



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL APPLICATION NO. 283 OF 2015

EDWARD THIONG'O WACHIRAAPPLICANT

=VERSUS=

DUNCAN KIRERI WACHIRARESPONDENT

RULING:

The matter coming up for determination is the Notice of Motion dated **29th October 2015**, brought by the Plaintiff/Applicant herein **Edward Thiong'o Wachira** against the Defendant, herein **Duncan Kireri Wachira** . The application is brought under **Order 51 Rule 3 of the Civil Procedure Rules, Section 1A , 1B ,3A and 4 and 18** of the **Civil Procedure Act, Section 13** of the **Environment and Land Court Act** and all other enabling provisions of the law. The applicant has sought for these orders:-

- a. That there be a stay of any further proceedings and any consequential orders thereof in Nairobi, Milimani CMCC No. 170 of 2015. Duncan Kireri Wachira Vs Edward Thiongo Wachira pending the hearing and determination of this application.***
- b. That the suit in Nairobi, Milimani CMCC No. 170 of 2015 , Duncan Kireri Wachira Vs Edward Thiongo Wachira be struck out or transferred from the subordinate court to this court for purpose of disposal thereof.***
- c. That the costs be provided for.***

The application is based upon the grounds stated on the face of the application and on the affidavit of **Edward Thiong'o Wachira** . These grounds are:-

- i. That the dispute in the said Milimani CMCC No.170/2015, Duncan Kireri Wachira Vs Edward Thiong'o Wachira relates to use, occupation and title to land which matters the subordinate court does not have jurisdiction to determine.***
- ii. That the Environment & Land Court has exclusive original jurisdiction over matters and disputes.***
- iii. That on 2nd October 2015, the Chief Magistrates Court in Milimani CMCC No. 170 of 2015 issued orders for the eviction of the applicant from the suit property to wit LR No. 330/694 Original 330 /221/1).***

iv. That the Chief Magistrates Court exceeded its jurisdiction in issuing the eviction orders as the subject matter is valued over Kshs.100,000,000/=.

v. That the application has been made without unreasonable delay.

vi. That the applicant stands to suffer substantial and irreparable loss unless this application is allowed as the Respondent is resolute on executing the eviction;

vii. That this application shall be rendered nugatory in the event that orders for stay of execution are not issued in the first instance.

viii. That is fair and just to grant the orders sought.

In his supporting Affidavit, the applicant reiterated the contents of his grounds in support of the application.

The application is opposed. The Respondent herein **Duncan Kireri Wachira** swore his Replying Affidavit on **3rd December 2015**. He averred that indeed, he instituted Milimani **CMCC No. 170 of 2015**, against the applicant herein who is his son and he sought for a declaration that he is entitled to exclusive use and possession of **LR No. 330/694**. He further averred that simultaneously with the filing of the said suit, he filed an application dated **19th January 2015**, in whose Ruling was delivered on **2nd October 2015**, and a mandatory injunction orders against the applicant were issued requiring him to vacate the said premises.

He alleged that on **5th November 2015**, the said orders were executed by a court bailiff. He further averred that the applicant filed an application dated **15th October 2016**, seeking for stay of execution of the orders issued on **2nd October 2015**, but to-date the said application has never been heard and determined and therefore the applicant is fishing for orders before two different courts.

He therefore contended that in view of the pending application the current application is an abuse of the court process as the applicant appears to be litigating the same issues before two different courts. He further contended that his daughter **Sylvia Muthoni** also filed an application at the lower court seeking to be enjoined as a party and also seeking for striking out of the Lower Courts suit on the basis that the said court lacked jurisdiction to hear and determine the suit in view of the provisions of Article 162(b) of the Constitution. The Respondent further contended that the applicant has not justified why the lower court suit should be transferred to this Court for hearing and determination. Therefore he further averred that this application by the applicant is an abuse of the court process, and is brought in bad faith and should be dismissed with costs.

The applicant filed a further affidavit and averred that the Respondent has been suffering from mental illness including confusion, delirium, and significant brain a trophy and is such incapable of understanding the contents and implications of the Replying Affidavit. Further that the orders obtained on **2nd October 2015**, were irregularly obtained, and executed and all persons affected by the said orders are entitled to restitution.

The parties canvassed the application by way of written submissions. Applicant filed his 1st set of written submissions on **30th November, 2015** and urged the Court to allow his application. The Respondent filed his submissions on **25th January 2016**, and asked the court to disallow the application herein. Applicant filed his supplementary submissions on **31st December 2015**.

The Court has now considered the instant application and the written submissions and the Court makes the following findings:-

There is no doubt that there is a pending suit **No. Milimani CMCC No. 170 of 2015**, filed by **Duncan Kireri Wachira**, the Respondent herein against **Edward Thiong'o Wachira**, the applicant herein. The

said suit was filed on **19th January 2015**. It is also evident that the Defendant in **CMCC No. 170 of 2015**, who is the applicant herein filed a Defence on **18th February 2015**, and raised various issues and denied the Plaintiff's claim therein. However on paragraph 9 of the said Defence, the applicant herein had admitted the jurisdiction of the subordinate court to hear and determine that suit; he stated as thus :-

“ Save that the Defendant admits jurisdiction of this Honourable court to hear and determine this suit”.

It is also evident that in **CMCC No.170 of 2015**, the Plaintiff therein had filed an interlocutory application seeking for mandatory injunction against the Defendant therein (applicant herein) requiring him to hand over vacant possession of land parcel **No. LR No. 330 /694**, the suit property herein.

It is also not in doubt that the said application was heard interpartes and the Defendant did not raise the issue of jurisdiction thereon. Thus the subordinate court delivered a Ruling on **2nd October 2015** and allowed the Plaintiff/applicant's application dated **19th January 2015**. There is no doubt that the applicant was dissatisfied with the said ruling and obtained a stay of execution of the Orders therein which was to expire on **1st November 2015**. Prior to expiring of the said orders, the applicant filed this Misc. application seeking for stay of further proceedings in **CMCC No. 170 of 2015**, and striking of this suit and/or transfer of the same to this court for lack of jurisdiction.

The application is opposed by the Respondent who has termed this application an abuse of the Court process. The application is anchored under **Sections 1A, 1B, 3A ,4 and 18** of the **Civil procedure Act**. It is also anchored under Section 13 of the Environment and Land Act and any other provisions of the law.

The main reason, why the applicant has filed this application is that the lower Court lacks jurisdiction to try and determine this matter herein. He averred that it is only the Environment and Land Court that has exclusive original jurisdiction over disputes relating to land. He relied on Section 13 of the Environment & Land Act which provides that;-

“ The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and the law applicable in Kenya relating to environment and land”.

It is note worth that when the Plaintiff filed this suit and the Defendant (applicant) filed his defence, he admitted the jurisdiction of the Court (subordinate court). It is only after the Ruling that the applicant sought to dispute the jurisdiction of the Lower court.

The power of the High Court to withdraw and/or transfer suits instituted in the subordinate court is governed by section 18 of the Civil Procedure Act which provides that:-

i. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage :-

(a)

(b) Withdraw any suit or other proceedings pending in any court subordinate to it and thereafter ...

(i) Try or dispose of the same

(ii) Re-transfer the same for trial or disposal to any Court subordinate to it and competent to try of dispose of the same or

(iii) Reiterate the same for trial or disposal to the court from which it was

withdrawn.

From the above provisions of law, it is clear that the High Court or courts of similar status have jurisdiction to transfer a suit from it to a subordinate court. This has been the holding of the courts in various decided cases. The general jurisprudence therefore is that the High Court or a Court of similar status has power to withdraw a suit pending in a court subordinate to it and dispose of the suit and transfer the same for trial and disposal to any court subordinate to it and competent to dispose of the suit.

The Courts have variously held that the power to transfer a suit from a court subordinate to it can only be exercised if the court from which the suit is being transferred has jurisdiction to hear the case in the first instance. That if the suit was filed in a court that lacked jurisdiction, then there would be no suit capable of such transfer. This was the findings in the case of **Kogenyi Vs Musiramo & Another (1968) EA 43 (Uganda).**

The above portion was later adopted by Ibrahim J (as he then was) In the case of **Rob De Jong & Another Vs Charles Mureithi Wachira (2012) ekl** where he held that :-

“I concur with the position taken by the learned counsel for the appellants that to invoke this power, the suit should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction, then the suit is a nullity and there is nothing capable of being transferred”.

The applicant herein has alleged that the subordinate court in ***CMCC No.170 of 2015*** had no jurisdiction to hear and determine the matter and deliver the Ruling on ***2nd October 2015***. If that was the position, then the applicant should have raised that issue in the first instance. Then if the subordinate court would have pronounced a finding contrary to the applicant’s allegations, then the applicant would have filed an appeal against that finding. The above position is supported by Section 16 of the Civil Procedure Act which provides that :-

“ No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a subsequent failure of justice”.

In the ***CMCC No.170 of 2015***, the applicant admitted jurisdiction of the court in paragraph 9 of his Defence. He cannot turn around and deny the same since a ruling was delivered on ***2nd October 2015*** that did not favour him. If the applicant was aggrieved by the Ruling of ***2nd October 2015***, he ought to have lodged an appeal and/or sought for review of the same.

I have however noted that the applicant filed a Notice of Motion dated ***15th October 2015***, seeking for review of the Ruling delivered on ***2nd October 2015***. He should pursue and prosecute the said application instead of seeking to have the matter herein transferred to this court on account of lack of jurisdiction. There is also another Notice of Motion even dated filed by one ***Sylvia Muthoni***, an intended interested party seeking to be enjoined in the said suit (***CMCC No.170 of 2015***) and also seeking for setting aside of the Ruling delivered on ***2nd October 2015***.

The applicant herein should prosecute his application dated ***15th October 2015*** and /or lodge an appeal against the Ruling of ***2nd October 2015***.

He cannot seek to stay the execution of the Orders of the Court on account of transfer of the suit ***CMCC No.170 of 2015***, on the basis of lack of jurisdiction. There was no Valuation Report attached to confirm that the value of the suit property was over ***Kshs.100,000,000/=***. No evidence that the applicant raised the issue of jurisdiction in the court of first instance and the same was rejected.

For the above reasons, the court finds that the applicant’s Notice of Motion dated ***29th October 2015***, is not merited. The same is dismissed entirely with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered this 16th day of **September, 2016**.

L.GACHERU

JUDGE

In the presence of

Applicant in person: Present

None appearance for the Respondent though served with Ruling Notice.

Court Clerk : Hilda

L.GACHERU

JUDGE

16/9/2016

Applicant : I seek for leave to appeal.

L.GACHERU

JUDGE

16/9/2016

Court:

Leave is granted and copy of the Ruling to be availed to the applicant after payment of the requisite fees.

L.GACHERU

JUDGE

16/9/2016