



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CASE NO. 84 OF 2008

CHRISTINE WANGARI GACHEGE.....PLAINTIFF  
 VERSUS  
 ELIZABETH WANJIRA EVANS .....1<sup>ST</sup> DEFENDANT  
 MOBIL OIL (K) LTD.....2<sup>ND</sup> DEFENDANT  
 ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT

RULING

The Applicant in the Chamber Summons dated 28<sup>th</sup> August 2009, is the 1<sup>st</sup> Defendant in this suit. She seeks the striking out of the Plaintiff’s Complaint filed in this court on 6<sup>th</sup> March 2008, and the dismissal of the entire suit, on the grounds that the suit ought to have been filed at the Nakuru High Court, move specifically “*in a Nakuru High Court Succession Cause No. 96 of 2000 (In the Estate of the late Rahab Wanjiru Evans)*” This, the Applicant states is because the suit property, namely **Nakuru/Municipality Block 4/258** is located in Nakuru Town and that the 1<sup>st</sup> Defendant/Applicant resides in Nakuru.

Further, the Applicant states that there is in place an appeal, being **Civil Appeal No. 233 of 2007** wherein a stay order has been made against these proceedings, which means that the present suit is scandalous, frivolous and vexatious and calculated to prejudice, embarrass and delay the fair trial of the issues pending before the court vested with jurisdiction to entertain the same. For these reasons the Applicant takes view that the suit is suitable for striking out under **Order V1 Rule 13 (b) (c) and (d)** of the **Civil Procedure Rules (2009 Revised Edition)**, and **Sections 6, 7 and 3A** of the **Civil Procedure Act**.

The Application is supported by the Applicant’s affidavit of 28<sup>th</sup> August 2009, to which she has annexed an extract of the **Gazette Notice No. 300** of 19<sup>th</sup> January 2007, which published the Chief Justice’s Practice Directions as relate to the filing of suits, applications and references in the proper courts. The said gazette notice state that the directions were issued pursuant to **Sections 11 to 18** of the **Civil Procedure Act (Chapter 21)** which,

“**Make provisions for the place of suing according to**

- (a) the pecuniary jurisdiction of the court;**
- (b) the place where the subject matter or property is situate;**
- (c) the place where the cause of action arose;**

and

**(d) where the defendants or any of them resides or works for gain.”**

The Chief Justice’s directions above stated require that court (filing) registries are to reject (for filing) all noncompliant suits and emphasize the need for the court to exercise its authority where suits have already been filed in the wrong court and to return the Plaint for presentation in the court where it ought to have been filed, in exercise of its power under **Order V11 Rule 9** of the **Civil Procedure Rules**, and without prejudice to other powers of the court *“to strike out the pleadings as an abuse of the process of the court.”*

The application is opposed on the Grounds of Opposition filed on 5<sup>th</sup> July 2011, and a replying affidavit sworn by the Plaintiff/Respondent on 26<sup>th</sup> October 2011, and filed on the same date. In the grounds of opposition, the Respondent states that the application is misconceived, incompetent, and an abuse of the court process for reasons that:

**(i) An application dated 24<sup>th</sup> March 2011 made by the Applicant on similar grounds was dismissed on 31<sup>st</sup> July 2009.**

**(ii) The application, though filed in September 2009 was not served upon the Respondent until May 2011**

**(iii) The issues raised ought to have been ventilated in the dismissed application**

The Respondent contends that the reliefs sought are not merited because the suit has been fixed for hearing twice without the current application being prosecuted and also because the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants both have their addresses of service in Nairobi and further that the contract forming the subject matter of the suit was executed in Nairobi.

The application was argued orally, with counsel for the 2<sup>nd</sup> Defendant attending but excusing herself on the basis that the 2<sup>nd</sup> Defendant did not consider itself affected by the application. The Attorney General though served, did not attend. Counsel for the Applicant submitted that there was want of territorial jurisdiction and cited **Succession Cause No. 96 of 2000**, which he says was concluded and the suit property awarded to the 1<sup>st</sup> Defendant/Applicant in the judgment dated 10<sup>th</sup> July 2007, produced before court as part of the 1<sup>st</sup> Defendant’s list of documents.

It was further submitted for Applicant that the Plaintiff/Respondent herein appealed against the said judgment in the **Civil Appeal No. 233 of 2007** in which she has obtained a stay of execution of orders touching on the suit property and the appeal is still pending. Since the Nakuru Court is one of stations that the Court of Appeal sits, a presumption is hereby made that the appeal was filed in Nakuru or Nairobi. Counsel has submitted that the Plaintiff cannot be before this court, prosecuting this suit, and at the Court of Appeal at the same time. It has been submitted also that there was nothing exhibited in the Replying Affidavit to show that the lease between the 1<sup>st</sup> Defendant/Applicant and the 2<sup>nd</sup> Defendant was executed in Nairobi to warrant the suit being filed here.

Without producing the orders obtained from the Court of Appeal, counsel for the Respondent told the court that the same were for the preservation of the estate property pending appropriate distribution after the appeal is concluded. The judgment in the Succession Cause is not denied, nor is the pending appeal. From the same it appears that the 1<sup>st</sup> Defendant/Respondent was awarded the suit property under item (iii) of the Distribution which appears at page 14 of the judgment as follows:-

**“L.R. Nakuru/Municipality block 4/258 (Petrol Station) shall be inherited by Elizabeth Wanjera Evans.”**

The above appears not to be in dispute either, only that the said beneficiary (1<sup>st</sup> Defendant) is alleged to have transferred the said property particularly to the 2<sup>nd</sup> Defendant by way of a long term lease whilst the Succession Cause was pending and the judgment of 10<sup>th</sup> July 2007 had not yet delivered. It is in respect of the proceeds of that transfer that the Plaintiff herein seeks an order to have the 1<sup>st</sup> Defendant account to the Estate, an order which the 1<sup>st</sup> Defendant/Applicant says ought to have been sought from the Nakuru Court.

From my perusal of the Ruling of Nambuye J. in the Notice of Motion dated 24<sup>th</sup> March 2009, it appears that the issue of jurisdiction, although brought in as one of the grounds in support of the application, was not considered and the application was dismissed purely on the ground that it did not meet the legal requirements as per the statutory provisions under which it was brought, or other relevant provisions as would support a dismissal for want of prosecution.

The true intention of the present application was rendered ambiguous when, at the close of his submissions counsel for the Applicant asked this court to exercise its discretion and either strike out the suit or order for its transfer to the Nakuru High Court. There is no dispute that the suit herein is closely tied to the Nakuru **Succession Cause No 96 of 2000**, which is said to have been pending whilst the challenged transfers by the 1<sup>st</sup> Respondent took place. Of particular interest are paragraphs 5, 6, 7, 8, 10 (vii) and 11 of the Plaint which state as follows:-

“5. The Plaintiff and the 1<sup>st</sup> Defendant together with one Peter Gachege Njogu and one Mary Wanjiku Gachigi are co-administrators of the estate of the late Rahab Evans pursuant to the orders issued in the High Court in Nakuru Succession Cause No. 96 of 2000.

6. The Deceased left behind several assets and properties upon her demise, among them being:-

(a) a property situate in Nakuru Municipality and known as NAKURU MUNICIPALITY/BLOCK 4/258 upon which is constructed a Petrol station complete with the usual conveniences valued in excess of Kshs.4,000,000/= (“the property”)

(b) -----

(c) -----

7. On or about 9<sup>th</sup> May 2007, while awaiting judgment in the Succession Cause aforesaid, the first Defendant in collusion with the District Land Registrar, Nakuru, unlawfully caused the property aforesaid to be transferred to the four co-administrators of the estate without the knowledge, concurrence or participation of the Plaintiff and prior to the confirmation of the Grant of Probate as by law required.

8. Subsequent thereto, on or about 3<sup>rd</sup> July 2007, prior to the delivery of judgment in the Succession Cause aforesaid, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in collusion with the District Land Registrar, Nakuru, unlawfully caused a Lease to be registered in favour of the 2<sup>nd</sup> Defendant against the said title without the knowledge, approval, concurrence or participation of the Plaintiff as co-administrator as by law required.

10. The Plaintiff contends that the said Transfer and Lease mentioned in paragraphs 6 and 8 hereinabove were illegal, null and void and of no legal effect.

Paragraph 10 (Vii) states the following as part of the particular of illegality:-

**(Vii) The Transfer and Lease were negotiated, completed and registered during the pending (sic) of and before the judgment was issued in Succession Cause No. 96 of 2000**

Most importantly, paragraph 11 of the Plaint states as follows:-

**“11. In further breach of the express provisions of the law, the 1<sup>st</sup> Defendant deliberately failed to disclose and account to the Court and to the estate the dealings concerning the Transfer and the Lease and the income in excess of Kshs. 13,500,000 derived from the latter. The Plaintiff shall crave leave of this Honourable Court to rely on the Official Search obtained from the District Land Registrar at Nakuru, reflecting the consideration of the sum Kshs 13,500,000/= paid by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant. (Underlining by the court)**

The orders sought in the Plaintiff if granted, will be obviously directed at on the District Land Registrar Nakuru, who is the client of the Attorney General. The latter also have offices in Nakuru and is well represented there. Although not stated, I would imagine that the Plaintiff would have to move the court to revoke the Grant if confirmed and if not yet confirmed to apply that the same be in accordance with the judgment in the appeal if, as stated herein the same has been lodged to challenge the judgment of 10<sup>th</sup> July 2007 and if the said judgment is reversed. A presumption has already been made in this Ruling that an appeal has been filed in Nakuru and is pending there.

I need not cite the provisions of **Sections 11 to 18 of the Civil Procedure Act**. However, given the facts of the present suit the Plaintiff had in my considered view, the option under **Sections 12(d) and 15(c)** to file the suit either in Nairobi or Nakuru. The facts of the suit herein militate against the filing of the same in Nairobi.

The objection to the territorial jurisdiction is well taken. However, I do not consider it a suitable ground for striking out the suit, being guided by the holding in the leading case of **D.T. DOBIE & CO. (K) LTD –VS- MUCHINA [1982] KLR 1**, and considering the strict guidelines under which the power to strike out pleadings is to be exercised. I therefore refuse to strike out the Plaintiff. Instead, and in exercise of my inherent power and jurisdiction under **Section 3A** of the Civil Procedure Act, I order and direct that this matter be transferred to the Nakuru High Court for hearing and final determination, for reasons given hereinabove. My decision is also informed by the fact that the 1<sup>st</sup> Defendant/Respondent is now the legal owner of the suit property pursuant to the distribution done by the court in its judgment of 10<sup>th</sup> July 2007, which has not been set aside.

Having sustained the objection, I award costs of the application to the Applicants.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of NOVEMBER, 2011**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Miss Mwangi holding brief for Mr. Onduso For the Respondent

No appearance

For the Applicant