



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Misc Application 392 of 2005**

**SALLY TOWETT & 10 OTHERS.....PLAINTIFFS**

**VERSUS**

**CHARLES CHERUTICH & ANOTHER.....DEFENDANTS**

**RULING**

This is a notice of motion made under **Sections 3A and 18 of the Civil Procedure Act** seeking the orders of this court to transfer **Nakuru CMCCC No. 2515 of 2003** to the High Court, Nakuru for hearing and determination. Pending the hearing and determination of this application, the applicants sought the order of this court to stay the said proceedings. The application is based on the ground that the applicants (who are the defendants in the suit filed in the lower court) filed a defence and a counterclaim to the said suit. In their counter-claim, the applicants sought the orders of the said court to permanently restrain the 1st respondent (who is the 1<sup>st</sup> plaintiff in the suit in the lower court) from evicting the applicants from the suit land known as **Nakuru Municipality/Block 29/1193,1134 and 1167 (Rhonda)** (hereinafter referred to as the suit land). The applicants also sought to have the title deeds issued to the 1st respondent in respect of the suit land cancelled and the registration thereof be reverted to the names of the 1st applicant and the 2<sup>nd</sup> respondent. The applicants argue that the prayers sought in the said counterclaim cannot be granted by the subordinate court but only by the High court. For that reason, the applicants pray that the said suit be therefore transferred to the High Court, Nakuru for hearing and determination. The application is supported by the annexed affidavit of the 1<sup>st</sup> applicant, Sally Towett.

The application is opposed. The 1st respondent Charles Cherutich has filed grounds in opposition to the said application. Essentially, the 1st respondent states that he is a purchaser for value of the said suit land. He depones that the applicants have frustrated him from taking possession of part of the suit land which they (the applicants) are currently residing without any colour of right. The 1<sup>st</sup> respondent further states that the suit before the lower court is pending hearing and determining (especially the application he had filed to have the applicant's defence and counterclaim struck out for disclosing no triable issues) and this application had been filed specifically to delay the expeditious conclusion of the said suit. He was further of the view that this application had been brought in bad faith and solely for the purposes of denying him immediate possession of the suit land.

Having read the submissions made by Mr Gai, Learned Counsel for the applicants and Mr Karanja and Mrs Ndeda Learned Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, the issue for determination by this court is whether the applicants have established a case to enable this court exercise its discretion to have the said suit transferred from the Chief Magistrates Court, Nakuru to the High Court for hearing and final determination. **Section 18 of the Civil Procedure Act** grants this court unfettered discretion to transfer any suit from any court to the other. This court however has to exercise this discretion for the purposes of meeting the ends of justice and not for the purposes of putting any of the litigants to a disadvantage. The applicants plea to this court is that the suit in the lower court should be transferred to the High Court for hearing and disposal because the said court does not have jurisdiction to hear the counterclaim filed therein.

Does this argument by the applicants have any basis in law? The suit land is land registered under the Registered Land Act. Section 143 of the Registered Land Act provides that:

*"(1) Subject to the subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than the first*

*registration) has been obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified so as to affect the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. "*

**Section 3** of the said Act defines a court to be a court having jurisdiction in the matter in question by virtue of Section 159 of the Act. **Section 159** of the said Act restricts cases of land registered under the said Act which may be heard by a subordinate court to be those cases of a value of less than twenty five thousand pounds (Kshs 500,000/=). In the current application the 1st respondent has stated that he purchased the suit land for Kshs 1.1 million. The value of the suit land is therefore well over the jurisdiction of the subordinate court. The 1st respondent should therefore have in the first instance filed the said suit before the High Court and not the Subordinate Court. The applicants were therefore placed in a difficulty when they filed their defence and counterclaim and realized that the subordinate court did not have jurisdiction to adjudicate on the dispute before it, hence this application.

I agree with the submission made by Mr Karanja that this court cannot order a suit to be transferred to another court from a court which did not have jurisdiction to hear the suit in the first place (See O& Produce Co. Lmwoyo -vs- African Highland td [20021 K.L.R. 698, and Kagenyi -vs- Musiramo & Anor [1968] E.A. 43).

However in the instant application the applicants did not chose the court which the suit was filed; Being defendants in the said suit, they did not have any choice on the matter. When they filed their counterclaim, they realized that the same could only be adjudicated upon by a court with jurisdiction. In this case the court is the High Court. I therefore hold that the applicants have established that Nakuru CMCCC No. 2515 of 2003 Charles Cherutich vs- Sally Towett & Isaac Towett is a case which ought to be heard and determined by the High Court which has jurisdiction.

In the premises therefore pursuant to the powers granted to this court by Section **18 of the Civil Procedure Act**, I order that the said suit filed in the Chief Magistrate's Court be transferred to the High Court, Nakuru for hearing and final disposal. In view of the peculiar circumstances of this case, I make no orders as to costs.

**DATED at NAKURU this 21st day of September 2005.**

**L. KIMARU**

**JUDGE**