



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L MISC APP 10 OF 2013

SARAH CHELAGAT SAMOEI..... APPLICANT

VS

MUSA KIPKERING KOSGEI.....1ST RESPONDENT

ESTHER SEUREI2ND RESPONDENT

(Application to transfer suit from Magistrates' Court to the Environment and Land Court; whether Magistrates' Courts no longer have jurisdiction to try matters of land and environment pending in the said courts; whether application ought to be allowed)

RULING

1. This is an application brought under the provisions of Section 18 of the Civil Procedure Act, CAP 21 Laws of Kenya.
2. The applicant is seeking orders to have the suit Eldoret CMCC No. 201 of 2011 transferred to the Environment and Land Court at Eldoret for hearing and disposal.
3. The grounds upon which the application is based are that :-
 - (a) *The dispute in the lower court relates to land.*
 - (b) *There there is need to have the dispute adjudicated upon effectually and conclusively.*
 - (c) *That there is need to transfer it to the Environment and Land Court.*
 - (d) *That the matter can be resolved conveniently in the Environment and Land Court.*
 - (e) *The overriding objective and the constitution provisions.*
 - (f) *That land and environment court is the only court which can handle land matters by dint of the new law.*
4. The application is supported by the affidavit of the applicant who has annexed the plaint in Eldoret CMCC No. 201 of 2011.
5. I have seen the plaint. It is pleaded that the plaintiff is the registered owner of the land known as Uasin Gishu/Tapsagoi Scheme/164. She has averred that she acquired the said land from her deceased husband one Henry Kipruto Samoei. The 1st defendant is brother to the late Samoei and the 2nd defendant is

sister-in-law to the late Samoei. It is alleged that the defendants are in illegal occupation and have been ploughing on the land since 1991. The plaintiff in the suit has sought orders to have the defendants evicted from the said land.

6. The respondents, who are the defendants in Eldoret CMCC No. 201 of 2011, have opposed the application. The 1st respondent has sworn a replying affidavit, in which inter alia he has deponed that the suit Eldoret CMCC No. 201 of 2011 is *res judicata* since the issue of ownership of the suit land was heard and determined in Eldoret Senior Resident Magistrate Award No. 8 of 1986. It is further deponed that the subordinate court did not have jurisdiction to determine the suit sought to be transferred, pursuant to the provisions of Section 159 of the Registered Land Act (CAP 300)(repealed). It is his view that the applicant is attempting to cure the issue of jurisdiction by seeking to transfer the suit from the Magistrates' Court to the Environment and Land Court. He has deponed that there is no provision in law for transfer of a suit from a court that did not have jurisdiction to hear it in the first place. He has averred that the option available to the applicant is to withdraw the suit Eldoret CMCC No. 21 of 2011 and file a fresh suit in the appropriate court. He has also deponed that the applicant had sought similar prayers of transfer in Eldoret High Court Miscellaneous Cause No. 123 of 2011 but withdrew the said application.

7. In urging the application, Mr. E.M. Momanyi for the applicant, stated that with the enactment of the Environment and Land Court Act, Act No. 19 of 2011, the Magistrates' Court is divested of jurisdiction to handle land matters. He averred that when the suit was filed, the Magistrates' Court had jurisdiction and that the subject application has been necessitated by a change of law. He reiterated that the suit Eldoret CMCC No. 201 of 2011 is a suit touching on land and the value of the land is unknown. He relied on Section 30 of the Environment and Land Court Act and on Gazette Notice No. 1373 of 28 September 2012.

8. Mr. J.K. Kipnyekwei for the respondents urged me to dismiss the application. He first stated that the suit land is over 20 acres, is fully developed and its value exceeds Kshs. 500,000/=. He averred that in the defence filed in Eldoret CMCC No. 201 of 2011, the respondents have contested jurisdiction. He contended that the suit was filed in a court which had no jurisdiction in the first place. He disputed the argument of Mr. Momanyi that with the enactment of the Environment and Land Court Act, the suit ought to be transferred from the Magistrates Court. He pointed me to Gazette Notice No. 16268 of 9 November 2012 and stated that the Notice directs that matters filed in the Magistrates' Court proceed to conclusion in that court. He averred that if the matter was filed in a court that had jurisdiction, then it ought to proceed there, but that if the court had no jurisdiction in the first place, then the matter cannot be transferred. He relied on the cases of ***Private Development Co. Ltd vs Rebecca Ngonyo & Another (2006) eKLR*** and ***Bishop Christopher Ndungu vs Andrew Abungu (2006) eKLR***.

9. I have considered the application. The applicants seek orders to transfer the suit Eldoret CMCC No. 201 of 2011 to this court. Their reasons are that because of the enactment of the Environment & Land Court Act, Act No. 19 of 2011 and the setting up of the Environment & Land Court, then the Magistrates' Court no longer has jurisdiction to try the suit which is a matter relating to land.

10. The gist of the objection raised by the respondents is that the Magistrates' Court did not have jurisdiction in the first place as the subject matter is in excess of Kenya Pounds 25,000 which was the limit of pecuniary jurisdiction provided in Section 159 of the Registered Land Act (CAP 300) (now repealed).

11. I have seen the Statement of Defence of the respondents filed in the suit Eldoret CMCC No. 201 of 2011, annexed to their Replying Affidavit, and I can see that indeed they had raised the issue of jurisdiction of the Magistrates' Court.

12. The argument of the respondent is that if the Magistrates' Court had jurisdiction when the suit was filed, then the matter ought to proceed in that court, and if the Magistrates' Court had no jurisdiction when the suit was filed, then there is nothing to transfer and the only avenue open to the applicant is to withdraw the suit and file another suit in a court with the appropriate jurisdiction.

13. Let me first deal with the argument of Mr. Momanyi that with the enactment of the Environment & Land Court Act, and with the setting up of the Environment and Land Court, Magistrates' Courts no longer have jurisdiction to continue handling matters touching on land that are pending in those courts.

14. The starting point is the Constitution which makes provision for the Environment and Land Court. Article 162 provides as follows :-

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

The Constitution was promulgated on 27 August 2010 and it was envisaged that not all the provisions of the Constitution were capable of being effected immediately. This is the basis for the Transitional Provisions in Schedule 6 of the Constitution.

15. For our purposes Article 22 of Schedule 6 is important. 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.

16. The provisions of Article 22 above were aimed at ensuring that there is no vacuum while transiting to the new regime envisioned in the Constitution. It will be seen that the transitional provisions provide for pending cases either to proceed in the courts in which the cases are pending or in the new courts established by the Constitution . Further the Constitution empowered the Chief Justice and the Registrar of the High Court to give directions as to the hearing of pending suits.

17. The Environment and Land Court Act, Act No.19 of 2012 was assented to on 27th August 2011 and commenced on 30th August 2011. Section 30 contains the transitional provisions and it provides as follows :-

30. (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.

18. The transitional provisions in Section 30 above are drafted in almost similar terms to the transitional provisions in Article 22 of the 6th Schedule of the Constitution. An interpretation of Section 30 of the Act will reveal that the transitional provisions provide for matters pending before other courts, not being the Environment and Land Court, are supposed to continue being heard in those courts until the Environment and Land Court is established, or as may be directed by the Chief Justice or the Chief Registrar. The transitional did not therefore stop land and environment matters from proceeding in the courts or tribunals which were properly seized with those matters. Those courts were to continue hearing them until the Environment and Land Court was established or as the Chief Justice or Chief Registrar directed. The power given by the Chief Justice and Chief Registrar in Article 22 of Schedule 6 of the Constitution is

again repeated in Section 30 of the Environment and Land Court Act.

19. The Environment and Land Court was set up on 3 October 2012 when the first group of judges of the court were gazetted. The court came into actual operation on 5th November 2012 when the Environment and Land Court judges were sworn into office and posted to various stations across the country.

20. The transitional provisions of S.30 are meant to cover the transition to the Environment and Land Court which under Article 162 (2) (b) of the Constitution is the court established to hear all matters touching on land and the environment.

21. Before the court was established in October 2012, the CJ had issued several practice directions. As noted earlier, these practice directions are anchored in Article 22 of the Transitional Provisions of the Constitution and Section 30 of the Environment and Land Court Act.

22. The first practice note was issued vide Gazette Notice No. 1617 of 17 February 2012. Note 1 of the practice direction provided that *"All proceedings relating to the environment and the use and occupation of, and title to land pending before the Court of Appeal, High Court, Subordinate Courts of Local Tribunal of competent jurisdiction other than the Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals Act, No.18 of 1990, shall continue to be heard and determined by the same courts of Tribunal. Any proceedings which shall not have been concluded by the time the Environment and Land Court is established, shall be moved to the Court upon its establishment."*

23. The contemplation as at February 2012 was that once the Environment and Land Court was established, all proceedings not yet concluded would be moved to the Environment and Land Court .

24. This position was however changed by Gazette Notice No .13573 of 28 September 2012 which practice direction superceded that of 17 February 2012. Notes 3, 4 , 5 and 6 are of importance to our situation and were drawn as follows :-

3. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

4. All cases relating to the environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto has yet to commence, shall be transferred to the Environment and Land Court as directed by the Chief Registrar.

5. All proceedings which were pending before the Resident Magistrates' Courts, having been transferred thereto from the now defunct District Land Disputes Tribunals shall continue to be heard and determined by the same Courts.

6. All new cases relating to the environment and the use and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said court.

25. Thereafter followed the Practice Directions issued on 9 November 2012 and which superceded the directions of 28 September 2012. Note 6 and 7 is important for our circumstances. They provide as follows :-

6. All proceedings which were pending before the Magistrates Courts, having been transferred thereto from the now defunct District Land Disputes Tribunal, shall continue to be heard and determined by the same courts.

7. 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.

26. It will be seen from the above practice direction, which at the time of this ruling, is the prevailing

direction, provides for matters touching on environment and land, pending before Magistrates Courts, to continue to be heard and determined in those courts so long as the courts have the requisite pecuniary jurisdiction. I will not dwell on the direction on the filing of new matters in Magistrates Courts for that matter is not before me for determination. The subject herein is a suit that was pending before the Magistrates Courts when the Environment and Land Court Act, and the Environment and Land Court, came into operation and is caught up by the above practice directions. The plaint in Eldoret CMCC No. 201 of 2011 was filed on 14th April 2011.

27. For the record, it is not correct to assert that all matters that were filed in the Magistrates Courts where those courts had the requisite pecuniary jurisdiction, are to be transferred to the Environment and Land Court, for there is no law or practice direction, that requires such action.

28. Let me now turn to the specific matter herein.

29. The land, which is the subject matter of the suit, was registered under the Registered Land Act, now repealed, but which was still operative when the suit was filed. Section 159 of the Registered Land Act provided for Magistrates courts to exercise jurisdiction upto 25,000 pounds. The said section provided as follows :-

S. 59 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.

30. Mr. Momanyi stated that the value of the suit land was unknown. If the plaintiff did not know the value of the land and took the risk of filing the matter in the Magistrate's Court then she opened herself to the possibility of an attack on jurisdiction, which salvo was actually fired by the defendant.

31. If we assume that the matter was filed within the pecuniary jurisdiction of the Magistrate's Court, then Practice Note No. 7 of 9/11/2012 above, buttressed by the provisions of Article 22 of the 6th Schedule to the Constitution and Section 30 of the Environment and Land Court Act, provides for the matter to proceed and be concluded by the Magistrate's Court. There will therefore be no need to transfer the matter to the Environment & Land Court for disposal.

32. If however, we are to assume that the Magistrate's Court did not have the pecuniary jurisdiction to hear the matter for want of pecuniary jurisdiction, then there is nothing to transfer, since the authorities hold that if a matter is filed in a court that is devoid of jurisdiction, the same cannot be transferred to a court which has jurisdiction. These holdings are laid out in the authorities supplied by Mr. Kipnyekwei for the respondents. In *Charles Wainaina Njehia v Barclays Bank of Kenya (2006) eKLR* the applicant sought to transfer a suit whose value was Kshs. 1,600,000/= from the Magistrate's Court to the High Court. The application was dismissed, the court holding that if the matter was filed in a court with no jurisdiction, the suit was a nullity *ab initio* and there was nothing capable of being transferred as the suit itself was a nullity. The court further reasoned that there was an express provision of law which barred the filing of the suit in the Magistrate's Court and therefore the suit was filed in breach of the law.

33. The holding was similar in the case of *Private Development Co. Ltd vs Rebecca Ngonyo & Another* and in *Bishop Christopher Ndungu v Andrew Abungu (2006) eKLR*, the latter case being an application to transfer a suit which was filed in a court which did not have the requisite geographical jurisdiction.

34. I do not think it is necessary for me to determine whether the value of the suit land is within the pecuniary jurisdiction of the Magistrate's Court because irrespective of whichever angle one looks at this application, it must fail. It must fail if the Magistrates Court had jurisdiction to try the suit for the transitional provisions provide for the trial of the suit to continue in that court. It must fail if the suit was filed in the Magistrates' Court, because if the Magistrates' Court did not have the requisite pecuniary

jurisdiction to try it, then the suit is a nullity and incapable of being transferred.

35. The determination of whether the Magistrates Court has the necessary pecuniary jurisdiction will have to be decided by that court.

36. For the above reasons I decline to transfer the suit Eldoret CMCC No. 201 of 2011 from the Magistrates Court to the Environment and Land Court.

37. I find that this application has no merit and dismiss the same with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JUNE 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.M. Kathili holding brief for Mr. Momanyi for the applicant

Mr. M.J. Omusundi holding brief for Mr. Kipnyekwei for the respondents.