



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

**Miscellaneous
Application
266
of
2012**

ZELUYAH WAIRIMU GITHINJI.....>>>>>>.....APPLICANT

VERSUS

JOHN KINYATI WARAHO.....RESPONDENT

RULING

The applicant herein instituted a suit by way of a plaint in the Chief Magistrate's Court, Milimani being CMCC No. 1145 of 2012 on 9th March 2012 in which the plaintiff is primarily seeking orders for declaration that she is entitled to half of the earnings from LR No. 3811/29 (IR No. 108451/1) Githurai 45 Estate, Nairobi. She further claims for an order of accounts for rents received and mandatory injunction for payment of the said entitlement as well as the usual order for interest and costs.

The cause of action apparently arises from joint ownership of the said property between the parties herein who are apparently estranged husband and wife respectively.

It is this suit which is the subject of this application in which by her Motion on Notice dated 10th May 2012 expressed to be brought under the provisions of sections 18(1)(b) and 3A of the Civil Procedure Act as well as Order 51 of the Rules made thereunder, the applicant now seeks *inter alia* an order that the same suit be transferred to the High Court for hearing and final determination. That is the only prayer that was urged before me, since the other prayers had, either been dispensed with or were simply incapable of being granted in this cause at this stage. The said motion is supported by annexed affidavit of the plaintiff, **Zelluyah Wairimu Githinji**, sworn on 10th May 2012. In the said affidavit, the applicant avers that the reason for seeking the transfer of the said case to the High Court is because the amount involved as well

as the value of the suit are way above what the Chief Magistrate's Court is allowed by law to adjudicate upon. In support of this application she has annexed a copy of the valuation report dated 4th February 2010 in which the valuers, **M/s Acumen Valuers Ltd** have placed the forced sale value of the suit property at Kshs. 10,000,000.00.

In his submissions, **Mr. Isinta**, learned counsel for the applicant submitted that at the time of the institution of the said suit, the applicant was unaware of how much was owed to her as a joint owner since the property had been charged. It is only on filing of the suit and perusing of the accounts that the plaintiff realised that the sum due to her may exceed the jurisdiction of the Chief Magistrate's Court.

The application was opposed by the respondent through his learned counsel **Mr. Njoroge**, who on 6th June 2012 filed grounds of opposition dated the same day in which he contends that the application is misconceived, bad in law and brought in bad faith; that the orders sought are untenable; and that there are no sufficient grounds to warrant the orders sought. Although it was not clearly expressed in the foregoing grounds, the main ground for opposing the application as understood by myself from **Mr. Njoroge's** submissions was that as the suit was filed in a Court that had no jurisdiction, the same was void *ab initio* and therefore is incapable of being transferred to the High Court. It was counsel's view that the filing of the suit in a court that lacked jurisdiction cannot be termed as a mere mistake which can be cured by transfer of the same under section 18 of the Civil Procedure Act. It was further submitted that section 3A which preserves the inherent jurisdiction of the court cannot be invoked where there is an express provision dealing with the particular situation, in this case section 18 aforesaid. To reinforce his submissions, **Mr. Njoroge** cited **Boniface Waweru Mbiyu vs. Mary Njeri & Another Nairobi HCCC No. 639 of 2005** and **Muchiri vs. Attorney General & 3 Others [1991] KLR 516**.

I have considered the foregoing. It is trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as "transfer". In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further. That is the law.

However, **Mr. Isinta** has argued that taking into account the nature of this suit which involves a couple and the interests of children, the court should proceed on the basis of substantive law and not on technicalities. With due respect to **Mr. Isinta**, jurisdiction is not a technicality. Jurisdiction is everything and without it the provisions of Article 159(2)(d) are of no assistance to a party. It is the jurisdiction that enables the Court to invoke the provisions of the said Article and without it I do not see how the Court can purport to invoke the same. Jurisdiction respects neither the matrimonial union nor the welfare of the issues therefrom. Accordingly, I associate myself with the holding of **J B Ojwang, J** (as he then was) in the **Boniface Waweru Mbiyu vs. Mary Njeri & Another (Supra)** that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

However, whether or not the Court has jurisdiction may depend on the facts and circumstances of a case. Where a cause of action, for example arises from injuries sustained in a road accident circumstances may arise during the course of the proceedings which tend to show that, taking into account the nature of the injuries sustained, the amount of damages likely to be awarded may exceed the jurisdiction of the subordinate court with the result that were that suit to be heard and determined in that court the outcome

thereof is likely to occasion a miscarriage of justice. In such cases the suit may properly be transferred to the High Court since the value of the subject matter was not determinable at the time of the filing of the suit and hence it cannot be said that the subordinate court lacked jurisdiction *ab initio*. In other words the damages are at large. It was precisely for the same reason that **Ouko, J** in **Rachel Isanda vs. Jane C Cheruiyot & Another Nakuru HCMCA No. 36 of 2009** invoked the provisions of section 18 aforesaid to transfer a suit from the subordinate Court to the High Court.

In the present case although the subject matter revolves around the suit property, the plaintiff is not claiming the suit property whose value is placed at Kshs. 10,000,000.00. The plaintiff is simply claiming an interest therein as her share of the contribution. Where the title of the property is not in issue and the claim for an interest in the property is within the jurisdiction of the Subordinate Court the suit can be filed in the Subordinate Court and such a suit can perfectly be transferred to the High Court. In the present proceedings, the plaintiff is also praying for an order that an accounts be taken. She contends that she was not aware of the amount in issue when the suit was filed. The fact that in the suit she is claiming for an order for account, in my view, is a clear indication that she is not sure of the exact sum that the court may eventually adjudicate in her favour if she succeeds. There is no other factual evidence on record to controvert what the applicant has stated on oath in her affidavit as the respondent has chosen to rely on grounds of opposition. The law as I understand it that a court is, and to has to be for the protection of the public, jealous of its jurisdiction, and will not lightly find its jurisdiction ousted. It is only in clear cases where the Court lacks jurisdiction that it should down its tools. In this case from the material presented, I am unable to find that the suit was filed in a court that had no jurisdiction from inception and therefore looking at the pleadings in the subordinate court, I am not able to state with certainty that the suit was filed in a court that had no jurisdiction *ab initio*.

It is my view that this is the kind of a case that is contemplated under section 18 of the Civil Procedure Act.

Consequently the Notice of Motion dated 10th May 2012 is allowed in prayer 2 thereof with the result that Nairobi Chief Magistrate's CMCC No. 1145 of 2012 is hereby transferred to the High Court to this Court for hearing and final determination.

As the grounds of opposition were admittedly filed and served on the hearing date, there will be no order as to costs.

Ruling read, signed and delivered in Court this 18th day of June 2012

G.V. ODUNGA
JUDGE

No appearance for parties