



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**ENVIRONMENT&LAND COURT**  
**ELC MISC APPLICATION NO. 82B OF 2015**

**PETER KYALO MUTUA**

**NZIOKO WILSON NDUTU**

**DANIEL MULANDI KIKUNZE**

**JULIUS KIOKO WAMBUA**

**ROSEMARY K.MULANDI (SUING AS TRUSTEES FOR THEMSELVES**

**AND OTHER BENEFICIARIES OF**

**ATHI RIVER SLUM DWELLERS.....APPLICANTS**

**VERSUS**

**AKIBAMASHINANI TRUST.....RESPONDENT**

**RULING**

The matter for determination is a *Notice of Motion dated 24th April 2015* brought under *Sections 18(1)(b), 1A, 1B and 3A of the Civil procedure Act* and all enabling provisions of the law. The applicant has sought for the following prayers;-

**1. Spent**

**2. Spent**

**3. That this court be pleased to withdraw MACHAKOS CMCC NO.1151 OF 2013 and there after order the same transfered to this court for hearing and final disposal.**

**4. That the cost of this application be provided for.**

The application is premised on the grounds stated on the face of the application and on the Supporting affidavit of *Peter Kyalo Mutua* the plaintiff/applicant herein. These grounds are;-

**(a) That the applicants filed in Machakos CMCC NO.1151 OF 2013 seeking for release of Title to the land parcel no. MAVOKO TOWN BLOCK 3/2347 from the respondents.**

**(b) That the respondent filed a Notice of Motion dated 9/10/2014 for the proceedings to be stayed alleging the issues in MACHAKOS CMCC NO.1151 of 2013 were substantially the same as on NAIROBI ELC NO.1181 OF 2013.**

**(c) That by its ruling delivered on 18th February 2015, the court stated the issues in the two suits were not similar but ruled that the value of land had appreciated and was beyond its pecuniary jurisdiction.**

**(d) That the applicant is desirous of being heard and getting justice before this court hence this application.**

**(e) That if the suit is transferred no prejudice will be suffered by the respondent.**

**(f) That the respondent has already prepared a draft decree and sent to the applicants advocate for approval hence any further proceedings in MACHAKOS CMCC NO.1151 OF 2013 should be stayed.**

**(g) That it will be in interest of justice that the orders sought be granted**

In his Supporting Affidavit, **Peter Kyalo Mutua** the 1st applicant herein and who is duly authorised by 2nd to the 5th applicant's, averred that the Respondent advanced a loan of **kshs.3000,000/=** to the applicants to purchase **land parcel no.MAVOKO TOWN BLOCK 3/2347** at a price of Kshs.4million as **per annexure PKM 1'** and as security for the loan the respondent was to hold onto the title of the said parcel of land until the loan is fully paid as per **annexture PKM 2'**.

The applicant further averred that the loan was fully repaid but the respondent refused to release the title deed hence the **Machakos CMCC1151 OF 2013 as per annexure PKM 3'**. That the respondent filed a Notice of Motion and sought for proceedings to be stayed alleging that issues raised in **MACHAKOS CMCC1151/13** were similar to ones raised in **NAIROBI ELC NO.1184/13 as per annexure PKM4'**.

The applicant further stated that by a ruling delivered on **18th February 2015**, the subordinate court ruled that the issues raised in **MACHAKOS CMCC1151/13** were not similar to those in **NAIROBI ELC NO.1184/13** and went ahead to state that it lacked pecuniary jurisdiction to hear the matter as the value of land had appreciated beyond its pecuniary jurisdiction as per annexure **PKM 5'** and further owing to that ruling, **Machakos CMCC1151/13** remains pending before subordinate court.

The applicant alleged that the title deed retained by the respondent is urgently needed to enable it subdivide the land and process title deeds to individual members so that they can stop living in the slums.

The applicants alleged that **CMCC 1151/13 MACHOKOS**, was never struck out and it will be in the interest of justice if the same is transferred to this honourable court for hearing and determination since it will not cause prejudice to the respondent. The applicants reiterated the averment contained in the grounds in support of the Notice of Motion.

The application is opposed and **JANE WERU**, swore a Replying Affidavit on **18th September 2015**, and averred that she has been informed by her Advocate that the plaintiff /applicant filed a suit in **Machakos CMCC 1151/13**, knowing very well the said court had no pecuniary jurisdiction to handle the same. The deponent further averred that the court rightfully ruled that it had no jurisdiction and that once a matter has been determined on issue of jurisdiction there is nothing to transfer. The respondent further averred that the allegation that the subject matter of this suit is the sale agreement on suit premises is ill founded as the determination was already made and the applicant did not appeal to challenge the same.

The application is canvassed by way of written submissions. The Law Firm of **SILA & CO. ADVOCATES**, for the applicant filed their written submissions on **12th January 2016** and urged the court to allow the application for transfer of the suit. They relied on **Article 159(2) (d) of the Constitution** and reiterated the averment contained in the Notice of Motion.

The Law Firm of **MUEMA&ASSOCIATES** for the defendant filed their written submissions on **18th March 2016** and urged the court to decline the orders sought and order that the applicant do withdraw the suit at **MACHAKOS CMCC 1151 OF 2013** and present the same in a court of competent jurisdiction to try the suit as required by the law and consequently discharge the orders for stay of execution granted by this honourable court. They relied on **Ugandan case Kangenyi versus Musiramo & Anor (1968)E.A 43** , where the court held that :-

**“ whereas Section 18 of the Ugandan Civil Procedure Act (which is Section 18 our Civil Procedure Act) gives the High Court a general power of transfer of all suits,which power may be exercised at any stage of the proceedings,even suo moto by court,An order for transfer of suit from one court to another cannot be made unless the suit has been in the first instance,brought to a court which has jurisdiction to try it.”**

The Respondent goes on to state that the above position was upheld by Ibrahim J. In **Rob De Jong &Anor versus Charles Mureithi Wachira (2012)** eklr and also Makau J.In **Joseph Muiruri versus Geoffrey G.Kundi Anjuhi(2012)eklr** stated.....

**“in view of the above mentioned decision the HighCourt can only transfer a suit which had been filed in a court of competent jurisdiction and not otherwise”**

The Court has now carefully considered the instant Notice of Motion which is brought under **Sections 18 (1)(b),1A,1B,3 and 3A of the Civil Procedure Act.**

**Section 18(1)(b)** under which the application is anchored states as follows;

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—

**(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.**

From the above provisions of law,it is evident that the High court has discretion to withdraw any suit or other proceedings pending in any court subordinate to it.In the case of this matter, the Court is the Environment and Land Court which court is of equal status to the High court.

It is evident from the proceedings that there is a ruling delivered by the Chief Magistrates,Machakos on **18th February 2015** in which the court held that it has no pecuniary jurisdiction to hear the suit which had been filed by the plaintiffs/applicant herein.The court proceeded further to uphold the defendant’s objection with costs.The suit was not struck out and so it is still pending at the Chief Magistrates Court.It is also evident that the defendant’s Advocate drew a Bill of Costs after the said ruling and served it upon the Advocate for the plaintiffs/applicants herein.It is the service of the said draft Bill of Costs that prompted the plaintiffs/applicants herein to file the instant application.The applicants sought for stay of any further proceedings,assessment of Bill of Costs,approval of Decree in Machakos **CMCC No.1151 of 2013** pending the hearing and determination of the application until further orders from this court.

As the court noted ealier, it is evident that this court has discretion to order for a withdraw of a suit from the subordinate courts to itself but that order can only be made if the matter was filed in court that had jurisdiction.The Chief Magistrate in his ruling stated that he had no pecuniary jurisdiction to hear the matter as the value of the subject matter was 20million.As has been stated by **Richard Kuloba in**

**“Judicial Hints on Civil Procedure” at page 77**

**‘the procedure in Kenya to refuse to transfer a suit from one court to another under this section unless the suit was in the first instant brought to court that had jurisdiction to try it’**

It is therefore evident that lack of jurisdiction in the lower court is not a ground for the High Court to order a transfer. The court will rely on the case of Muiru Mugeni versus Chege Mukora HCCC Misc.No.75 Of 1976 where the court held that;

**‘A suit which has been filed in the subordinate court which raises a claim in excess of jurisdiction of that court should not be made the subject of transfer Order under Section 18.**

The subordinate court in this suit held that it had no pecuniary jurisdiction. Clearly that would not be made a subject of transfer as the suit was then filed in a court that had no jurisdiction. The court has noted that this application was prompted by the fact that the defendant/respondent had served a draft Bill of costs to the plaintiffs/applicants advocates for approval. The subordinate court upheld the defendant’s preliminary objection with costs to the defendant. There is therefore in existence a valid court order on the issue of costs. If the plaintiffs/applicants were dissatisfied with the issue of costs, they should have filed an application for review or appeal that finding instead of applying to transfer a suit in which the subordinate court held that it had no pecuniary jurisdiction. See the case of kagenyi v Musiramo and Another[1968] 1EA 43 (HCU)the High Court of Uganda held that;

**“An order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it”**

The court finds that if the Subordinate Court had no pecuniary jurisdiction to hear the matter, then this court cannot issue an order for transfer or withdraw as envisaged under **Section 18(1)(b) of the Civil Procedure Act.**

The suit was not struck out and is still pending at the Chief Magistrates Court at Machakos. The court has noted that through special issue of **Kenya Gazette Supplement of 18<sup>th</sup> December 2015**, the Chief Magistrates Courts pecuniary jurisdiction was enhanced to **twenty million(20 million)** as stated in **Section 7(1)(a) of the Magistrates Court Act no.26 of 2015**. The objection upheld by the court on pecuniary jurisdiction was therefore overtaken by events and the suit had not been struck out. The matter can now proceed for hearing and determination at the Chief Magistrates Court in Machakos as the said court now has pecuniary jurisdiction as stipulated by **Section 7 1(a) of the Magistrates Court Act no 26 of 2015**. With the enhanced pecuniary jurisdiction of the Chief Magistrates Court, the applicants can apply for review of the court order on the issue of costs as directed by the Subordinate Court on **8<sup>th</sup> February 2015**.

For the above reasons, the court declines to issue the orders sought in the Notice Motion dated **24<sup>th</sup> April 2015**. The court further directs that this matter be taken back to the Chief Magistrates Court in Machakos for hearing of the main suit and for further orders.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **17<sup>th</sup>** day of **February 2017**

**L.GACHERU**

**JUDGE**

In the presence of;

Mr Sila for the Plaintiff/Applicant

Mr Muema for the Defendant/Respondent

Steve : Court Clerk

**Court:**

Ruling read in open Court in the presence of the above stated advocates.

**L.GACHERU**

**JUDGE**