IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), WAKI, & KIAGE, JJ.A)

CIVIL APPEAL NO. 107 OF 2014

BETWEEN

MONA ATZ LIMITED.....1ST APPELLANT

SILVERSTONE QUARRY LIMITED.....2ND APPELLANT

AND

CAPITAL FISH KENYA LTD.....1ST RESPONDENT

SILVERSTONE LIMITED.....2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mabeya, J.) dated 14th February, 2014

in

E. L. C. No 273 of 2014)

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JUDGMENT OF THE COURT

This appeal concerns the narrow issue of whether the High Court (Mabeya, J.) having ruled itself bereft of jurisdiction to entertain a suit relating to ownership and title to land and transferred it to the Land and Environment Court for hearing and disposal could properly extend interim injunctive orders it had previously issued.

By the said suit the 1st respondent had sought compensation for Kshs. 500 million, general and special damages, and a permanent injunction restraining the defendants therein from trespassing, excavation, mining, quarrying, dumping, storage or in any other way interfering with the 1st respondent's quiet possession of L.R. No. 24627, the suit property. The suit was premised on allegations that the said defendants as owner of an adjoining piece of land known as L. R. No. 24636 had in trespass encroached upon the suit property and excavated then stolen ballast therefrom and then transferred it and sold stones on its said land occasioning the appellant much loss and damage.

The learned Judge by a ruling dated 14th February 2014 (and read on his behalf by Havelock J. on 14th

March 2016) upheld a preliminary objection raised by the 2nd appellant herein against the suit filed against it by the 1st respondent on the basis that the High Court did not have jurisdiction to entertain the suit it given the provisions of **Section 13 (1) (2)** and **(7)** of the **Environment Land Court Act No. 19 of 2011**. The respondent accordingly and in consequence sought the striking out of the suit or, in the alternative, its transfer to the Environment and Land Court for further directions and hearing.

Having found that the High Court lacked jurisdiction to entertain the suit which, in the words of the learned Judge was "*primarily about use and occupation or title to the suit property"*, the learned Judge held that the Environment and Land Court which can grant reliefs including injunctive orders, damages and compensation, was the proper forum at which to agitate the dispute. He ordered that the suit be transferred to that court in Nairobi. He then proceeded to address *suo motu*, the fate of the interim orders on injunction previously granted in the appellants' favour and about which there had been filed an application to cite the appellants' for alleged contempt which was pending hearing and determination. He took the view that the said interim orders were granted to the 1st respondent to maintain the *status quo* between the parties pending the hearing and determination of the 1st respondent's application for injunction. On the order of transfer of the suit he concluded his ruling thus;

> ***"In order to safeguard the position of the parties obtaining position as of today, the interim orders now in force are extended for 14 days."***

It is this order alone, and not the order of transfer of the suit itself, that has aggrieved the appellants. Their memorandum of appeal raises three short and related grounds charging that the learned Judge erred by;

> **"1....misdirecting himself by holding that the appellants did not address the issue of whether or not the interim orders granted previously should be vacated.**
>
> **2...failing to vacate the interim orders after holding that the preliminary objection was meritorious.**
>
> **3....extending the interim order after holding that he had no jurisdiction."**

Arguing the appeal before us, **Mr. Ouma,** the appellants' learned counsel attempted to urge that the learned Judge did not have jurisdiction to order transfer of the suit to the Land and Environment Court. He thus sought to draw a distinction between the present case, which he opined was incompetent, and that of

DANIEL N. MUGENDI VS. KENYATTA UNIVERSITY & 3 OTHERS [2013] eKLR, appearing in the respondents' list and bundle of authorities. Not having appealed against the transfer of the suit in the memorandum of appeal and not having sought our leave, counsel's foray into that territory was bound to flounder in light of **Rule 104 (a)** of the Court of Appeal Rules.

For the respondents, learned counsel **Mr. Mbugua** opposed the appeal by just restating that the appeal as framed is against part only of the learned Judge's ruling since there is no challenge to the order of transfer. He pointed out that in their preliminary objection that led to the ruling part of which is impugned herein, the 2nd appellant had sought, as an alternative to the striking out of the suit, an order that the same be transferred to the Environment and Land Court for further directions and hearing. The appellants could not therefore be heard to challenge unseasonably the order of transfer.

Counsel next argued that the suit before the court below was not a dispute over title but rather a claim for compensation for ballast unlawfully mined. He contended that the learned Judge had expressed the view that even though some of the reliefs sought could properly be granted by the High Court, the Environment and Land Court was best suited to deal with the whole claim. He thus contended that the suit had been properly filed at the High Court. Relying on the aforesaid **MUGENDI** decision, he asserted that the transfer of the suit from the High Court to the Environment and Land Court, which has equal status, was proper. The case was therefore distinguishable from **GEORGE G. GICHURU VS. SENIOR PRIVATE**

KIOKO & ANOTHER [2013] eKLR cited by the appellant where the suit transferred had originally been filed before a court that had no jurisdiction.

The position herein, in counsel's view, was analogous to that in **MARGARET NJOKI MIGWI VS. BARCLAYS BANK OF KENYA LTD**

Civil Appeal No. 68 of 2015 where the High Court, upon finding that it did not have the requisite jurisdiction to hear a matter, properly transferred it to the Environment and Land Court and this Court affirmed. He suggested that the learned Judge was correct to extend interim orders as no application had been made to discharge them.

Counsel went on to submit that this appeal is not brought in good faith as the appellants' true intent is to use it as a collateral attack on some contempt of court proceedings filed by the respondents to have the appellants cited and punished for disobeying the said interim orders. Those orders were extended by the Land and Environment Court when the parties first appeared before it. He therefore defended the learned Judge's extension of the interim orders as being no more than a preservation of the *status quo.*

In his brief reply, Mr. Ouma contended that *"status quo does not mean jurisdiction"* by which we understand him to mean that the need to preserve the status quo cannot confer a jurisdiction that is non-existent in law. He cited the decision of the Supreme Court in **ADVISORY OPINION NO 2 OF 2011 (IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION)** to the effect that a court cannot arrogate itself jurisdiction through judicial craft or innovation when its jurisdictional limits are clear in law. Nor can parties by consent create or confer such jurisdiction. He concluded by stating that a suit filed in the wrong court is a nullity *ab initio* as would be any orders granted therein.

As we have stated before, this appeal turns on a very narrow issue of whether the learned Judge could, after ruling himself bereft of jurisdiction to entertain the suit and transferring it to the Land and Environment Court, extend the existing interim orders. The appellants do not contest the transfer of the suit to the Land and Environment Court. Indeed, they prayed for precisely such transfer in their preliminary objection. Such a prayer essentially anticipated the continued valid and effective existence of the suit. Had the learned Judge struck out the suit for incompetence or as being null, any interim orders issued in it would have been equally null and void *ab initio* and would certainly have died a natural death with the demise of the suit. By the same token, in our view, the saving and transfer of the suit saved and transferred also all its incidents and appurtenances. It seems contradictory, sophistic even, that the appellants would in one breath accede to and even plead the transfer of the suit to the Land and Environment Court, yet seek to impeach as null and void the temporary extension of the interim orders granted therein.

We think that it would be a serious dereliction or abdication of duty were a court that had found sufficient cause for granting interim injunctive relief to fail to make appropriate orders to protect the *status quo* by extension of those orders to cover the transitional period of the transfer of the suit to the proper court. Indeed it seems clear to us that the learned Judge properly directed his mind to the questions and that the order that he made accorded with the interests of justice in that it safeguarded the parties' respective positions. We are justified in this view in the fact that the appellants stood to suffer no prejudice, indeed they have not cited any, since the extension was for a limited period of time and they were always at liberty to move the proper court, namely the Land and Environment Court, to discharge the said orders were they minded to do so. They did not.

The totality of our consideration of this matter is that the jurisdictional attack on the extension of the interim orders fails once it is accepted on the authority of **MUGENDI** (supra) and similar cases, as well as the appellants' own plea, that the suit itself was competent and amenable to transfer to the Land and Environment Court. The matter then remained in the discretion of the learned Judge considering that as an appellate court we have to be deliberately slow to interfere with such exercise of discretion unless based on wrong principles or is demonstrably wrong. See **SHAH VS. MBOGO [1968] EA 116).** This has not been established by the appellants and we thus have no basis for interfering.

In the result, the appeal lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 17th day of February, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR