REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L MISC APPLICATION NO. 12 OF 2014

SAMSON K.A. TIM..APPLICANT

VS

HILLARY KANGOGO SONGOYO..1ST RESPONDENT

W. KIGEN & COMPANY ADVOCATES...2ND RESPONDENT

RULING

This is a Miscellaneous Application seeking to transfer the suit Eldama Ravine SPMCC No.2 of 2014 from the Eldama Ravine Resident Magistrate's Court to this Court for hearing and determination. The applicant also wants an application dated 19 March 2014, that was heard at the Eldama Ravine Magistrate's Court, heard afresh by this court. The sole ground upon which the application is based is that the applicant has genuine fears that he will not receive an impartial hearing before the trial magistrate presiding over the case in the Eldama Ravine Law Court. The applicant has filed a supporting affidavit and a further supplementary affidavit to support his application. In the affidavit, it is stated that on 14 January 2014, the applicant as plaintiff, filed the suit Eldama Ravine SPMCC NO. 2 of 2014 and he proceeded to serve the 1st and 2nd respondents as defendants in the said suit. The respondents then appointed the law firm of M/s Kipkenei & Company Advocates to act for them. An appearance was filed on 21 January 2014 and again on 20 March 2014, but the same was not served upon the plaintiff until 1 April 2014. In the meantime on 12 February 2014, the applicant states that he filed a request for judgment which was entered on 13 February 2014, and requested for a date for formal hearing, and he was given 10 April 2014. On 1 April 2014, the respondents, as defendants, filed and served an application to set aside the interlocutory judgement and was given 3 April 2014, which the applicant says was contrary to the Civil Procedure Rules. The applicant appeared on 3 April 2014 and was allowed time to respond to the application with the matter being fixed for the application on 29 April 2014. On that date, the application to set aside the interlocutory judgment proceeded, and according to the applicant, no good proper reason was demonstrated as to why defence was not filed within time, but nevertheless the court allowed them to file defence out of time vide a ruling delivered on 22 May 2014. The applicant has stated that the application was allowed, without the written ruling being read, and without giving reasons why the application was allowed. He states that only an announcement lasting a minute was made that the application was allowed. It is deponed that the learned Magistrate heard the matter despite having worked in one law firm with the defendants and also the defendants are Advocates in Eldama Ravine Town. This has enhanced his fears that he cannot get a fair hearing. The applicant states that he feels mistreated especially with the one minute unread ruling and states that he should have been given reasons why the application was allowed. The applicant feels that the trial Magistrate was biased. The applicant is therefore fearful that he may not get a fair trial. It is for that reason that he wants the ruling of the Magistrate set aside and the matter referred to this court for disposal.

The respondents have filed a lengthy replying affidavit through the 1st respondent. The 1st respondent has averred that he is an Advocate practicing in the law firm of M/s W. Kigen & Company Advocates. He has deponed that the applicant was served with the Memorandum of Appearance on 21 January 2014. He has also averred that the Notice of Motion application dated 19 March 2014 was filed and served in good time. He has stated that on 3 April 2014, the trial Magistrate was not sitting and the matter was placed before another Magistrate who adjourned the matter and gave the applicant time to respond to the said application. He has stated that the applicant was allowed opportunity to be heard on the application and the ruling delivered in respect of the application was fair. He has proceeded to attach a copy of the said ruling. The respondent has stated that the applicant now wants to re-introduce the same application for hearing. In his opinion, his remedy lies on filing an appeal. He has averred that the applicant raised no complaint with the Magistrate until the ruling was delivered. He has refuted the allegation that the trial Magistrate worked with the 1st respondent in any law firm or organization and neither has she ever worked with the 2nd respondent. He has stated that he himself was admitted to the roll of advocates on 19 June 2012 when the said Magistrate was already working in the judiciary. He has averred that the applicant's case is hollow and baseless, merely meant to settle scores with the respondents. He has deponed that the 2nd respondent received instructions to act on behalf of some members of the applicant's family in Nakuru High Court Succession Cause No. 57 of 2008 where it is claimed that the applicant had fraudulently obtained a grant and sub-divided the land in issue in that case. The applicant then filed a civil suit in this court being Eldoret E&L No. 346/13 seeking to evict the clients of the respondents. It is claimed that the suit in Eldama Ravine was aimed at scaring and intimidating the respondents from representing their clients. He has also opposed the movement of the said suit to this court since in his view, the suit is not a land matter and this court has no jurisdiction to try the same.

The application was argued before me on 15 July 2014. The two parties put forth their respective positions and I take the following view of this matter.

It is apparent that what the applicant wants is to transfer the suit Eldama Ravine SPMCC No. 2 of 2014 to this court. He also wants the application dated 19 March 2014 determined by the said court, heard afresh by this court. Basically the reasons given touch on alleged bias of the trial Magistrate, Hon. Yator. It is the view of the applicant that he cannot get a fair trial before that court for the various reasons that he has given. He has also taken issue with the ruling on the application of 19 March 2014 which he feels was not a good ruling.

I have seen the plaint in Eldama Ravine SPMCC No. 2 of 2014. The claim against the respondents is that the 1st defendant illegally commissioned cautions and caused them to be registered against the titles Lembus/Torongo/790, 791,792 and 721 on 8 February 2011, while he was a clerk with no capacity to do so in the law firm of M/s Arusei & Company Advocates. It is further claimed that on 16 October 2012, the 2nd respondent allowed the 1st respondent to use his name and/or law firm, to draw and file an objection in the case Nakuru High Court Succession Case No. 57 of 2008, while in the knowledge that the 1st respondent did not hold a practicing certificate, and thus, the 1st and 2nd respondents need to be ordered to compensate the plaintiff in damages. It is also claimed that the 1st defendant with the full authority of the 2nd defendant illegally sought unlawful orders which were issued by the Honorable judge in Nakuru on 14 February 2013. It is said that the defendants maliciously interfered with the plaintiff's right to exclusively enjoy his proprietary rights to his property. Various particulars of negligence are pleaded including illegally taking instructions and filing an objection without a valid practicing certificate; taking a case in which he was signatory to its caution; illegally seeking unlawful orders without a provision for inter partes hearing and causing the same to be entered to the plaintiff's detriment; taking an unmerited case to cause stress and sufferance to the plaintiff from his right to enjoy the land parcel Lembus/Torongo/790,791,792 and 721;forging a signatory of objectors and on the part of the 2nd respondent, allowing an unqualified person to manage his office and practice law. In his prayers, he has sought damages for loss of user to the plaintiff's properties, immediate withdrawal of the objection in Nakuru High Court Succession Cause No. 57 of 2008; and a permanent injunction to bar the defendants from interfering with the properties Lembus/Torongo/790. 791, 792, and 721. The defendants filed a Defence in which they refuted all the claims of the plaintiff. It is this case which the applicant wants transferred to this court for hearing and disposal. As I stated earlier, the reasons given are that the trial magistrate is biased.

Any party is allowed to raise the issue whether a particular judicial officer ought to hear or continue hearing a particular matter, and any party is at liberty to ask that a particular judicial officer to recuse himself or herself from hearing the said particular matter, if he feels that he has good reason. It is prudent that such applications first be heard before the particular judicial officer. If the said judicial officer finds merit in the said application, then the officer will recuse himself/herself. If the judicial officer does not find merit in the said applications then, the remedy of the applicant is to file an appeal or revision against the said decision. It is not wise for applications for recusal to be made before another judicial officer, even if such other officer is of a higher rank or holds an office that is superior to that of the officer sought to recuse himself/herself. It is best that one judicial officer does not pass judgment on another officer, and decide whether or not such officer needs to continue or recuse herself from hearing the matter for the reasons tabled, unless on appeal. Such applications need to first be tabled before the particular judicial officer and the said judicial officer be given a chance to assess whether or not she needs to recuse herself from the suit.

In the instance of this case, the applicant feels that the trial Magistrate is biased, but no application has been made before the said trial Magistrate for her to consider whether or not to recuse herself. I think that it is necessary for the applicant, to file an application before the trial Magistrate, asking that she recuses herself, if he feels strongly that the trial Magistrate is biased and that he cannot be given a fair trial before her. I think it is imprudent for me to pass judgment on whether or not she is biased before she has got a chance to do so. In any event, there are several Magistrates in the Eldama Ravine Court and the applicant can also request, through the in-charge that the said suit be heard before another of the available Magistrates. So long as there are other competent Magistrates in the said court, I think the fears of the applicant can adequately be accommodated.

The other issue is the rehearing of the application dated 19 March 2014. The applicant is obviously aggrieved by the said ruling. The application was however heard by a competent court and I have no jurisdiction to rehear it afresh. This will go against the res judicata principle laid down in Sections 6 and 7 of the Civil Procedure Act, Cap 21, Laws of Kenya. The applicant can of course appeal against the said decision but he has no recourse to have the same application heard afresh by a Superior Court.

It has been argued that this court in any event does not have jurisdiction in the matter before the Eldama Ravine Court. The jurisdiction of this court as provided by Article 162 (2) (b) of the Constitution and the Environment and Land Court Act, Act No. 19 of 2011, is to hear disputes "related to the environment and the use and occupation of, and title to land." I have tried to break down the case of the applicant as drawn and it is not very clear to me whether the claim of the applicant is a complaint against the respondents for taking instructions without being licenced to do so, or whether his claim is one relating to the "use and occupation of, and title to land." If it is the latter, then his avenue would have to institute the said suit before this court and not before the Magistrate's Court which has no jurisdiction given the provisions of Article 162 (2) (b) of the Constitution. Ordinarily, a suit filed before the wrong court ought to be struck out and not transferred to the proper court, although courts of late have been liberal in transferring suits amongst the superior courts. If it is not a land matter, then the Magistrate's Court would have jurisdiction depending on the pecuniary value of the subject matter and this court would not have jurisdiction.

However, I do not think that it will be wise, based on the substance of the application before me, to make a determination on whether or not the Magistrate's court has jurisdiction to hear the matter. In any event the core reason given for seeking the transfer of the suit, is not that the Magistrate's Court has no jurisdiction, but rather, the application is hinged on the ground that the trial Magistrate is impartial.

Suffice it to say that for the reason that the applicant first needs to direct his application for recusal to the trial court, I find no merit in this application. I will dismiss the same, but in my discretion, I make no orders as to costs.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. Samson K.A. Tim- Applicant.

N/A for M/s B.N. Ngetich for respondent.