



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Miscellaneous Civil Application 56 of 2010

MWANGI MWAURA..... APPLICANT

VERSUS

JONAH NG'ANG'A MWAURA.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE KANGEMA.....2ND RESPONDENT

RULING

MWANGI MWAURA, the applicant herein, took out the Summons dated 12th May 2010 in which he applied for the following orders:

1. *That this court be pleased to stay the hearing of SRM Civil Suit No. 15 of 2006 at Murang'a Law Courts.*

2. *That the Honourable Courts do order the transfer of the suit to this court for hearing, determination and*

disposal of the same.

The Summons is supported by the affidavit of the Applicant sworn on 12th May 2010. **JONAH NG'ANG'A MWAURA**, the Respondent herein, opposed the summons by filing a replying affidavit he swore on 26th May 2010.

The main reason advanced in support of the Summons is that the Murang'a Senior Resident Magistrate's Court has no pecuniary jurisdiction to hear and determine the suit. It is also said that the High Court sitting at Embu issued a prohibitory order prohibiting the subordinate court from hearing the suit vide **EMBU H.C. J.R. MISC. APPL. NO. 126 OF 2005.**

The Respondent urged this Court to dismiss the Application because it was filed by a party who seeks to transfer a suit where he is represented by an advocate i.e. D.P. Kinyanjui Advocate. It is also argued that **Murang'a S.R.M.C.C. NO. 15 of 2006** has never been a subject of judicial review proceedings. It is further argued that the suit is properly before Murang'a S.R.M.'S Court. The Respondent has further attacked the application on the ground that there is no evidence that the value is stated in the pleadings.

I have considered the rival averments presented to this court. The application before this court is supported by an affidavit which did not annex to it the pleadings before the subordinate court. It is therefore difficult for this court to determine what sort of a suit is pending before that court. The Applicant was enjoined to supply piece of evidence in order to prove his case. On the face of it, the application is not well supported. It has left this court to speculate. The Respondent has been helpful to this Court in that he was able to annex to his replying affidavit the amended plaint and the typed proceedings before the subordinate court. I have perused the amended plaint and it is obvious that the Plaintiff therein did not assign any value to the parcels of land in dispute i.e. **LOC. 2/KANGARE/703, LOC. 2/MARIIRA/703, LOC. 2/MARIIRA/563 and LOC. 2/KANGARE/563.** Even if the value had been stated, I doubt whether the order sought herein could have been given for the following reasons:

First, it is a well settled principle of law that where a suit is not competently before the court, it can either be withdrawn or struck out. The court cannot transfer an incompetent suit. The law presumes that the court can only transfer a suit which is competently before that court.

Secondly, in the suit the Applicant seeks to transfer, he is a defendant and is represented by an advocate namely: D. P. Kinyanjui & Company Advocates. He has now appeared before this court through the firm of E. M. Mutahi & Company Advocates. It is expected that the Applicant should have involved the firm of D. P. Kinyanjui & Company Advocates, the firm seised with **Murang'a S.R.M.C.C. NO. 15 of 2006.**

Thirdly, that the Applicant has failed to lay a strong basis of this application.

Fourthly, that the Applicant has approached this Court by way of a summons yet under *Order L rule 1*, he was required to approach the court using a Motion.

For above reasons the Motion is found to be incompetent and to be lacking in merit. It is ordered struck out and dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 23rd day of July 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mukuha holding brief Muhia for Respondents. P. N. Mutahi for Applicant.