



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL MISCELLANEOUS APPLICATION NO. 127 OF 2018**

**DANIEL MUIA MBITHUKI.....PLAINTIFF**

**VERSUS**

**1. MUKII NZUKI**

**2. NGINGA KINANDU.....DEFENDANTS**

**RULING**

1. By a notice of Motion dated 9/4/2018 the Applicant herein seeks for orders *inter alia*; that **Yatta SRMCC NO. 55 of 2012 Daniel Muia Mbithuki =Vs= Mukii Nzuki & Another** be transferred therefrom to the Environment and Land Court at Machakos High Court Registry for determination and that the costs do abide the application.

2. The application is supported by the annexed affidavit of the Applicant herein sworn on even date as well as the grounds on the face of the application. The Applicant's case is that the matter has never proceeded since the filing of the case on 10/05/2012. It is the Applicant's case that the Respondents have been interfering with the said case and hence it is fair that the matter be transferred to the High Court in order for it to proceed.

3. The application was opposed. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 22/10/2018 in which he raised several grounds of opposition *inter alia*; that the application is full of malicious falsehoods cunningly crafted to mislead the court; that the Applicant has never fixed the matter for pre-trial conference or for hearing despite the case having been in court for over six years; that the principal Magistrate's Court Kithimani has jurisdiction to hear and determine the matter as the cause of action arose at Kwa Ndulyu village in Ekalakala within the jurisdiction of the said court;

4. Parties opted to rely on the rival affidavits.

5. I have considered the Applicant's Application and the rival affidavits. A perusal of the plaint dated 26/4/2012 reveals vide paragraph 9 thereof that the cause of action arose at Kwa Ndulyu village within the jurisdiction of Yatta SRM's Court. The prayers sought relate to a claim for refund of Kshs.38,000/= with interest from 20/09/2004 to the date of order for specific performance of the agreement dated 20/09/2004. It would therefore appear from the onset that the Applicant's claim was properly filed at Yatta law courts as it has jurisdiction to hear and determine the matter.

The Respondents have squarely laid blame upon the Applicant as being indolent for failing to set down the matter for hearing since the filing in May, 2012 to date. The Applicant has not controverted the Respondents assertion that he has been the one who has dragged his feet in setting down the matter for hearing. All the pre-trial directions pursuant to the provisions of Order 11 of the Civil Procedure Rules appear to have been fully complied with. There is a defence filed as well as list of witnesses and statements of witnesses. It seems that what has been remaining is for the Applicant to proceed to fix a hearing date for the matter.

The Applicant's claim that the Respondents have seriously interfered with the case appear not substantiated whatsoever. The Applicant has not availed evidence as to how the Respondents have interfered with the case. There is also no evidence to the effect that the Applicant has raised issues with the trial court over the alleged interference of the case by the Respondents. There are no comments or directions issued by the trial court for consideration herein. The Applicant is well aware that all suits ought to be instituted before the lowest court competent to try them and in the event of lack of jurisdiction to apply to the High Court for transfer of such suits. The claim is only for refund of Kshs.38,000/= which is perfectly within the jurisdiction of Yatta law courts as described by the Applicant in the Plaint. The Applicant has not given any convincing reasons to warrant a transfer of the suit to the Environment and Land Court at Machakos because the Yatta SRM's court has the requisite jurisdiction to not only hear the claim for Kshs.38,000/= or even a claim for specific performance of an alleged sale agreement. The Principal Magistrate's Court at Kithimani (Yatta) has pecuniary jurisdiction of upto Kshs.10,000,000/=.

Again if the Applicant intended to treat the **Yatta SRMCC No. 55 of 2012** to be an ELC matter and to seek for an order of transfer then the proper court to receive the present application should be the Machakos Environment and Land Court and not the High court as presently presented.

Looking at the averments of the Applicant *viz a viz* those of the Respondents, it is quite clear that the Applicant herein is out on a forum shopping. This court is not ready to countenance that kind of conduct. Consequently, I find the Applicant's application dated 9/4/2018 lacks merit. The same is ordered dismissed with no order as to costs. The Applicant is hereby directed to proceed and set down the suit at Yatta law courts for hearing.

Orders accordingly.

**Delivered at Machakos this 23<sup>rd</sup> day of January, 2019**

**D.K. KEMEI**

**JUDGE**