



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Misc Appli 491 of 2005

JANE WANJIRA KAMAU.....APPLICANT

VERSUS

MUSA K. KIPKIOS.....RESPONDENT

RULING

Jane Wanjira Kamau, the applicant in the Notice of Motion dated 15th July, 2005, sought for an order of Transfer of Nakuru C.M.C.C. No.429/90 to the High Court for hearing and determination.

The Applicant is the defendant in Nakuru CMCC No.429/90 where she was sued by the Respondent. The dispute involved allotment of a PlotNo.1113.

It was the applicant's contention that when the case was pending for hearing and with an interim order to maintain the status quo by both the Plaintiff and Defendant, the Respondent unlawfully obtained the title to the suit property thereby necessitating the amendment of the defence and the filing of the counter-claim by the applicant in order to protect her interest

In view of the amendment of the pleading, the lower court would not have the Jurisdiction to grant the prayers sought and thus it would be in the interest of justice to transfer the case to the high court.

The Respondent opposed the application by filing grounds of opposition. Since there is no replying affidavit of the Respondent to counter the allegations of facts contained in the applicant's affidavit. The applicant's Statement of fact must be accepted by this court.

However, on a point of law, Counsel for the Respondent submitted that although 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 moto by the court without even an application by any party. An order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance been brought to a court which has jurisdiction to deal with a suit.

Counsel for the Respondent put forward the case of ***Kangenyi –Vs- Musiromo & Another E.A.L.R.*** [1968]EA 43. The High Court of Uganda with a similar issue in an application brought by an applicant seeking to transfer a suit to the High Court for determination on the ground that the court of the

Magistrate Grade II, Bukoto before whom the case was pending, had no jurisdiction to try the case. The total value of the subject matter of the case was stated to be well over Shs.10,000/- whilst the jurisdiction of the Magistrate in civil matters was limited to Kshs.1,000/-.

It was held:-

“The subject matter of the application on the admission and showing of the applicant had been instituted 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 case before me is slightly different from one determined in the above authority. The suit in question was filed by the respondent in the subordinate court. An order was issued to maintain the status quo and during the pendency of the case, the respondent caused a transfer of the land and Title to be issued in his name and thereby the applicant had to amend the pleadings. The whole substractum of the suit changed while the suit was pending determination and due to the acts of the respondent and the lower court now lost jurisdiction.

It is therefore clear that the court had in the first instance when

the suit was brought the jurisdiction to deal with it but due to the intervening action by the respondent the lower court has no jurisdiction.

I am of the view that under the provisions of Section 18 this court has power to:-

a) “transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (b)...

b)(i) try or dispose of the same or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same...”

For the above reasons, the applicant should be allowed,

the prayers sought. The Nakuru CMCC No.429/90 be and is hereby transferred to the High Court for hearing and determination.

Costs shall await the outcome of the suit.

It is so ordered.

Ruling Read and Signed on 28th April, 2006.

MARTHA KOOME

JUDGE