



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 208 of 2011

VERONICAH NDUNGE MUSYIMI.....PLAINTIFF

AND

MUTISYA MARTIAS.....DEFENDANT

RULING

Before me is an application by way of Notice of Motion dated 23rd August 2012 brought by the plaintiff. The application was filed under sections 3A and 18 of the Civil Procedure Act (Cap 21), and Order 51 Rule 1 of the Civil Procedure Rules. The prayer sought is as follows:-

This Honourable Court be pleased to withdraw civil suit Nos. CMCC 387 of 2011 and CMCC No. 377 of 2011 pending before the Chief Magistrate’s Court at Machakos and transfer the same to the Principal Magistrate’s Court at Makueni for hearing and final determination.

The application was filed with a supporting affidavit sworn on 23/8/2011 by Anne W Wambua Advocate.

The application is opposed on technical grounds.

The plaintiff through Anne M Kiusya & Company Advocates filed written submissions on 30th May 2012. The defendant through M/s Kairu & Mc Court Advocates filed written submissions on 4th April 2012.

There are three main objections to the application. Firstly, that the application is fatally defective as it seeks to withdraw and transfer two cases which are not consolidated. The second objection is that the prayers are strange as there is a prayer for withdrawal and transfer combined in the same application. The third objection is on jurisdiction of the court from which the suits are to be transferred. It is contended that the Chief Magistrate’s Court Machakos does not have jurisdiction over the cases, and therefore the cases cannot be transferred.

I must state at the outset that Article 159 (2) (d) and (e) of the Constitution (2010) requires courts to administer substantive justice as much as the particular situation permits. It provides:-

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(a)

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be promoted and protected.

In my view, one of the purposes of the Constitution is to allow unhindered access to substantive justice. The cases of **Omwonyo –vs- African Highlands and Produce Ltd (2002) 1 KLR 698** and that of **Private Development Co. Ltd –vs- Rebecca Ngonyo (2006) e KLR** cited by the defendant’s counsel were decided before the Constitution was promulgated in August 2010. The Constitutional principles therefore supersede the reasoning in the above cases.

Be that as it may, the file for this application herein in the High Court is **No. Misc. 208 of 2011**. The pleadings in both **CMCC 377 of 2011** and **CMCC 387 of 2011** were annexed to the application. There is a request that those two cases be transferred to the Principal Magistrate’s Court at Machakos. I find no defect in applying for transfer of the two files or cases in the same application without necessarily consolidating the said cases. I dismiss the first objection.

On the prayers for withdrawal and transfer of the two cases, I find that the wording used is a matter of form. It does not go to the substance of the application. I am convinced that what is required by the plaintiff is a transfer of the two cases to the Principal Magistrate at Makueni. Therefore, I can order a transfer.

Coming to the objection that the Chief Magistrate at Machakos did not have jurisdiction to deal with the two cases, I differ. Any Chief Magistrate in my view has national jurisdiction in Kenya. Besides, the request is to transfer the case to a lower court. The Chief Magistrate has wider jurisdiction than the lower court in this Eastern Province area. It cannot be said that the Principal Magistrate at Makueni has jurisdiction over and above that of the Chief magistrate at Machakos unless it is special jurisdiction, which is not the case herein.

In the result, and in the interests of justice, I allow the application and grant an order for the transfer of the two cases as requested. The costs of this application will be determined in the respective two cases.

Dated and delivered at Machakos this **20th** day of **November** 2012.

George Dulu

Judge

In the presence of:

N/A for Plaintiff

Ms. Kavita holding brief for Ms Mutai for Respondent/Defendant

Nyalo – Court clerk