



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Appli 1709 of 2007**

**DEVENDRA VALJI HALAI.....1<sup>ST</sup> PLAINTIFF**

**HARJI RAMJI RACHWANI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RAMJI DEVJI VARSANI & OTHERS.....DEFENDANTS**

**R U L I N G**

The Applicants are the 3<sup>rd</sup> to 34<sup>th</sup> Defendant's in Milimani CMCC No.6015 of 2007. They have moved this court under sections 3A, 17 and 18(1)(b) of the Civil procedure Act Cap 21 of the Laws of Kenya. The Application is essentially brought under S.18 (1)(b) of the above Act which gives the court discretion to withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter-try or dispose of the same, among other things. The grounds for the application are that the subject matter of the suit is a property development whose value exceeds Kenya shillings eighty-four million. That there are long leases whose consideration is over Khs.5 million and that the Applicant's counterclaim raises issues of general and special damages beyond Kenya shillings five million. The Application is supported by the Affidavit of Ramji Devji Varsani the 1<sup>st</sup> Defendant in the chief Magistrates Case.

The Application is opposed by the Respondents who are the two Plaintiffs in the said suit. The grounds are that there is no specific pecuniary plea in the pleadings and so there is no basis upon which the Jurisdiction of the lower court can be challenged without inviting evidence at this stage. The Respondents content that the value of the subject matter is not in issue and it is not part of the claim by any party. That the general damages sought are speculative and a transfer would only serve to delay the hearing of the case.

No Replying Affidavit was filed for the Respondents but their grounds of objection were filed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed nothing but their counsel Mr. Kimanthi attended court at the hearing of the application.

At the hearing both counsel for the 3<sup>rd</sup> to 34<sup>th</sup> Defendants/Applicants and for the Plaintiffs/Respondents urged their respective positions, the former reiterating the contents of the supporting Affidavit and the latter the grounds of objection.

Mr. Okwach for the Applicants also relied on the **Advocates (Remuneration) (Amendment) Order 2006; JUDICIAL HINTS ON CIVIL PROCEDURE 2<sup>ND</sup> EDITION** and on the case of **JORETH LTD –VS- KIGANO AND ASSOCIATES** to show the value of the matters in contention between the parties. He stated that as the prayers in the plaint are for a permanent injunction prohibiting sale or otherwise disposing of the property the subject matter of the plaint and also for eviction of the persons already in possession, this amounts to a claim for recovery of immovable property. He relied on **JUDICIAL HINTS ON CIVIL PROCEDURE** for that position. He therefore stated that as the value of the property the subject matter of the suit is Ksh.84 million, the lower court obviously has no jurisdiction. He said that the amounts refundable in the event of the plaintiff succeeding and the amounts payable in the event of the counter claim succeeding are way beyond the jurisdiction of the lower court.

Mr. Kibanga while conceding that the position as quoted from the **JUDICIAL HINTS ON CIVIL**

**PROCEDURE** about a claim for eviction amounting to a claim for immovable property is correct, said that that position was irrelevant to the case in question. There was no prayer for specific performance and as no prejudice would be suffered by the Defendants if the suit proceeded in the Chief Magistrate's court, he prayed that the Application be dismissed.

I have given consideration to the Application and to counsels' arguments. I have also read the authorities referred to me. As is the position in matters of this nature this court is not concerned with the merits of either party's case. That is for the trial judge. For the Application before me and as urged by counsel for the Defendants mine is to determine whether this is a proper case for transfer to the High Court for trial. I find that the counterclaim is intimately connected with the plaintiffs' claim. The cumulative amounts already made by certain of the defendants in possession and those made by defendants not in possession are way beyond the pecuniary jurisdiction of the Chief Magistrate. And as both counsel concede that a prayer for eviction amounts to a prayer for the immovable property, and the value of the property herein is shown to exceed Kshs.3 million then that takes the matter out of the jurisdiction of the Chief magistrate's Court. It will be remembered always that it is the Plaintiffs who filed this case before the Chief Magistrate's court. The Defendants' counter-claim has to be considered by a court with jurisdiction. Whether or not it succeeds is another matter. No case was quoted to me that would justify a refusal to transfer. A transfer of the suit in the Chief Magistrate's court is therefore necessary and the Plaintiffs will not suffer any prejudice by the claim being tried in the High Court. For these reasons therefore I will allow the application and order that Milimani CMCC No. 6015 of 2007 is hereby withdrawn from that court and transferred to this court for hearing and disposal. Costs of this application shall be in the cause.

Orders accordingly.

**DATED AND DELIVERED** at **NAIROBI** in open court this 7<sup>th</sup> day of March 2008 in the presence of Okwach for 3<sup>rd</sup> to 34<sup>th</sup> defendants and in the absence for counsel for the Plaintiff/Respondents and in the absence of Kimanthi for the 2<sup>nd</sup> Defendant

**P. M. MWILU**

**JUDGE**