



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC MISCELLEANOUS APPLICATION NO. 15 OF 2016**

**AYUB AHMED U. MUSA.....APPLICANT**

**-VERSUS-**

**DAVID SHEIKH ABDURLRAHMAN.....1<sup>ST</sup> RESPONDENT**

**ADJUDICATION AND SETTLEMENT, KWALE COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE LAND SURVEYOR KWALE COUNTY.....3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR KWALE.....4<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The application dated 3<sup>rd</sup> June 2016 is seeking orders that this Court do transfer Mariakani PMCC No 258 of 2014 into this Court for hearing and disposal. The reason the application is made is that Mariakani PMCC does not have pecuniary and territorial jurisdiction to hear and determine the matter. The Applicant in his supporting affidavit deposed that he instructed Mr Munyao – deceased to institute a case of trespass over plot No Kwale/Mackinnon Road Phase 1 S S 797. The said suit was filed vide Kwale PMCC No 26 of 2013.

2. He deposed that as being served the 1<sup>st</sup> Respondent filed MSA Misc. application No 70 of 2013 disclosing the existence of Mariakani PMCC 206 of 2013 where the subject matter was the same. The applicant deposed that the High Court ordered that his suit (filed in Kwale) be transferred to Mariakani. He annexed a copy of this order as *AHUM – 1*. The Court in Mariakani ordered the consolidation of the two suits and PMCC 258 of 2014 was the number given to the consolidated file. The applicant deposed further that the Mariakni Court does not have powers to issue some of the orders sought such as cancellation of title and rectification of the R.I.M. He therefore urged for the suit to be brought to the E.L.C.

3. The application is opposed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent in his replying affidavit accused the applicant of not being candid. He deposes that he is a resident of Mackinnon and the registered proprietor of Land title Kwale Mc Road Phase 1/63 & 64 which he began to develop in 2013. He continued that when the applicant tried to interrupt his developments, he filed suit Mariakani PMCC 206 of 2013 and obtained orders. According to him when the applicant was served with pleadings in that suit,

he also filed Kwale PMCC 26 of 2013.

4. He challenged the orders issued by Kwale Court vide Miscellaneous 70 of 2013 and the High Court sitting in Miscellaneous No 70 of 2013 ordered the two files to be sent to Mariakani. The two suits were consolidated. The Respondent contends that the applicant amended his plaint a fortnight ago which amendment ousted the jurisdiction of the Mariakani Court. It is the Respondent's contention that this application is merely to deny him a speedy trial, creating unnecessary backlog and an abuse of the Court process.

5. The parties filed their submissions which I have considered together with the case law cited. The issue before me is whether I have powers to transfer suit from the Magistrate's Court to this Court for final disposal. From the pleadings both parties filed different suits. Whether rightly or wrongly. They each obtained temporary orders. Since the Respondent obtained the first orders, he challenged the orders issued from Kwale PMCC No 26 of 2013. The High Court on being moved directed that both suits be heard by Mariakani Principal Magistrate's Court. The parties appeared before that Court and directions were given with the result being a consolidated suit No 258 of 2014.

6. On 11.5.16 parties recorded a consent allowing the applicant to amend his plaint which according to the Respondent the amendment was to allow some prayers that were outside the jurisdiction of the lower Court to be discarded. When those "defects" as they are called by the Respondent were not discarded, they filed a preliminary objection to strike out that suit. The Respondent admits that some of the orders contained in the amended plaint cannot be issued by the Magistrate's Court. He cannot then turn around that the request to have this suit brought back to High Court as a ping pong exercise.

7. The law is that you cannot confer jurisdiction even by consent. If the applicant consented to the transfer, this consent did not change the law. The law is that environment and land disputes should be heard and determined by the Environment and Land Court. Probably the initial suits as initiated, the Magistrate's Court had jurisdiction. If the "defects" have not been discarded then a party cannot be forced to proceed in a Court which has no jurisdiction. This is the essence of the provisions of article 162 (2) of the Constitution and Section 13 of the ELC Act.

8. On case law cited, the **Charles Omwoyo & African Highlands & Produce (2002) eKLR** and **Peter Mayeka Khisa vs Godfrey Masibo** are all persuasive on me. They were also decided before the operation of the Constitution of Kenya 2010 which has brought with it different principles on the approach towards dispute resolution mechanisms. Similarly in the case of **Sara Chelagat Samoei vs Musa K. Kosgei & Another (2013) eKLR** the facts are different. In this case, when the suit was filed, the Magistrate Court lack jurisdiction *ab initio* and therefore there was nothing to transfer.

9. The Judge in the Sara case said that if at the commencement of the suit, the trial Court had jurisdiction then practice direction No 7 of 9/11/2012 together with article 22 of the Constitution and Section 30 of the ELC Act would apply. However if the Magistrate's Court lacked pecuniary jurisdiction then there was nothing to transfer. In this instant, the parties agree that it is the amendments which has ousted the jurisdiction of the Magistrate's Court i.e the suits were not null and void *ab initio*.

10. Article 159 (2) of the Constitution provides for speedy disposal of suits and in fulfilment of the purpose and principles of this Constitution. The applicant moved this Court within two weeks of filing his amended plaint. In the circumstances I find no reason to refuse the instant application. The same is allowed with costs to the Respondent.

**Dated and delivered at Mombasa this 9<sup>th</sup> day of November 2016.**

**A. OMOLLO**

**JUDGE**