



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 232 of 2005

HIMATLAL MORARJI MANEK.....PLAINTIFF

VERSUS

RATILAL GOVA SUMARIA.....DEFENDANT

R U L I N G

This is an application made by the Defendant in this suit under Section 18 (1) (a) and Order L rule of the Civil Procedure Act and Civil Procedure Rules. It seeks to have this suit transferred to the Chief Magistrate Milimani for hearing and final determination. The primary basis for this application is that the cause of action is within the jurisdiction of the Chief Magistrate's Court. It is also based on a ruling delivered by Hon. Kasango, J. on 26th October, 2006 where the Defendant contends the learned Judge ruled that the only issue for trial in the case is whether the Plaintiff was entitled to mesne profits if any, and how much.

The Application is supported by the affidavit of the Defendant.

This application is opposed. There is a replying affidavit sworn by the Plaintiff to the suit. The gist of the affidavit is that the ruling by Kasango, J. did not just say that the issue for determination was mesne profits, but that it also identified other issues for determination. Those issues were identified to be at page 5 of the said ruling and are quoted in the affidavit as the issue when the suit property was vacated by the Defendant and also the issue when the property was transferred into the name of the Plaintiff. The Plaintiff contends that the issue before the court in this case was when the possession of the suit property was delivered to him and that the value of that suit property far exceeds the jurisdiction of the lower court.

I have considered the rival submissions by advocates of both parties to this suit. This suit was filed on 4th May, 2005 in which the Plaintiff was seeking the following reliefs against the Defendant:

- (a) Vacant possession of the suit premises
- (b) mesne profits
- (c) General damages
- (d) interest on mesne profits

- (e) Shs.23,200/- with interest at Court rates
- (f) Costs of the suit together with interest thereon at Court rates.
- (g) Any other relief this court may deem fit in the circumstances.

There was an application for summary judgment filed by the Plaintiff. That application was dismissed on grounds that there were triable issues in the matter that needed to go for trial. These issues, Kasango, J. ruled, were the date when the Defendant vacated the suit property and secondly the date when the property was transferred into the Plaintiff's name. The learned judge ruled that it was important for both dates to be established in order to enable the court determine the mesne profits or damages awardable, if at all, to the Plaintiff.

In the application herein, it is the Plaintiff who instituted the suit not the Defendant. The history of this case shows that the Defendant has been to the Court of Appeal and back over the same suit property. Given that history and other circumstances of the case, it is my view that it will be erroneous to transfer this case to the lower court. This court has the jurisdiction to hear the matter now as it had at the time the suit was filed.

I decline to order a transfer of the suit to the lower court. In the circumstances the application dated 23rd September, 2008 be and is hereby dismissed with costs.

Dated at Nairobi this 21st day of November, 2008.

LESIT, J.

JUDGE

Read and signed in presence of:

Mr. K'Opere for Applicant/Defendant

N/A for Mr. Parekh for Plaintiff

LESIT, J.

JUDGE