

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 40 OF 2019

1. SIMON KATUA MUTIA

2. ABDULLA SAHRRIF OMAR MOHAMED....APPLICANTS

VERSUS

PENNINAH KIMERU MUTUARESPONDENT

RULING

1. The application for consideration is the notice of motion dated 20th November 2019 and stated to be brought under Section 6, 1A, 1B and 3A of the Civil Procedure Act and order 51 Rule 1 of the Civil Procedure Rules. In the application, the applicants are seeking for orders that there be a stay of proceedings in Voi ELC Case 17 of 2018 pending the hearing and determination of Mombasa ELC Misc. Application No. 40 of 2019.

2. The application is supported by the affidavit of Samuel M. Kasyoka, advocate sworn on 20th November, 2019. It is the applicants' case that it filed Voi ELC No. 17 of 2018 at a time when the magistrate's court had jurisdiction. That subsequently, the magistrate who had pecuniary jurisdiction was transferred. This prompted the respondents to raise a preliminary objection seeking to strike out the suit for want of jurisdiction. The applicant then filed Misc. Application No. 40 of 2019 before this court seeking the transfer of Voi ELC NO. 17 of 2018 to this court. The said application is pending hearing. It is for this reason that the applicant brought the instant application. The applicant contends that it is in the interests of justice and in advancing the overriding objective that the orders sought herein be granted.

3. In opposing the application, the respondent filed a replying affidavit sworn on 18th December 2019. It is deposed that the applicants have decided to engage in forum shopping and are guilty of material non-disclosure as to what transpired in the subordinate court. It is the respondent's contention that the overriding objective cannot cure a void suit and the interests of justice do not warrant the grant of the orders sought.

4. I have considered the application and the affidavits in support and against as well as the rival submission. The application seeks to stay the proceedings in Voi SPMC ELC Case No. 17 of 2018 pending the hearing and determination of the application for transfer which is pending herein. There is no denial that this court has supervisory powers over the subordinate courts. Section 18 of the Civil Procedure Act gives this court power to withdraw and transfer a case instituted in a subordinate court. The application for transfer therefore will be heard and decided on merit. In the meantime, it is my view that in order not to render the said application for transfer nugatory, it is only just and fair that a stay order is granted as sought by the applicants. Should the stay order not be granted, the matter in the subordinate court may proceed to conclusion and the miscellaneous application pending before this court may be overtaken by events.

5. The upshot is that I find merit in the Notice of Motion dated 20th November 2019. The same is allowed as prayed. Costs of the application to abide the outcome of the main application.

6. Orders accordingly

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE