



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC APPLICATION NO 31 OF 2019

JOHN KILONZO NDIVO.....APPLICANT

VERSUS

1. EVERTON COAL ENTERPRISES LIMITED

2. RAJAB SELEMANI MWAZIYO

3. YUSUF SELEMANI MWAZIYO

4. BENSON MAKUMI MUKULA.....RESPONDENTS

RULING

1. The Application under consideration is the Applicant's Notice of Motion dated 6th August 2019 in which the Applicant is seeking mainly for orders that Kwale CMCC No. 45 of 2019 be transferred to this court for hearing and final determination. The application is brought under Section 1A, 1B, 3A, 18(1) (b) of the procedure Act, Order 37 Rule 7, Orders 51 of the Civil Procedure Rules Section 37 and 38 of the Limitation of Actions Act and all the enabling provisions of the Law.

2. The application is supported by the grounds listed on the face of the application and the affidavit of John Kilonzo Ndivo sworn on 6th August 2019. Briefly, the applicant avers that the 1st respondent is the registered owner of PLOT NO. KWWALE/UKUNDA/509. That the 1st respondent sued the Applicant and 3 others in Kwale Chief Magistrate's Court case No. 45 of 2019 for alleged trespass on the subject property. That the applicant has filed a defence and counter-claim in which he refuted the claim by the 1st respondent and pleaded that he is entitled to a portion of the suit property by dint of the doctrine of adverse possession. That the magistrate's court has no jurisdiction under the law to hear and determine a claim for adverse possession hence this application.

3. The application is opposed. The 2nd and 3rd respondents filed grounds of opposition dated 16th August 2019 in which they state that they raised an objection challenging the jurisdiction of the court to entertain Kwale CMCC NO. 45 of 2019 as the same relate to a boundary dispute. That the applicant's claim of adverse possession in the counter-claim is against the 1st respondent and two other persons who are not parties to Kwale CMCC No. 45 of 2019 and therefore that the 2nd and 3rd respondents who have no interest in that counter-claim should not be dragged into it. It is their contention that the defence and counter-claim as pleaded and filed calls for filing of fresh suit at this court without involving the 2nd and 3rd respondents who have not conceded the 1st respondent's title over the subject area.

4. In opposing the application, the 1st respondent filed a replying affidavit sworn by Patrick Karanja Ngugi on 19th August 2019. He deposes that the 1st respondent had initially filed Mombasa ELC Case No 97 of 2019, but the court suo moto transferred the case to Kwale Magistrate's court, now referred to as Kwale CMCC No. 45 of 2019. That the 1st respondent has been actively participating in the suit at Kwale Law Courts and is desirous of having it heard and determined in that court. It is the 1st respondent's contention that the applicant's counter claim is misplaced as the chief Magistrate's Court does not have jurisdiction to hear and determine the same, adding that the applicant cannot have the case transferred back to this court for the reason of his counter-claim which is wrongly before the magistrate's court. That a preliminary objection challenging jurisdiction of the court in regard to the said counter claim had been raised at the subordinate court. The 1st respondent avers that it sued the applicant for trespass and that his counter claim should be heard and determined separately.

5. Directions were given that the application be canvassed by way of written submissions. The applicant filed his submissions on 14th November 2019 while the 2nd and 3rd respondents filed theirs on 27th November 2019 and the 1st respondent filed theirs on 29th November 2019.

6. I have considered the application and the submissions filed and the authorities cited. The only issue I have to deal with is whether Kwale CMCC No. 45 of 2019 should be transferred to this court for hearing and determination. It is well principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. Various authorities and the law require that the court should also consider such factors as the motive and 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 question of expense, the interest of justice and possibilities of undue hardship and if the court is left in doubt as to whether under all the 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.

7. In the present case, it is not disputed that the proceedings herein were initially filed in this court as Mombasa ELC No. 97 of 2019. However this court suo moto transferred the suit to the magistrate's court at Kwale. It has now emerged that the applicant has filed a counter-claim in which he claims a portion of the suit property by dint of the doctrine of adverse possession. There is no denial that the subordinate court does not have jurisdiction to hear and determine a claim for adverse possession. Since the case was initially filed in this court before the court suo moto transferred it to the subordinate court and since the issues in the case are intertwined it is only just and fair that the matter should be transferred back to this court, for the court to hear and determine all the issues in the case, including the claim for adverse possession. The overriding objective provided for under Sections 1A and 1B and the inherent power of the court under Section 3A are meant for the attainment of justice to the parties who come to court. The court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of proceedings at a cost affordable by the respective parties. The respondents have opposed the application herein and argued that the applicant should file a separate suit to agitate his claim of adverse possession. In my view, filing a new case will go against the efficient use of available judicial and administrative resources and timely disposal of proceedings at affordable cost. Had the suit not been transferred from this court and the counter-claim now raised by the applicant been raised in this court, the court could still have heard and determined all the issues in the suit without the necessity of a separate suit.

8. Section 18 of the Civil Procedure Act provides as follows:

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 proceedings pending in any court subordinate to it, and therefore –

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 2) where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

9. The power of the court to transfer a suit under Section 18 of the Civil Procedure Act has been discussed by the courts. Nyamweya, J in the of **Aberdare Investments –v- Bernard Wachira & 5 Others (2015) eKLR** held as follows:

“It is clear from those provisions (sections 17 and 18 of the Civil Procedure Act) that the court with jurisdiction to transfer a suit from or to a subordinate court is the High Court, or courts of similar status.”

10. The general jurisprudence, therefore, is that the High Court (or a court of equal status such as this court) has power to withdraw a suit pending in a subordinate court to it and dispose of the suit or transfer the same for trial and disposal to any court subordinate to it and competent to dispose of the suit. The respondents have submitted that although this court has the power to transfer a suit from a court subordinate to it, that transfer can only take place if the court from which the suit is being transferred had jurisdiction to try the case in the first instance. That since the claim for adverse possession raised by the applicant in his counter-claim was filed in a court that lacked jurisdiction, then the suit should not be transferred to this court. Indeed this was the position before the enactment of Sections 1A and 1B of the Civil Procedure Act. However since the enactment of Sections 1A and 1B, the courts have decided otherwise.

11. In the case of **John Mwangi Karanja –v- Alfred Ndiangui (2011) eKLR**, Waweru J delivered himself as follows:

“With the enactment of Section 1A and 1B of the Civil

Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh....

It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction. If a suit finds itself in the wrong court, surely it is in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the civil procedure Act and Rules is to facilitate the just, expeditious, proportionate and

affordable resolution of the civil disputes governed by the Act (Section 1A (1). The court itself is enjoined by subsection (2) of that Section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions. ”

12. I agree with and I am persuaded by the approach adopted by Waweru J in the above case. Moreover, in the present case, the suit was originally instituted in this court before the court suo moto transferred it to the subordinate court. The transfer was made when the applicant had not filed his defence and counter claim.

13. The upshot of the foregoing therefore is that I reach a finding that this application is merited and the same is allowed. Kwale CMCC NO. 45 of 2019 is ordered withdrawn and transferred to this court for hearing and final determination. Each party to meet their own costs of this application.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February, 2020.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Kyalo holding brief for Ngigi for applicant

Ms. Nyaga holding brief for 1st respondent

Kinyua holding brief Mwadzoyo for 2nd and 3rd defendants

No appearance 4th defendants

Yumna Court Assistant

C.K. YANO

JUDGE