



JOSEPH MURURI.....APPLICANT

VERSUS

GODFREY GIKUNDI ANJURIRESPONDENT

R U L I N G

The applicant by an application dated 8th May, 2012 brought under Section 18(1) (b) of the Civil Procedure Rules seeks the following orders:-

1. That the Honourable court deem it fit to transfer suit Number 46 of 2012 from Tigania Law Courts to the High Court of Meru for trial and disposal.

2. That costs of this application be in cause.

The application is based on the following grounds:-

I. That the Tigania Senior Principal Magistrate has neither territorial nor pecuniary jurisdiction to hear and determine the suit.

II. The court apparently issued illegal injunction ex-parte orders which were misused by police to destroy the applicant's property.

The application is further supported by the applicant's affidavit dated 8th May, 2012. The applicant in his advocate's affidavit dated 8th May, 2012 stated as follows:- That the applicant inherited his father's suit No. HCCC 118 of 1985 which suit is still pending and that the original plaintiff is now deceased. That on 11th April, 2012 the applicant telephoned his advocates informing him that the police were about to evict him from his land by virtue of court's order issued in Tigania court in **SPMCC 46 of 2012 Geoffrey Gikundi Anjuri – VS- Joseph Murori**. That on 13th April, 2012 the applicant's advocate obtained copy of the Tigania Law Court's order and discovered that the order was issued ex-parte to the advocate for the respondent, Mr. Elijah Ogoti and the same was served upon the police for execution.

That the orders issued were injunctive in nature but that notwithstanding the orders were used by police to allow the respondent to evict the applicant and destroy his crops as well as demolish his buildings and other structures. The applicant's counsel states that he tried to talk to OCS to tell him that the orders were illegal and could not be used for eviction. That he turned deaf ear and continued to harass the applicant. The applicant's counsel states the land in dispute is in Central Imenti District and the case was filed in a court without territorial jurisdiction. The advocate has stated that although he has been in Tigania twice he has been unable to have his application heard. He concluded by praying that this matter be transferred to this court so as to be consolidated with the old case or be heard separately by another court.

On the other hand, the application is opposed. The respondent in opposition to the application filed a replying affidavit dated 22nd March, 2012. The respondent stated that there is no dispute that he is the registered proprietor of suit land in SPMCC 46 of 2012 being Abothuguchi/Gaitu/2200 as per attached

copy of the plaint marked EOK2. That Tigania case and the Meru HCCC 118 of 1985 have no relationship and that the mentioned HCCC 118 of 1985 has since abated following the death of the Applicant's father and there having no succession process commenced by any party.

The respondent contended that he has been advised by his advocates that the Tigania court has jurisdiction to entertain this claim. The respondent challenged applicant's contention that his properties were destroyed and stated no document has been attached to prove distribution of applicant's property. The respondent stated that he owns Abothuguchi/Gaitu/2200 whereas the applicant owns Abothuguchi/Gaitu/318 and if police destroyed the applicant's property in parcel No.Abothuguchi/Gaitu/318 that is a complete story altogether.

The respondent further stated that the applicant is dwelling on technicalities such as jurisdiction and magistrate being absent. That Section 159 2(d) of the Constitution of Kenya is against the application. He further pointed out that the remedy available to the applicant is to challenge the orders in issue in the court which issued the orders and if not satisfied file to the High Court an appeal and not to "jump guns" as he is now trying to do. He further stated that the applicant is "jinxed" since the application by the applicant proceeded on 11th May, 2012 and the ruling is scheduled for 29th May, 2012 hence the current application is against the principal of sub judice. He further averred that the dates the Magistrate was absent he was unwell and Mr. Kioga, Advocate should not capitalize on the Magistrate's sickness to create a mountain out of sickness.

When the application came up for hearing Mr. Kioga advocate for the applicant on his part relied on his affidavit and that of his client. The applicant in his affidavit states that on 12th April 2012 police came to his home and told him to vacate his premises. The police who were accompanied by the respondent and a lorry full of young men embarked on his crops, cutting them down as well as trees which included miraa, and bananas. That the following day the respondent started fencing the applicant's land and burned the applicant's houses. That the applicant is now left with only one house which the respondent is threatening to demolish. That the respondent have had the applicant's gate closed and he has no way whatsoever of getting out of the house or coming out of the house. That the applicant's crops were ploughed off and respondent planted his own crops on the applicant's land. That the suit land is situated at Central Imenti District, however the suit was taken to Tigania Law Courts. He averred that he has not been heard on his application as trial Magistrate has been away.

Mr. Kioga Advocate in support of the application argued that the trial court has neither territorial nor pecuniary jurisdiction to hear and determine this matter. That the orders issued by court were only injunctive in nature. That the order was misused by police by allowing the respondent to have applicant evicted from the land in dispute. That in doing so the applicant was subjected to very inhuman treatment. He submitted that the respondent's counsel Mr. Ogoti knew that there was a pending case before the High Court. He also submitted that Mr. Ogoti Advocate swore a false affidavit of service. He submitted that the applicant was indeed not served with the application. He argued that Mr. Ogoti advocate must have served the wrong party.

Mr. Kioga Advocate argued that the suit land is situated at Gaitu within Central Imenti District. He submitted that matters from Gaitu in Central Imenti District should either be filed at Nkubu Law Courts or Meru Law Courts and not Tigania. He argued without disclosing the value of the property, that the land and the property exceeded the pecuniary jurisdiction of Tigania Law Courts. He submitted that it cannot in any way be argued that the respondent's counsel did not know the boundaries. He argued this court has supervisory powers over the lower court and referred the court to Article 165(6) and (7) of the Constitution of Kenya, urging the court to call for the lower court file for fair administrative justice. He submitted that HCCC 118 of 1985 has not abated as they filed an application for substitution. He argued the submission advanced on behalf of the respondent that lower court has jurisdiction is only an opinion by the respondent and ought to be expunged from the part of the respondent's affidavit.

He further stated that plot No.2200 was subdivided from plot 318 and cannot be argued to be a different parcel of land.

The learned counsel for the respondent Mr. Ogoti strongly opposed the application for the transfer of this suit. In doing so he argued that the applicant has not given convincing reasons to warrant a transfer of the suit. The respondent's counsel referred to the Replying Affidavit in opposing the application. He argued that the applicant has other avenues for reviewing or setting aside the orders issued by the lower court rather than bringing up this application. He termed the action by the applicant as seeking orders through a backdoor. On the issue of jurisdiction the respondent's counsel submitted that it is not disputed that in Imenti Central District, where the suit land is situated, there are no local courts. He averred that in the aforesaid District, there is no single Law Court. That civil matters are supposed to be filed in the nearest District. He submitted the nearest court from Gaitu is either Tigania or Nkubu. He also submitted that now we have Counties and not Districts in this county and the land being within Meru County Council a claim can therefore be filed in any court within the County. He further argued Tigania is an SPM court and it has not been shown that the court did not have pecuniary jurisdiction. He argued that parcel land No.2200 is different from parcel No.318 and as such the suit land in dispute in HCCC 118 of 1985 is not plot No.2200. He urged the court not to dwell on technicalities referring the court to Article 159(2) (d) of the Constitution of Kenya.

Mr. Kioga Advocate in reply stated that in this matter we are concerned with jurisdiction and integrity of the court. He submitted that Section 18 of the Civil Procedure Act do not require that reasons be given for transfer of the suit. He therefore argued that the court has jurisdiction to allow the application and referred to Section 12 of the Civil Procedure Act.

The issue for determination in this matter is whether the lower court has jurisdiction to hear and determine the suit filed before it and whether this court can transfer the case at the lower court to any other court for hearing and determination.

The copy of the plaint attached to respondent's affidavit show that the prayers sought are for an order of permanent injunction to restrain the respondent, his agents or assigns from interfering with the plaintiff's peaceful occupation of parcel No.Abothuguchi/Gaitu/2200 to be executed by OCS Gaitu Police Station. The suit was filed on 23rd March, 2012.

Under Section 12 of the Civil Procedure Act suit ought to be instituted where the subject matter is situated. Section 12 of the Civil Procedure Act provides:-

“12. Subject to the pecuniary or other limitations prescribed by any law, suits -

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”

The suit land is situated in Gaitu, Central Imenti District, in which district there is no court within the aforesaid district. The nearest court has been submitted by the applicant as Nkubu and Meru Law Courts whereas the respondent insists it is Tigania.

That notwithstanding I find that since Central Imenti District has no court, a party can file a suit either at Nkubu, or Meru or Tigania depending on which court is near to the suit land. I find therefore that Tigania Court has territorial jurisdiction to hear and determine a matter originating from Central Imenti District.

Further on perusal of Section 11 of Civil Procedure Act jurisdiction of a Subordinate Court is based on District and not County.

Section 11 of the Civil Procedure Act provides:-

“11. Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and

sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

(i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

(ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.”

On the issue of pecuniary jurisdiction Section 159 of the Registered Land Act(repealed) provided that Civil suit and proceedings relating on the possession of the land or title to lease or charge registered under Cap.300 where value of subject matter in dispute does not exceed twenty five thousand pounds, the matter shall be heard by the Resident Magistrate’s court or where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunal Act in accordance with the Act(***The Land Disputes Tribunal Act is now repealed***).

Section 159 of the Registered Land Act(Cap.300)(which is now repealed) provides as follows:-

“159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”

The applicant averred that the suit land’s value is beyond the jurisdiction of the trial court. The averment was not supported by any valuation. On the other hand, the respondent averred the court has jurisdiction but equally did not file any valuation report. This court is faced with two conflicting affidavits. The court cannot therefore decide to prefer one affidavit and ignore the other. In the instance case the applicant averred that trial court did have pecuniary jurisdiction to try the matter. The burden of proof lied with the applicant that the trial court lacks jurisdiction.

Section 107 of the Evidence Act provides:-

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In view of the foregoing I find that the applicant failed to prove that the trial court lacked pecuniary jurisdiction. I therefore find and hold that the trial court had both territorial and pecuniary jurisdiction.

The next issue for my consideration is whether this court can transfer this suit filed at Tigania Law Courts.

In the case of **KAGENYI – V- MUSIRAMO AND ANOTHER(1968) E.A.43** Court of East Africa held:-

1. Section 18 of the Civil Procedure Act gives a general power to the High Court for due trial and determination on the ground that the court of the magistrate grade II, Bukoto, Kabula, before which court the case was pending, had no jurisdiction to try the case. The total value of the cattle, the subject matter of the case, was stated to be well over Shs.10,000/- whereas the jurisdiction of the magistrate in civil matters was limited to Shs.1,000/=

2.An order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it;

3.The subject matter of the application on the admission and showing of the applicant had been instituted in a court without jurisdiction and it was therefore incompetent for the case to be transferred to the High Court for hearing and determination.

In view of the above-mentioned decision High Court can only transfer a suit which had been filed in a suit of competent jurisdiction and not otherwise.

Under Section 18(1) of the Civil Procedure Act it is provided as follows:-

“18. (1) 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) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court

subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.”

It is therefore clear from the above mentioned section that the High Court has on an application by any of the parties after due notice to the parties and after hearing such of them as desires to be heard on its own motion without such notice may at any stage order withdrawal of any suit pending in any court subordinate to it and thereafter try or dispose of the suit or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same.

Besides the above under **Article 165 (6) and (7) of the Constitution of Kenya** the High Court has supervisory jurisdiction over subordinate courts and the High Court may call for record of any proceedings before subordinate court or person, body or authority and give any direction it considers appropriate to ensure such fair administration of justice.

Article 165(6) and (7) of the Constitution provides:-

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

As a matter of concern and interest in the instance case applicant is said to have been evicted by use of court's order arising out of injunctive orders without having been heard and without the suit having been determined on merits. It was wrong of the respondent or for the court after issuing an injunctive order to allow the same to be used to evict the applicant. I feel this is a case in which High court is under duty to call and give directions for fair administration of justice if the same shall have to remain at the lower court.

This suit interestingly was filed on 23rd March, 2012 notwithstanding Gazette Notice No.1617 of 9th February,2012 in which Chief Justice/President, Supreme court gave the following practice directions pending the establishment of the Environment and land court:-

“IN EXERCISE of the powers conferred by the sixth Schedule Part 5 section 22 of the Constitution of Kenya, 2010, and in pursuance of section 30 (1) of the Environment and Land Court Act, (No. 19 of 2011) of the laws of Kenya on transitional provisions for proceedings relating to the environment and the use and occupation of, and title to land, as read with section 31 of the Act, the Chief Justice makes the

Following practice directions pending the establishment of the Environment and Land Court.

- ***All proceedings relating to the environment and the use and occupation of, and title to land pending before the Court of Appeal, High Court, Subordinate Courts or Local Tribunal of competent jurisdiction other than Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals Act, No. 18 of 1990, shall continue to be heard and determined by the same Courts or Tribunal. Any Proceedings which shall not have been concluded by the time the Environment and Land Court is established, shall be moved to the Court upon its establishment.***
- ***All proceedings which were pending before the District Land Disputes Tribunals as at the date of the enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest Resident Magistrate's Court for hearing and determination by a Court presided over by a Magistrate of the rank of Resident Magistrate.***
- ***All proceedings which were pending before the Provincial Land Appeals Committees as at the date of the enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest High Court for hearing and determination.***
- ***The proceedings to be moved to the Resident Magistrate's Courts and High Court respectively, shall be under separate registers to facilitate ease of movement to the Environment and Land Court once established in the event that the proceedings are not concluded before the establishment of the said Court.***
- ***All new disputes relating to the environment and the use and occupation of, and title to land shall be filed in the nearest High Court under a separate register to facilitate ease of movement of the proceedings to the Environment and Land Court once established.***

Under the last bulletin above, it is clear that the land cases filed at Tigania as it related to use and occupation of and title to the land ought to have been filed at Meru High Court to facilitate case

movement of the proceedings to the Environment and Land Court once established.

The upshot of this application is that it is allowed and I proceed to make the following orders:-

1. That Tigania SPMCC 46 of 2012 is withdrawn from Tigania SPM Law courts and transferred to the High Court at Meru and to be registered under a separate register to facilitate ease of movement of the proceedings to the Environment and land court once established.

2. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE, 2012.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

1. Mr. Murithi h/b for Mr. Kioga for the applicant

2. Mr. Meenye H/b for Mr. Ogoti for the respondent

J. A. MAKAU

JUDGE