



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 134 OF 2013

JOHN KIMATHI KATHARIKI.....APPELLANT

V E R S U S

REUBEN MWAURA GICHIA.....RESPONDENT

RULING

1. John Kimathi Kathariki, the Appellant filed this appeal against the Ruling of 6th September 2013 before the Senior Resident Magistrate's Court, Mombasa in CMCC No. 2338. This appeal is still pending. The Lower Court file has not been produced to this court to enable this appeal to be heard.

2. Appellant has now a Notice of Motion dated 9th April 2015. By that application he seeks an order that this appeal be transferred to Nairobi High Court for hearing. He has based the application on the following grounds:-

1. **THAT this appeal case was filed in Mombasa Law Courts on 2013,**
2. **THAT this matter has not been heard since the month of 23rd December 2013 except but adjourned,**
3. **THAT when the Appellant went to the registry on 18th December 2014, he was told that the diary was missing and that it will not be available until Monday the 22nd December 2014,**
4. **THAT we invited the Defendants Advocate in the Month of February, 2015 for taking a hearing date and when we came to court to take a hearing date, the file was still missing from the registry since 18th December 2014,**
5. **THAT when the said file was found sometimes in later in February, 2015 the Appeal documents went missing from the courts file,**
6. **THAT we plead with this honorable court of law to grant our orders and transfer this matter to Nairobi Milimani Law Courts to further cause of justice of the Appellant case,**
7. **THAT Granting the orders sought shall not prejudice the Defense case,**
8. **THAT the Appeal case is pending for a period of more than 1 year.**

3. In submissions both advocates for the Appellant and Respondent informed the court that the subject matter in the Lower court was land which is situated in Mombasa.

4. The first thing that needs to be noted is that this is an appeal and not a primary suit. That being so the provisions of sections 12, 13, 14 and even 15 of the Civil Procedure Rules do not apply. That sections refer to where a suit is instituted, not where it is appealed from. In that regard the primary suit herein was filed in Mombasa Chief Magistrate's Court and the Ruling the subject of this appeal was delivered in the Mombasa Chief Magistrate's Court.

5. The above being so there is no legal basis for transferring this appeal out of Mombasa High Court.

6. It should however be noted that the Appellant has in the past written a letter to the Judicial Service Commission, dated 20th January 2015. In that Letter Appellant, amongst other things complained against me personally against what he said to have been humiliation meted to him when I asked him to move from the Advocates allocated bench in the courtroom. In view of that I do hereby disqualify myself from hearing this appeal if for nothing else that the Appellant may feel that justice is seen to be done.

7. In the end the Notice of Motion dated 9th April 2015 is dismissed with costs to the Respondent. Further this appeal shall be fixed for any hearing before any other judge except me.

DATED and DELIVERED at MOMBASA this 25TH day of JUNE, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Appellant:

For Respondent:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE