-ARMY.....2ND PLAINTIFF

-VERSUS-

MOSES MBUGUA MEHTADEFENDANT

RULING

1. The application for hearing is the one dated 22nd December 2016 brought under the provisions of section 1A, 1B, 3A and 17 of the Civil Procedure Act. The defendant/applicant sought for orders:

- 1. That this case herein be consolidated with ELC NO. 5 of 2014 Environment and Land Court in the High Court of Kenya at Nairobi.**
- 2. That ELC NO. 5 of 2014 in the High Court of Kenya at Nairobi be transferred to Mombasa for the purpose of consolidation with case ELC NO. 226 of 2015 in Mombasa.**
- 3. That the costs of this application be cost in the cause.**

2. The application is premised on the grounds inter alia that the subject matter land reference No 144/4 (original 11179/7) Section /MN Shanzu is within the jurisdiction of this Court. Secondly that the plaintiffs are residents of Mombasa and that the defendant in ELC No 5 of 2014 has registered offices in Mombasa. The application is also supported by the affidavit sworn by Njoroge Wachira advocate. He reiterated the facts contained in the grounds and added that to avoid the risk of two Courts of equal jurisdiction making conflicting decisions, it is absolutely necessary for the two suits to be consolidated. He annexed the pleadings in ELC No 5 of 2015 to prove the state of facts. The applicant urged the Court to grant the orders sought.

3. The application is opposed by the plaintiffs vide the grounds of opposition filed in Court on 12th September 2017. The grounds state inter alia that the plaintiffs are strangers to case Nairobi ELC No 5 of 2014. Secondly that this Court lacks jurisdiction to order the transfer of LEC No 5 of 2014 from Nairobi. Lastly that the consolidation will delay and defeat the fair & just expeditious trial of this suit.

4. The application is also opposed by the defendants in ELC No 5 of 2014 via a replying affidavit sworn by her legal manager Mr Tom Okoth Ogola dated 12.9.2017. He deposed that even though the subject matter is the same, the prayers sought are not similar between the two suits. That KCB Bank Kenya Ltd is not a party to the current proceedings and it has no interest in the subject matter having exercised its statutory power of sale. That the applicant never amended his plaint in Nairobi ELC No 5 of 2014 therefore what is annexed as “NW – 1” is a non – existent pleading but is a draft. Further that annexure “NW– 3” was withdrawn on 24.6.2015 therefore the initial orders given and marked as “NW – 4” are no longer part of the pleadings in ELC No 5 of 2014. This Respondent also deposed that they have moved the Court to dismiss the suit No 5 of 2014 for want of prosecution which application should be heard first. He urged the Court to dismiss this application because it is baseless and lacks substantive grounds.

5. The parties argued the application before me orally on 25th September 2017. Mr Wachira submitted that it is the process of sale of the suit property that is in dispute. Mr Asige on his part submitted that a draft plaint cannot form a basis to transfer a suit from Nairobi to Mombasa. That this application is based on fear which fears can be sorted out in the counter – claim filed by the applicant. That this Court cannot order transfer of Nairobi ELC No 5 of 2014 to this Court. Mr Njeru for KCB added that the only Court seized with jurisdiction to transfer Nairobi ELC No 5 of 2014 is the Court seized of that matter. That this application is meant to short circuit their application seeking to dismiss ELC No 5 of 2014 fixed for hearing on 30.11.2017. He urged the Court to dismiss the present application.

6. I have perused the plaint in this suit and note that the plaintiffs/Respondents are seeking for vacant possession of the suit property. From the plaintiffs list of documents, annexed at No 4 is a certificate of sale from a public auction dated 20th December 2012 issued by Watts Auctions. The applicant has conceded that the suit Nairobi ELC No 5 of 2014 is challenging the process of sale therefore admitting some sale took place. The applicant annexed both the original plaint dated 7th January 2014 and the draft amended plaint in his affidavit in support of the motion. It is pointed out by the Respondents that the amendment is yet to be done therefore the Court will go with the contents of the original plaint and not what is contained in the draft amended plaint.

7. In that plaint, the applicant herein sued KCB & Savings & Loan Ltd. He sought for: *(1) An order of injunction restraining the defendants from transferring, taking over and seizing possession of the suit property and or transferring the title to 3rd parties. (2) An order to declare the sale of the suit property on 20th December 2013 unlawful and illegal and the sale be set aside.* In the suit before Court, the defendant/applicant has filed a defence and a counter – claim to the Respondents’ claim. I have considered the issues raised by the pleadings and do make a finding of fact that the subject matter is the same. I also do make an opinion agreeing with the applicant’s contention that the issue in dispute is the same because the plaintiffs herein are seeking for vacant possession of the suit premises on account of interest acquired pursuant to an auction conducted by the defendants in Nairobi ELC No 5 of 2014.

8. However I do not think the two suits can be consolidated for the reason that the decisions to be reached by the two Courts cannot be in conflict given that one seeks an order to declare the sale as illegal while the other is for suit eviction. The proper procedure the applicant ought to have done was to apply to stay this suit pending the determination of Nairobi ELC No 5 of 2014 as its outcome would have a bearing on this case. Without alluding to the merits of Nairobi ELC No 5 of 2014, the Plaintiffs/Respondents herein already acquired a title in their names. Until that sale is set aside, the prayer for eviction can only be made in a separate suit. Consolidating the two will only complicate their hearing and their determination.

9. The applicant also asked that this Court do transfer Nairobi ELC No 5 of 2014 to this Court for hearing and determination. First he is the one who filed the suit in Nairobi. In paragraph 2 of that plaint, he described the defendants as having their headquarters in Nairobi and in paragraph 3 he stated thus **“At all material times the plaintiff was a customer of the defendant bank having transacted business within the City of Nairobi.”** This implies that the applicant admitted that the cause of action arose in Nairobi. Alternatively it is because the defendants have it’s headquarter in Nairobi hence the suit filed in Nairobi where the defendant resides as per the provision of section 12 of the Civil Procedure Act. Further as pointed by the Respondents that the order of transfer can only be made by the Judge seized of the matter. It behoves logic for me to make an order of transfer in a separate file. Lastly without prejudice consolidation would have been given consideration if both files were all held in one registry. The applicant did not ask me to transfer this file to Nairobi ELC registry. I shall therefore not grant what is not prayed for.

10. Consequently, for the reasons given herein above, I find no merit in this application and proceed to dismiss it with costs to the Respondents.

Dated, signed & delivered at Mombasa this 31st day of October 2017

A. OMOLLO

JUDGE