



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

E&L MISC. APPLICATION NO. 6 OF 2018.

JOSHUA M. MADONYE.....PROPOSED INTERESTED PARTY/APPLICANT

AND

SAMMY KIPROTICH KOSGEL.....1ST RESPONDENT

CLEMENT KIPROTICH LAGAT.....2ND RESPONDENT

RULING

This is the ruling in respect of an application dated 3rd April 2018 brought by way of notice of motion by the interested party for orders :

(a) Spent

(b) THAT this Honorable court be pleased to transfer and place the entire court file in ELDORET CMCC NO. 794 OF 1979 before the Honorable Judge for directions on how to proceed with the Interested Party/ Applicant's Application dated 22nd March 2018.

(c) THAT the costs of this Application be provided for.

This matter was brought under certificate of urgency and the same was certified urgent and temporary orders of stay of the proceedings in ELDORET CMCC NO. 794 OF 197 were granted. The applicant later filed an application seeking that the documents filed by Elijah Ayieko Advocate be expunged from the court record for lack of a practicing certificate. The same was later withdrawn with costs to the Advocate as Counsel for the applicant had not done his groundwork well on the person he was referring to as Elijah Ayieko.

Applicant's Submission

The applicant's application is for the transfer of ELDORET CMCC NO. 794 OF 197 to this court for hearing of the interested party's application to be enjoined. Counsel relied on the grounds on the face of the application and stated that the court has powers to transfer the suit.

Counsel further submitted that the Magistrate's Court does not have jurisdiction to hear the matter as the subject matter is above 20 million shillings. Counsel cited section 18 of the Civil Procedure Act which provides for transfer of suits as follow:

On the application of any of the parties and 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 proceedings pending before it for trial or disposal to any court subordinate to it or competent to try or dispose of the same or .

(b) Withdraw any suit or other proceedings 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

ii. Re — transfer 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 re try it or proceed from the point at which it was transferred or withdrawn.....

Counsel listed many issues for determination by the court to support the application for transfer and therefore urged the court to grant the orders as prayed.

Respondent's Submission

The respondent opposed the application stating that the Proposed Interested Party, one Joshua Makhulungu Madonye has approached this court by way of Miscellaneous Application seeking for various orders.

Counsel submitted that the respondents herein are in the process of executing a decree in Eldoret CMCC NO. 794 OF 1979 which decree intends to evict trespassers in all that parcel of land formerly known as NAND1/KAPKANGAN1/272 and now NAND1/KAPKANGAN1/1371-1383.

Counsel submitted that it is this exercise of eviction that triggered the proposed interested party to move to the Chief Magistrate's court vide his application dated the 22nd March 2018, when the matter came up for inter partes hearing the respondents' Advocate raised a preliminary objection on a point of law more specifically with regard to the locus standi of the proposed interested party in the suit that the court is already functus officio.

Counsel further submitted that the Magistrate ordered that the parties file written submissions for that matter, which were filed but while the same was pending for ruling the proposed interested party moved to this court vide the instant motion now seeking the orders already stated above. The issue of the interest of the applicant was what was to be determined at the lower court but he chose to move to this court.

Mr Ayieko submitted that the interest of the proposed interested party is absolutely unidentifiable at all. He stated that the court has further relied with approval on Black's Law Dictionary 9th Edition at pg. 1232 which defines an interested party as

"An interested party has a recognizable stake (and therefore standing) on a matter"

It was counsel's submission that the applicant herein having absolutely failed to identify his interest or stake in the subject matter, it then follows that he is devoid of Locus standi hence his motion on this very basis fails.

Counsel also submitted that the applicant's motion in this court and the Resident Magistrate's Court is res judicata. It is on record that on the 9th November 2015 an application akin to the applicant's application dated the 22nd March 2018 was filed by some other persons who sought that they be enjoined as interested parties. The Resident Magistrate made a finding through his ruling on the 23rd December 2015 that the applicants did not merit being enjoined as interested parties and their application was dismissed.

Counsel further submitted that the court vide Kitale High Court Constitutional Petition No. 6 of 2016, the petitioners sought that the orders made by the Resident Magistrate's Court at Eldoret in RMCCC NO. 794 had abated. Justice E.O Obaga found that the judgment in Eldoret RMCCC NO. 794 of 1979 is still valid and can be executed and is not statutorily barred.

Mr. Ayieko submitted that the proposed interested party and 58 others had filed an originating summons vide Kitale High Court E & L No. 167 Of 2017 (O.S) over the same subject matter and the same was dismissed by Justice Mwangi Njoroge on the 22nd January, 2018.

Counsel submitted that litigation must come to an end. He urged the court to dismiss the application with costs to the respondents.

Analysis and determination

The application before me is for transfer of Eldoret RMCCC NO. 794 of 1979 to this court on grounds that the court lacked pecuniary jurisdiction. I have read the application together with the submissions by Counsel in this matter.

This is a matter that has a checkered history moving from one court to another. The matter was finalized in the lower court and is awaiting execution of the decree. I wish to state that the submission of the respondent has helped the court in providing a background to the case. The annexed rulings and judgments by Judges Obaga and Mwangi Njoroge have shed light in this case.

The court will not deal with the issues that have previously been dealt with by other competent courts. The issues listed by the applicant as to whether the Resident Magistrate had jurisdiction to handle the matter cannot be dealt with in a miscellaneous application. Does the proposed interested party who has not been enjoined in a suit want the court to determine the issues as if they are appealing against the orders of the lower court. Does he have locus to question whether the court had jurisdiction or not?

Further the issues of enjoining the interested party are pending before the lower court. Why was this application filed in this court in the first place? Parties must not be allowed to abuse the court process. They should also not be allowed to forum shop. If the applicant was forum shopping then, he went to the wrong shop because this court will not allow parties to abuse court processes. There is nothing left to be transferred to this court. Litigation must come to an end at some point.

Having said that I find that the application has no merit and is therefore dismissed with costs to the respondents. The earlier orders given staying the proceedings in the lower court are therefore vacated.

Dated and delivered this 14th day of November, 2018

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Ayieko for Respondents and Mr. Odongo holding brief for Mr. Osango for Applicant.

Mr. Koech: Court Assistant.