



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO.1422 OF 2016

GEORGE GATHIGE.....PLAINTIFF

=VERSUS=

STEPHEN A.NYAMANGA.....DEFENDANT

RULING

(Notice of Motion dated 29th September 2021)

1. The Application before me seeks that this suit be transferred to the Chief Magistrate's Court at Milimani Commercial Courts for hearing and determination. The Application has been made by the Defendant. His basis is that this suit was filed before the ELC Court when there were directions that all land matters be handled by this court. The Defendant further states that the subject matter of this suit is valued at Kshs.1,500,000/= only, hence falls within the jurisdiction of the Chief Magistrate's Court. The Defendant also alleges that there is another matter pending before the Magistrates' Court over the same subject matter and by the same parties. He states that no prejudice will be suffered by the Plaintiff if the suit is transferred to the Magistrate's Court.
2. The Plaintiff opposes the application by way of his replying affidavit sworn on the 15th October 2021. He terms the Defendant's application as vexatious and devoid of merit. In the affidavit, the Plaintiff to a large extent delves into the merits of this case. For purposes of this application, I will refrain from commenting on the averments touching on the substance of the case.
3. On the allegation that there is another pending suit before the Chief Magistrate's Court at Milimani, the Plaintiff avers that the said case was withdrawn by the Defendant. He accuses the Defendant of dishonesty and attempting to mislead the court. The Plaintiff states that the suit was actually withdrawn by the Defendant himself. There is therefore no other pending suit. The Plaintiff states that he too had filed a counter-claim in the case referred to before the Chief Magistrate's Court but he withdrew the same, since the Chief Magistrate's court lacked the jurisdiction to try it. He has annexed the notices of withdrawal of the suit to his affidavit.
4. The Plaintiff avers that the suit property has, during the pendency of the suit been developed, therefore its market value cannot be Kshs.1,500,000/= as alleged by the Defendant. Further that no professional valuation has been done of the suit property to establish its current market value. The assigned value of Kshs.1,500,000/= has no basis.
5. The Plaintiff contends that the application by the Defendant is only calculated to delay the expedient hearing of the case. The Defendant only filed it after being served with a mention notice for purposes of fixing a hearing date of the case.

Court's determination

6. This suit was filed on 17th November 2016. The Defendants application comes 5 years later seeking to transfer the suit to the Chief Magistrate's Court.
7. Justice L Mutende in **Kathita Ngeana Vs Mwaniki Kisume (2018) eKLR** referred to the case of **Hangzhou Agrochemicals Industries Ltd vs panda Flowers Ltd (2012) eKLR** where the court addressed conditions to be considered in determining whether or not to grant an order transferring a suit. The court had stated that;-

“.....in my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transferring and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all circumstances it is proper to order transfer, the application must be refused. Being a

discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.

8. The question that comes to mind is, what took the Defendant so long? This application was filed five years after the filing of the case. Secondly, one of the reasons advanced by the Defendant why this suit should be transferred to the Magistrate’s Court is that there is another pending case pending before the Chief Magistrate’s Court between the same parties and involving the same subject matter as is pending before this court. That, however, seems not to be the true position. I have looked at the pleadings by the parties in this case. The issue of the case – Milimani Civil Case 2485/2015, has been addressed in the pleadings. The Defendant in his statement of defence dated 10th January 2017 at paragraph 7 states as follows;-

“The Defendant admit filing Milimani civil case 2485 of 2015 against the Plaintiff herein after the Plaintiff continued harassing the Defendant’s workers and started interfering with the Defendant’s peaceful occupation of the suit parcel. The Defendant avers that he withdrew the suit in the lower court after he completed his construction and the suit was not serving any purpose”.
The Defendant is therefore not honest when he alleges that the said suit is still pending in court.

9. On the issue of the value of the suit property, the court agrees with the sentiments of the plaintiff that no valuation report has been produced by the Defendant to justify the value of Kshs.1,500,000/=. In the paragraph quoted above from the Defendant’s own statement of Defence, the Defendant clearly states that he finished his construction on the suit property. That, and the passage of time must have significantly enhanced the value of the suit property.

10. Finally, the timing of the application by the Defendant raises suspicion. It was filed, as the Plaintiff points out in his replying affidavit, just when the matter was scheduled for fixing of a hearing date.

11. This court is not convinced that it would serve the interests of justice to transfer this suit to the Chief Magistrates’ Court. In fact, such an action would delay further the expedient hearing of this suit.

12. Accordingly, the Defendant’s application dated 29th September 2021 is dismissed with costs for want of merit. This matter will be heard and determined by this Court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Okello for the Plaintiff/Respondent

None appearance for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE