



**Kipkulei v Kisisem & 6 others (Miscellaneous Application
361 of 2015) [2016] KEELC 1315 (KLR) (18 October 2016) (Ruling)**

Peter Yegon Kipkulei v Sarah Teriki Kisisem & 6 others [2016] eKLR

Neutral citation: [2016] KEELC 1315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
MISCELLANEOUS APPLICATION 361 OF 2015**

M SILA, J

OCTOBER 18, 2016

BETWEEN

PETER YEGON KIPKULEI PLAINTIFF

AND

**SARAH TERIKI KISISEM & 6 OTHERS & 6 OTHERS & 6
OTHERS DEFENDANT**

(Application seeking to transfer a suit filed in the Magistrates Court to the Environment and Land Court; Case filed in 2011 before the coming into force of the Land Registration Act and Land Act; Magistrate then had jurisdiction in line with Section 159 of the Registered Land Act; the said jurisdiction remains unaffected; it is the cases filed in Magistrates Court after the coming into force of the Land Registration Act and Land Act which ought to be affected; directions on hearing of land cases ought, by dint of Section 22 of the 6th Schedule and Section 30 of the Environment and Land Court Act, only to have been confined to pending cases and not fresh cases where jurisdiction is prescribed by statute; in this instance the case was filed before the Land Registration Act and Land Act; jurisdiction unaffected; application dismissed; Magistrate directed to proceed to hear and determine the case)

RULING

1. This is a motion seeking the transfer of the Civil Case No. 64 of 2011 pending before the Eldama Ravine Senior Principal Magistrates' Court to the Environment and Land Court in Nakuru. The reason given for the application is that the Magistrate's Court lacks jurisdiction to deal with the matter. The applicant is the 1st defendant in the suit sought to be transferred and has filed this application on behalf of all the 7 defendants in the said case. Nothing has been filed by the plaintiff in the said case to either support or oppose this motion and his counsel did not appear at the hearing of this motion.



2. I have seen the plaint in Eldama Ravine SPMCC No. 64 of 2011. It is pleaded that the plaintiff on 27 June 2005, purchased one acre of land to be excised from the land parcel Baringo/Perkerra 101/210 which belongs to one Kipsigen Aengwo, the husband of the 1st defendant and father of the 2nd to 7th defendants. It is further pleaded that consent to transfer was given. It is averred that the defendants therefore have no lawful cause to prevent the plaintiff from gaining entry in the said plot. In the suit, the plaintiff sought orders of injunction to restrain the defendants from the said portion of one acre. The defendants filed a defence and counterclaim. They claimed that any sale to the plaintiff was fraudulent and that no survey of the land has ever been done. They asked for a declaration that the suit property is family land.
3. It is apparent to me that the suit property is registered under the Registered Land Act (Cap 300) (now repealed by the Land Registration Act, 2012). When the case was filed the Registered Land Act was still in force, its repeal having come on 2 May 2012 when the Land Registration Act, 2012, came into force. Section 159 of the Registered Land Act, provided for the forum where disputes touching on land registered under the regime of the Registered Land Act, ought to be heard. It was drawn as follows :-
 159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.
4. The pending dispute is not one that could be heard before the Land Disputes Tribunal, and the Magistrate's Court would have had jurisdiction, so long as the subject matter of the case did not exceed twenty five thousand pounds (the equivalent of Kshs. 500,000/=). It has not been suggested in this application that the subject matter of the suit exceeded this sum and therefore I have not been shown anything to demonstrate that when the case was filed, the Magistrates Court could not have had jurisdiction to hear the matter.
5. I am at a loss as to why the applicant wants the case transferred to the Environment and Land Court since when the case was filed, the Magistrate had jurisdiction to hear the case.
6. The Environment and Land Court was mooted in the Constitution of Kenya, 2010 which was promulgated on 27 August 2010. Article 162 (2) (b) of the Constitution, mandated Parliament to establish a superior court to hear disputes related to land and the environment. Pursuant to this, the Environment and Land Act, 2011 was passed, which statute created the Environment and Land Court (ELC). That Act provided for what should happen to matters that were pending before courts through the transitional provision at Section 30 which is drawn as follows :-
 30. Transitional provisions
 - (1) 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.
 - (2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.



7. It will be discerned that pending matters, before a court of competent jurisdiction, are to continue to be heard by the same courts until the ELC is established or as may be directed by the Chief Justice or the Chief Registrar. In other words, the statute gave power to the Chief Justice or Chief Registrar to give directions on the hearing of cases that were pending before courts of competent jurisdiction, before and after the establishment of the ELC.
8. The above provisions echo what is prescribed in Section 22 of Schedule 6 of *the Constitution* which deals with Transitional and Consequential Provisions on judicial proceedings. It provides as follows :-
22. 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.
9. The Chief Justice has through the powers donated by Section 30 of the *Environment and Land Court Act* and section 22 of the 6th schedule of *the constitution* issued Practice Directions, the latest being the Practice Directions of 28 July 2014, wherein it is directed that matters pending before Magistrates Courts should proceed in that court. The direction is as follows :-
- 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.
10. I am not convinced about the directions on new matters, given that the Chief Justice was only empowered to give directions on pending matters, by Section 22 of the 6th Schedule and Section 30 of the *Environment and Land Court Act*, but I do not think that there can be any contention about the directions relating to pending matters. In my view, it was improper for the directions to be issued on new matters since the jurisdiction on new matters is provided for in the statutes. It cannot be argued that directions can override statutory provisions for the same are inferior to statute.
11. Since the case at hand was pending before the Environment and Land Court came into operation in October 2012, the jurisdiction of the Magistrate's Court is unaffected, so long as the Magistrate's Court had jurisdiction when the matter was filed in accordance with Section 159 of the Registered *Land Act*, which was still operative at the time. There is no law which has taken away this jurisdiction and indeed that jurisdiction is preserved, as I have explained, by Section 22 of the 6th Schedule of *the Constitution* and Section 30 of the Environment and *Land Act*, 2011 and the directions of the Chief Justice on pending land matters.
12. It is correct to state that the jurisdiction of Magistrates after the enactment of the *Land Registration Act*, 2012, which repealed the Registered *Land Act*, was affected, but this can only be for matters filed after the *Land Registration Act*, 2012 came into operation and not before. The *Land Registration Act* and the *Land Act*, 2012 provided that the court with jurisdiction to hear matters falling within those two statutes is the Environment and Land Court. This was provided in Sections 101 of the *Land Registration Act* and Section 150 of the *Land Act* which were drawn as follows (before amendment in 2015 by the Statute Law Miscellaneous Amendment Act, 2015) :-
- Section 101, *Land Registration Act, Act No. 3 of 2012*, Jurisdiction of court.
- The Environment and Land Court established by the *Environment and Land Court Act*, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.
- Section 150, *Land Act, Act No. 6 of 2012*, Jurisdiction of Environment and Land Court.



The Environment and Land Court established in the *Environment and Land Court Act* is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

13. These two new statutes came into force on 2 May 2012 and it is on that date that the Registered *Land Act*, was repealed, by Section 109 of the *Land Registration Act*. It is on this date that Magistrates ceased to have jurisdiction on land matters which hitherto, they had been granted by Section 159 of the Registered *Land Act*. But the *Land Act*, and *Land Registration Act*, never took away jurisdiction of the Magistrates Court retrospectively, meaning that the matters pending before the Magistrates Court, where the Magistrates Court had jurisdiction, before the two statutes were enacted, remained unaffected. They remained unaffected because of the provisions of Section 22 of the 6th Schedule to *the Constitution* and Section 30 of the Environment and *Land Act* which I have expounded. After the *Land Act* and *Land Registration Act* came into force, fresh matters relating to land ought to have been filed in the Environment and Land Court and not Magistrate's Court or indeed any other court, given the provisions of Section 101 of the *Land Registration Act*, and Section 150 of the *Land Act* which I have already outlined above.
14. I am aware that Sections 150 of the *Land Registration Act*, and Section 101 of the *Land Act*, and Section 30 of the Environment and *Land Act* were repealed and/or amended by the Statute Law Miscellaneous Amendment Act of 2015 and the new Magistrates Court Act, 2015. The jurisdiction of Magistrates, taken away by the original *Land Registration Act* and *Land Act*, is sought to be returned. These amendments, which aim to give Magistrates jurisdiction, have been challenged in Malindi High Court Petition No. 3 of 2016 and an order issued staying the said amendments. Given the order of stay, the situation then is taken back to what it was before the enactment of the amendments, meaning that the original provisions of the *Land Act* and *Land Registration Act*, which provided for land matters to be filed exclusively before the Environment and Land Court, continue being in operation. A final decision will of course determine whether *the Constitution* allows for Magistrates to hear new land matters.
15. But I need to repeat that the matters filed before the coming into force of the *Land Act* and *Land Registration Act*, are completely unaffected by the provisions in these two statutes which prescribed that land matters be filed before the Environment and Land Court. Those old cases filed before the *Land Act* and *Land Registration Act* came to force, also remain unaffected by the amendments in the Magistrates Court Act, 2015 and Statute Law, Miscellaneous Amendment Act, 2015, and the stay order issued in Malindi High Court Petition No. 3 of 2016. They are instead covered by the transitional provisions in Section 22 of the 6th Schedule and Section 30 of the *Environment and Land Court Act*, and the directions, properly so given by the Chief Justice, as he was empowered so to do in relation to pending matters only, is that the said cases pending before Magistrates Courts continue to be heard where filed, so long as the Magistrates court had jurisdiction in the first place.
16. There should therefore be no confusion. Magistrates should continue hearing land cases filed prior to the coming into force of the *Land Act* and *Land Registration Act*, so long as they had jurisdiction when the said cases were filed.
17. To be clear, I summarize the law as I understand it, to be as follows :-
 - (i) For land matters pending before the Magistrates Courts prior to enactment of the *Land Act* and *Land Registration Act*, these are to proceed to be heard before these courts, so long as the subject matter was within that prescribed in Section 159 of the Registered *Land Act*, or where other statutes gave Magistrates jurisdiction, then in line with the provisions of those statutes.



- (ii) After the enactment of the *Land Registration Act* and the *Land Act*, the court which had jurisdiction to hear land cases is the Environment and Land Court.
 - (iii) The amendments of 2015 proposed in the Statute Law Miscellaneous Amendment Act, 2015 and the new Magistrates Court Act, 2015, seek to bring back jurisdiction on land matters to Magistrates Courts subject to some pecuniary limits but these amendments have been stayed by Malindi High Court petition No. 3 of 2016 and therefore the position reverts back to situation (ii) above until the decision in the said Petition is rendered.
18. Going back to the matter at hand, since it is not challenged that the Magistrate had jurisdiction to hear the case when it was filed in 2011, that jurisdiction has never been taken away and therefore there is no need to seek that the said case be transferred to this court. For the avoidance of doubt, the Magistrates Court in Eldama Ravine is hereby directed to proceed with the case and with such other cases falling within the same category as this one.
19. I therefore see no merit in the application herein and it is dismissed.
20. I make no orders as to costs.
21. It is so ordered .

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 18TH DAY OF OCTOBER 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

No appearance on part of M/s Gekong'a & Co. advocates for applicant

No appearance on part of M/s Kipkenei & Company for respondent

Court Assistant : Janet

