



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION 500 OF 2011

HOTTENSIAH WANJIRU.....APPLICANT

VERSUS

MESHACK NGOMO.....RESPONDENT

RULING

This ruling is delivered in the Notice of Motion dated 23rd November 2011 wherein the applicant seeks an order of the court to transfer CMCC No. 8191 of 2007 from the Chief Magistrate's Court Milimani to the High Court for further hearing and disposal.

The application is promised on the ground that the suit, which is substantially heard ought to have been filed in the High Court the dispute being over a parcel of land registered under the Registration of Titles Act (Chapter of the Laws of Kenya) which defines “ a court” as the “High Court” for the purposes of the determination of disputes. For this reason the applicant states that the lower court lacks jurisdiction to hear the suit and that the same ought to be tried in the High Court.

In the suit the plaintiff/applicant prays for judgement against the defendant/respondent inter alia for:

(a) A declaration that the plaintiff is the lawful and legal owner of Plot No: 33 of L.R. No. 209/11046 Embakasi, Nairobi.

(b) A perpetual injunction restraining the defendant either by himself, his agents or servants from trespassing or construction on the said plot until the determination of the suit.

The applicant states that an interlocutory injunction pending the hearing and determination of the suit was granted by the subordinate court and remains in force, pending the transfer sought and that the same ought to be recognised and adopted as a subsisting order with full force of the law, to be maintained pending the finalization of the suit by the High Court. Counsel for the applicant has submitted that this is a suitable case for an order of transfer of suit under **Section 18 of the Civil Procedure Act**.

The application is opposed in the strength of the replying affidavit sworn by the defendant/respondent on 6th December 2011 and filed on 7th December 2001. The respondent concedes that an interim injunction order was issued against him by the lower court, which the applicant has been enjoying, without making any efforts to have the suit heard to completion. He challenges the application mainly on the ground that the suit, having been filed in a court lacking jurisdiction is null and void and incapable of being transferred. He has submitted also that the provisions of **Section 18 of the Civil Procedure Act** do not apply to this case, which provision, according to the respondent allows not for a transfer of a suit from a lower court to the High Court but for a withdrawal of the same and for trial and

disposal of the same by the High Court. The respondent argues also that this application is an afterthought, calculated at delaying the suit so that the applicant can continue to enjoy the interim orders.

Oral submissions were made in arguing the application and the same have been carefully considered. Counsel for the applicant submitted that no authority was cited to support the respondents contention that the suit was a nullity and incapable of being transferred.

The courts have held, many times over, in line with the holding in **KAGENYI .VS. MUSIRAMO & ANOTHER [1968] EA 43** that a transfer of a suit is only possible where the same has been, in the first instance, filed in a court which has jurisdiction to try it. Where in the cited case the court before which the suit had been filed having had no jurisdiction to try it, the court held that it would have been incompetent to transfer the suit in the circumstances and dismissed the application for transfer.

I find that the same circumstances do obtain in these proceedings and that there is no suit to transfer. Lack of jurisdiction being the reason for seeking the transfer, I regret that the application must fail. Accordingly, the same is hereby dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 9th DAY OF FEBRUARY 2012.

M.G. MUGO

JUDGE

In the presence of :

for the applicant

for the respondent.