



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISCELLANEOUS APPLICATION NO. 26 OF 2016

IN THE MATTER OF LAND PARCEL NO. KERICHO/KIPCHIMCHIM/163

AND

**IN THE MATTER OF SECTION 3, 3A, 18 AND 63 (e) OF THE CIVIL PROCEDURE ACT CAP
21 OF THE LAWS OF KENYA**

JULIUS K KIRUI.....PLAINTIFF/RESPONDENT

VERSUS

VERONICA CHELANGAT KIBANGA.....DEFENDANT/APPLICANT

RULING

Introduction

1. What is before me is an application brought by way of Notice of Motion pursuant to Order 20 Rule 2, Order 45 Rule 2, Order 51 Rule 1 and section 3A of the Civil Procedure Act Cap 21 of the laws of Kenya. The application seeks an order for review and/or setting aside of the order issued by my predecessor, Justice Sila Munyao on the 3rd day of November 2016.

2. The application is premised on the grounds set out on the face of the Notice of Motion as well as the applicant's supporting affidavit sworn on the 23rd March 2016. The ground upon which the application is based is that the plaintiff's application dated 6th June 2016 was heard and determined on 23rd November 2016 in the defendant's absence yet the matter was listed for mention.

Applicant's Case

3. In her supporting affidavit the applicant depones that the respondent filed an application dated 16th June 2016 seeking orders that KERICHO CMCC No. 20 of 2016 be transferred to the High Court (Environment and Land Court Division) for hearing and determination. Upon being served with the application, the applicant filed a Replying Affidavit dated 26th September 2016 opposing the said application as she had objected to the suit being heard in the lower court and prayed that it be dismissed for lack of jurisdiction.

4. She averred that on 23rd November 2016 the matter was slated for mention to confirm the position of Malindi High Court Petition No. 3 of 2016 filed by the Malindi Law Society touching on the jurisdiction of the magistrates' courts to hear and determine Land and Environment cases. She avers further that instead of fixing a hearing date for the application for transfer of the suit from the Magistrate's court, the

court proceeded to make an order transferring CMCC no 20 of 2016 to the Kericho ELC.

Respondent's Case

5. The application is opposed by the Respondent through his Replying Affidavit sworn on the 16th may 2017. In the said affidavit he depones that Justice Sila Munyao followed the right procedure in making the order for transfer of the suit from the lower court based on the pleadings on record and the law and the same should remain in force.

6. The parties opted to rely on the affidavit evidence on record without filing any submissions.

7. The main issue for determination is whether the court ought to have heard and determined the application on a date set for mention.

8. I have looked at the proceedings of 23rd November 2016. On the said date, Ms Chelimo who was appearing for the applicant informed the court that matter was coming up for mention to confirm the outcome of the Malindi Petition. She then requested that the court gives a date for the hearing of the application. Ms. Maritim who was holding for Mr. Koko then informed the court that they had no objection to the transfer as the Malindi Petition had been decided. Thereafter the court proceeded to make the orders for transfer of the suit filed in the lower court to the ELC.

9. I have established from the court record that indeed the matter was not listed for hearing on the 23rd November 2017. The mistake arose when Ms. Maritim who was holding brief for Mr. Koko informed the court that she did not object to the transfer thus prompting the court to dispose of the matter immediately rather than fix a hearing date for the application. What I now gather from the applicant's affidavit is that Ms. Maritim may have exceeded her instructions thereby causing an erroneous order to be issued by the court. In the case of **Evans V Esso Kenya limited Civil Appeal No 13 of 1995** Court of Appeal held that where a matter is fixed for mention, the court ought not to determine the substantive issues unless the parties agree.

10. From the previous proceedings, it is clear to me that the applicant had every intention of defending the application on the grounds that a suit filed in a court without jurisdiction could not be transferred to a court of competent jurisdiction. I am however aware that the legal position has since shifted. In the case of **The Law Society of Kenya Nairobi Branch V Malindi Law Society & 6 Others (2017) eKLR** the Court of Appeal held that Parliament may confer jurisdiction on Magistrates courts to hear and determine cases relating to Land and Environment. In the circumstances, the applicant's line of argument is no longer valid as the current jurisprudence is that magistrates' courts have jurisdiction to hear and determine disputes relating to land and environment.

Conclusion

11. Accordingly, I invoke the powers conferred on me by section 3A of the Civil Procedure Act and hold that it would not serve the ends of justice to review the orders made by my predecessor. I therefore decline to grant the orders sought. Each party shall bear its own costs.

Dated, signed and delivered this 8th day of December 2017

J.M ONYANGO

JUDGE

In the presence of:-

Miss Chelimo for the Respondent

Mr Motanya for Koko for the Applicant

Court assistant:Rotich