



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
E.L.C MISC. APPLICATION NO. 11 OF 2017

PATRICK MUNENE KIMANI & OTHERS.....PLAINTIFFS

VERSUS

KIRINYAGA COUNTY COUNCIL.....1ST DEFENDANT

MAGONDU MATU.....2ND DEFENDANT

KENYA COMMERCIAL BANK.....3RD DEFENDANT

RULING

Notwithstanding the establishment of the *Environment and Land Court in 2011* with the enactment of the *Environment and Land Court Act*, my view has always been that the establishment of that Court did not take away the jurisdiction of magistrates to hear and determine land cases which fall within their pecuniary jurisdiction. Other Judges also share the same view. See, for example, **LENAOLA J.** (as he then was) in **EDWARD GATURU & ANOTHER VS ATTORNEY GENERAL & OTHERS CONSTITUTIONAL PETITION No. 72 of 2013 (NBI) (2013 e K.L.R)**. An attempt to amend the law and confer jurisdiction on magistrates to hear and determine matters relating to the use, occupation and title to land through *Statute Law Miscellaneous Amendment Act 2015* was declared as un-Constitutional and therefore null and void by the High Court in **MALINDI LAW SOCIETY VS ATTORNEY GENERAL & OTHERS CONSTITUTIONAL PETITION No. 3 of 2016 (MALINDI) (2016 e K.L.R)**. Judgment in that Constitutional Petition was delivered on 11th November 2016 but the Court of Appeal stayed those orders on 13th December 2016 in **C.A CIVIL APPEAL APPLICATION No. 65 of 2016** and judgment is still pending to be delivered on notice. My view therefore is that pending the judgment of the Court of Appeal, the position obtaining ante 11th November 2016 remains the law meaning that magistrates can hear and determine disputes relating to occupation and title to land so long as the subject matter does not exceed their pecuniary jurisdiction as was introduced by **Section 26 (3) of the Environment and Land Court Act** which had been declared un-Constitutional and therefore null and void.

It is within the context of the above state of affairs that I should consider the application before me which seeks the transfer of **KERUGOYA PRINCIPAL MAGISTRATE'S CIVIL CASE No. 264 of 1994** to this Court. The basis upon which that application filed by the plaintiff herein is premised is that the value of the suit land exceeds Ksh. 7,000,000 and should therefore be heard in this Court.

Only the 2nd defendant has filed grounds of opposition to the application describing it as incompetent, bad in law and an abuse of the Court process. Counsel for the plaintiff and 2nd defendant agreed that the

application be determined on the basis of the pleadings herein.

In the course of this application, it became clear that infact the subordinate Court had already on its own motion transferred the case file to this Court as per a letter dated 26th June 2016. Indeed it is clear from the face of the application that this application is only meant for purposes of formalizing that “**transfer**”.

It is of course trite law that a subordinate Court cannot make such order of transfer of a case to this Court. I am however aware that following the establishment of this Court, there was a lot of confusion in the handling of land cases with magistrates even taking it upon themselves to transfer such cases to this Court contrary to the law. This state of confusion necessitated the issuance of several administrative directions by the Chief Justice with respect to the handling of land cases. The case sought to be transferred to this Court was filed in 1994 some twenty three (23) years ago. It is not clear why that suit is still pending but that is not surprising given the nature of land disputes. Although I am informed that the subordinate Court file was transmitted to this Court, I have not been told if it was registered in this Court and if so, which new number was allocated to it. The decision in ***Court of Appeal Civil Appeal No. 65 of 2016*** is of course still pending and it is not clear when it will be delivered. I do not have the benefit of the pleadings in **KERUGOYA PRINCIPAL MAGISTRATE’S CIVIL CASE No. 264 of 1994** except the bare statement that it is a land dispute. Counsel for the plaintiff could surely have done better. Nonetheless, the plaintiff came to Court seeking justice and is entitled to an expeditious disposal of the dispute as mandated by ***Article 159 (2) (b) of the Constitution***. One of the overriding objectives of this Court set out under both ***Sections 3 (1) of the Environment and Land Court Act 2011*** and ***Section 1B of the Civil Procedure Act*** is the just and expeditious disposal of cases. In spite of the many lapses in this application coupled with the not so elegant pleadings, I take the view that substantive justice will be done in this very old dispute if I allowed it to be transferred to this Court for determination as we await the Court of Appeal’s judgment regarding the jurisdiction of subordinate Courts to handle land disputes. Rejecting this application when I am informed that the subordinate Court’s case file is infact already in this Court’s registry, albeit un-procedurally, will amount to playing a game of ping-pong with the parties and further delaying this dispute. No prejudice that I am aware of will be caused to the defendants and the interests of justice will be served in granting the orders sought.

I am of course aware about the decision in the Ugandan High Court Case of ***KAGENYI VS MUSIRAMO & ANOTHER 1968 E.A 43*** to the effect that an order for the transfer of a case cannot be made unless the case was in the first instance filed in a Court with jurisdiction to hear it. That case was decided in 1967 and with the promulgation of our new Constitution in 2010 which eschews “**procedural technicalities**” in the administration of justice, it is doubtful if it is still good law. Perhaps the time has come to depart from it notwithstanding that it has been adopted by superior Courts in this country.

Ultimately therefore, the plaintiff’s Notice of Motion dated 3rd April 2017 is hereby allowed in the following terms:

- 1. KERUGOYA PRINCIPAL MAGISTRATE’S CIVIL CASE No. 264 of 1994 be and is hereby transferred to this Court for hearing and determination.***
- 2. The file be placed before this Court on 16th October 2017 for directions.***
- 3. No order as to costs.***

B.N. OLAO

JUDGE

6TH OCTOBER, 2017

Ruling delivered, dated and signed in open Court this 6th day of October 2017 at Kerugoya

Ms Waweru for Ms Munene for 2nd Defendant present

Mr. Munene for Mr. Kariithi for Plaintiffs present.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017