



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC MISC APPLICATION NO. 48 OF 2019**

**(Formerly Naivasha High Court Misc. Application No. 119 of 2019)**

**HUSSEIN ALI DIMA.....1<sup>ST</sup> APPLICANT**

**BALKHISA QAADIR.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**SOPHIA MOHAMED SARAH.....DEFENDANT**

**RULING**

What is before me for determination is the Applicants' Notice of Motion Application dated the 28<sup>th</sup> February, 2019 brought pursuant to the inherent powers and jurisdiction of the Court as well as Article 159 (2) (d) of the Constitution. The Applicants' seek that Naivasha CMCC No. 337 of 2014 (formerly Kajiado SRMCC No. 361 of 2009) be transferred from Naivasha to Kajiado where the suit land is situated. The application is premised on the summarized grounds that the Machakos High Court delivered a Judgment dated the 3<sup>rd</sup> April, 2014 and the Court mistakenly ordered the Lower Court file whose original number is Kajiado SRMCC No. 361 of 2009 (now Naivasha Civil Suit No. 337 of 2014) be transferred to Naivasha. The time to apply for review of that order has now lapsed, though the suit land is situated in Kajiado, which fact was pleaded in the Applicant's then replying affidavit filed in Machakos High Court January 2011, although G Morara Omariba Advocates indicated the cause of action arose in Naivasha which was a typing error, curable under Article 159 (2) (d) of the Constitution. The trial could only be conducted in Kajiado and not Naivasha. Further, despite the mistake, the suit was properly filed at the Court with the Territorial Jurisdiction being Kajiado Law Courts way back in November, 2009.

The application is supported by the affidavit of BALKHISA QAADIR THE 2<sup>nd</sup> Plaintiff/Applicant where he reiterates his claim above and avers that the suit land is situated in Ole Kasasi Trading Centre and it was mistakenly indicated that the cause of action arose in Naivasha. He deposes that the Court has unfettered jurisdiction to correct the mistake and transfer suit to Kajiado Law Courts where it was originally filed. He relied on the cases of **Bamanya Vs Zaver (2002) 2EA 329** and **Patel Vs E A Cargo Handling Services Ltd (1974) EA 75**.

The Respondent SOFIA MOHAMED SARAH opposed the application by filing a replying affidavit where she deposes that on 23<sup>rd</sup> November, 2009, the Applicants filed Kajiado SRMCC No. 361 of 2009 in Kajiado and pleaded that the cause of action arose in Naivasha. Further, that the High Court in Machakos vide HCCA No. 142 of 2010 delivered its judgment on 3<sup>rd</sup> April, 2014 and directed that the suit be transferred to Naivasha where the cause of action arose, culminating in the transfer of the said suit to Naivasha where it was allocated CMCC No. 337 of 2014. She explains that on 25<sup>th</sup> July, 2014, the Applicants filed an application seeking to amend the Plaintiff and transfer suit to Kajiado. Further, on 11<sup>th</sup> November, 2014, the Court dismissed the application with costs to the Defendant. She contends that since this suit was transferred to Naivasha, the Applicants have continued to fix it for hearing on several occasions as the cause of action as rightly stated in the Plaintiff arose in Naivasha. She insists that since the suit was filed in 2009, the Applicants have caused prolonged and inexcusable delay in having the matter determined. The Respondent further filed Grounds of Opposition where she avers that the application is frivolous, vexatious and an abuse of the Court process. Further, that it is misconceived, incompetent and totally lacking in merit. She reiterates that the application is an afterthought, brought in bad faith, defective, a nullity and fundamentally flawed.

The Applicants and the Respondents filed their submissions that I have considered.

**Analysis and Determination**

Upon perusal of the Notice of Motion dated 28th February, 2019 including the parties affidavits', Grounds of Opposition and submissions, the only issue for determination is whether the Naivasha CMCC No. 337 of 2014 (formerly Kajiado SRMCC No. 361 of 2009) should be transferred from Naivasha to Kajiado Law Courts for hearing and final determination.

The Applicants in their submissions reiterated their claim above and averred that the administration of justice should normally require substance of all the disputes, while errors or lapses should not necessarily bar a litigant from pursuit of his rights. They relied on the following cases: **Philip Keipto Chemwolo & Another V Augustine Kubende (1986) KLR 495**; **Bamanya V Zaver (2002) 2 EA 329**; **Patel V EA Cargo Handling Services Ltd (1974) EA 75**; **Belinda Murai & Others V Amos Wainaina (1978) 1KLR 278**; **Kagenyi V Musiramo & Another (1968) EA 43**; **Microsoft Corporation V Mitsumi Computer Garage (2001) IEA 127**; **Saggu V RoadMasters Cycles V Ltd (2002) EA 258**; and **D T Dobie & Co (K) Ltd V Joseph Mbaria Muchina CA 37 of 1978** to buttress their arguments. The Respondent in opposition to the instant application in her submissions referred to the judgment delivered on 3<sup>rd</sup> April, 2014 and stated that the Applicant seeks the Court to sit as an appellate court which the Court lacks jurisdiction to do so. She relied on the case of **David Kabungu V Zikarenga & 4 Others Kampala HCCS No. 36 of 1995 (unreported)** and **Victoria Katuku (Suing as the legal representative of the Estate of Eunice Mueni Muthamba) V Jessinkay Enterprises & 2Others (2017) eKLR** to support her arguments.

Section 18 (1) and (2) of the Civil Procedure Act provides that:’ **(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage— (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) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter— (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; or (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.**’

In the current scenario, I note Lady Justice Mutende in her judgment dated the 3<sup>rd</sup> April, 2014 in Machakos High Court Civil Appeal No. 142 of 2010 directed that the Kajiado SRMCC No. 361 of 2009 was to be transferred to Naivasha for hearing and final determination. On keen perusal of the Plaintiff in the Kajiado SRMCC No. 361 of 2009 ( now Naivasha CMCC No. 337 of 2014) the Plaintiffs therein clearly pleaded that the cause of action arose in Naivasha. It is trite law that parties are bound by their pleadings. I note in the authorities cited by the Applicant, they were all made in instances where a Court of Concurrent jurisdiction had not already made a decision to transfer a matter from one court to another, which is not the case herein. Further, Section 11 and 12 of the Civil Procedure Act are explicit on the jurisdiction of a Court. Insofar as the Applicants have made a strong case for the transfer of the matter from Naivasha to Kajiado, except for contending that their previous advocate had made a mistake, they have not explained to Court whether they have sought for review or appealed from the judgment in Machakos High Court Civil Appeal No. 142 of 2010. I opine that the said judgement stands.

In associating myself with the legal provisions and the case of **Victoria Katuku (Suing as the legal representative of the Estate of Eunice Mueni Muthamba) V Jessinkay Enterprises & 2Others (2017) eKLR**, I note the Applicants have relied on Article 159 (2) (d) of the Constitution to argue their case but I opine that the said Article is not a remedy for all procedural shortfalls especially in instances where there is already a judgement of the Court determining an issue in controversy as is the case herein. As a Court, I cannot sit as an appellate Court from a judgment of a Concurrent jurisdiction. I find that the Naivasha CMCC NO. 337 of 2014 should be heard and determined at Naivasha. In the circumstance, I will decline to allow the orders sought in the instant application dated the 28<sup>th</sup> February, 2019 and proceed to disallow it.

Costs to the Respondent.

**Dated signed and delivered in open court at Kajiado this 29th day of January, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**