



CIVIL PRACTICE AND PROCEDURE

- *S. 18 of Cap 21 transfer of a case from one court to another will only be allowed where it was first filed in the court with jurisdiction.*
- *The magistrate's court has jurisdiction to entertain claim of trust in R.L.A. property.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT MISC. APPL. 76 OF 2010

M'MWONGERA MIRURIAPPLICANT

VERSUS

NANCY KANUGU MBAYA (*Legal Administratrix of the*
estate of

AYUB MBAYA MWONGERA RESPONDENT

RULING

The applicant has filed two applications which are the subject of this ruling. The first application is dated 7th June 2010. It is brought under section 18 of the Civil Procedure Act Cap 21. It seeks as an order for the transfer of Meru CMCC No. 807 of 1995 to this court for hearing and determination. In support of that application, the applicant argued that he filed his claim in the lower court seeking determination that the respondent's late husband Ayub Mbaya Mwongera (Ayub) held two acres for him on Parcel No. *Kiirua Kiirua 324* in trust. The background of that action is that the applicant together with the late Ayub purchased jointly the Parcel No. *Kiirua Kiirua 324* in 1970. The applicant's entitlement of that land was two acres. The land was registered in the name of Ayub. The late Ayub was the advocate who did the transaction of the purchase of that land but failed to excise the two acres for the applicant. The applicant therefore filed the case Meru CMCC No. 807 of 1995. As stated before, he sought in that action the court's declaration that the late Ayub held the two acres in trust for him. The applicant now seeks to add further prayers in his action for the declaration that he has acquired title for the two acres by adverse possession. He stated that he had been in occupation of that land for over twenty years. The application was opposed by the respondent on the basis that this court cannot transfer from the lower court a suit filed without jurisdiction. In that regard, the respondent relied on the case **Kagenyi vs. Musiramo & Ano.**

[1968] E.A. where the High Court at Uganda held as follows:-

- i) Section 18 of the Civil Procedure Act gives a general power of transfer of all suits, which may be exercised at any stage of the proceedings even suo motu by the court without application by any party;**
- ii) 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;**
- iii) The subject matter of the application on the admission and showing of the applicant had been instated in a court without jurisdiction and it was therefore incompetent for the case to be transferred to the High Court for hearing and determination.**

The applicant's suit in the lower court seeks a declaration of trust. The suit land is registered under the Registered Land Act (RLA). As stated in HCCA Meru No. 74 of 2001 (UR) the magistrate's court has jurisdiction to hear matters of trust to land registered under R.L.A. The court in that case stated:

"The interpretation section of the Registered Land Act defines a court which has jurisdiction to entertain matters under that Act as:-

"The court" except as otherwise expressly provided means the court having jurisdiction in the matter in question by virtue of Section 159."

Section 159 of the Registered Land Act then provides:-

"159. Civil suits and proceedings relating to the title, 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 Dispute Tribunal Act in accordance with that Act." (Underlining mine)."

"From that Section, it is clear that the magistrate court does have jurisdiction in matters involving land registered under that Act not exceeding five thousand pounds."

The above answers the opposition raised by the respondent. I find that the application dated 7th June 2010 is merited and is granted in terms of prayer No. 1. The second application is dated 25th October 2010. It is by Chamber Summons brought under sections 1A 1B and 3A of the Civil Procedure Act and section 128 of the RLA. The application is for inhibition to stop registration of dealings with parcel Nos. *Kiirua Kiirua 1404, 1405, 1406, 1407, 1408 and 1409*. These parcels are the sub divisions of *Kiirua Kiirua 324*. The sub divisions seem to have been done following conclusion of the succession cause of the estate of Ayub. The applicant deponed that if inhibition will not be granted, those parcels will be transferred to 3rd parties to his detriment. The application is opposed by the respondent. In the replying affidavit, the respondent annexed a ruling of the lower court in Meru CMCC No. 807 of 1995 dated 29th July 2010. That was a ruling of an application by this same applicant. By that application he sought revision of

the lower court's previous ruling dismissing his application for inhibition over the land in question. The lower court declined to review its dismissal order. It is in that background that the applicant again filed before this court an application seeks inhibition orders over the same property. In the first instance, this matter as can be seen from its title is a miscellaneous matter for the sole purpose of seeking the transfer of Meru CMCC 807 of 1995 to this court. Inhibition orders are ordinarily granted as interlocutory orders pending final determination of a suit. If the inhibition sought by the applicant is granted in this miscellaneous application, it will be granted pending what? The answer is, nothing really, because once the orders are granted for the transfer of the lower court matter, this action will come to an end. Secondly, having failed to get inhibition orders before the lower court the applicant is not permitted to seek the same before this court unless it is an appeal. That finding however does not bar the applicant to seek such orders once the lower court matter is transferred to this court and once he makes the claim that he intends to file for adverse possession. The applicant in arguing the application for inhibition pleaded with the court to consider the overriding principle which is sometimes called the *double 'O'* rule and grant inhibition orders. The Court of Appeal in the case **Mradula Suresh Kantaria vs. Suresh Nanalal Kantaria** Civil Appeal (Application) No. 277 of 2005 stated that the overriding principle is not panacea for all ills. It stated thus:-

“While the enactment of the double 'O' is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian case of Puruse Pty Limited vs. Council of the City of Sydney [2007] NSWLEC 163 where the court underscored that the court in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained..... In our view, the overriding objective cannot override fundamental principles of law”

The *double 'O'* principle will not assist the applicant to overlook the fundamental principles of the law as stated before. The Chamber Summons dated 25th October 2010 is therefore without merit. In summary, the final orders of this court are as follows:-

- 1. The court orders the withdrawal and transfer to this court Meru CMCC No. 807 of 1995. The costs of the Notice of Motion dated 7th June 2010 are awarded to the respondent.***
- 2. Chamber Summons dated 25th October 2010 is dismissed with costs to the respondent.***
- 3. The orders of status quo issued by this court on 15th November 2010 are hereby vacated and discharged.***

Dated, signed and delivered at Meru this 13th day of April 2011.

**MARY KASANGO
JUDGE**