



IN THE HIGH COURT OF KENYA AT NYERI

REV TIMOTHY MURERE NJOYA..... APPLICANT

MARY WANGUI MAINA & 2 OTHERS.....RESPONDENTS

By originating notice of motion under section 1A, 3A 18(1)(b) & 2 of CPA the applicant moved court for the following orders:

2. ***That service of the application be dispensed with in the first instance owing to the urgency of the matter.***
4. ***That if prayer No. 2 is granted the applicants notice to the Attorney General, the statement and verifying affidavit dated 4th November 2013 and sworn on the same day respectively be deemed to have been filed.***
5. The application was based upon the following grounds:
 2. ***On 29th July 2013 the High Court in 1212 of 1997 dismissed the 1st respondents application and were served upon the respondents on 28th September 2013 which have been disobeyed.***
 3. The application was supported by the affidavit of REV. DR. TIMOTHY MURERE NJOYA in which he deponed that he is the registered owner of the suit property known as MUHITO/THIHA/324 and is not benefiting therefrom since the respondents are trespassing on it despite the court order issued by the chief magistrate on 28th April 2004.
 4. The application was certified urgent and ordered served for interpartes hearing on the respondents and in reply thereto the 1st respondent on 21st March 2014 filed a replying affidavit in which she deponed that the application to transfer the Nyeri CMCC No. 116 of 2005 to this court is an abuse of the court process since the parties in the lower court are different from the parties in the instance application save for the applicant and the 1st respondent.
 5. That the orders issued by the lower court were interim orders pending hearing and determination of the suit and therefore the application is an abuse of the court process.

Direction were given that the application be heard by way of written submissions which have now been filed. On behalf of the applicant it was submitted that the High Court has jurisdiction to try the cases and therefore the honourable court should exercise its jurisdiction and transfer to it Nyeri CMCC No. 116 of 2005 for purposes of commencing contempt of court proceedings. In support thereof the case of MILKA NANYOKIA MUSUNGA V ROBERT WEKESA MWAMBE & 2 OTHERS {2013}eKLR was cited.

- It was further submitted that the applicant therefore lacks suit/file in which he can file his application for committal to civil jail and will therefore not be able to enforce the orders made in his favour by the subordinate court if the file is not transferred,
- It was submitted that the learned trial magistrate exercised powers to grant mandatory injunction and therefore those rights should be protected and the order enforced.
- It was further submitted that the orders sought to be enforced were issued at the exparte stage consequently the matter never proceeded to full hearing to date and that those orders were irregular and unlawful and have no legal basis therefore ought to be set aside. It was submitted

that on the authority of WANJIKU v ESSO KENYA LTD the court ought to use its inherent jurisdiction to set aside the order which was obtained irregularly.

- a) NAIROBI HIGH COURT SUCCESSION Cause No. 1212 of 1997 in the matter of the estate of NAHASHON NJOYA MURERE.

The issue for determination by this court is whether the applicant has made up a case for the transfer of Nyeri CMCC No. 116 of 2005 to this court for hearing and determination.

- **18(1) on the application of any of the parties and after notice to the parties and after hearing such of them as desires to be heard on of its own motion without such notice, the High Court may at any stage**

b) Withdraw any suit or other proceedings pending in any court subordinate to it and thereafter.

- Courts in Kenya have given justification for the transfer of suits and in this I find useful analysis in the Ugandan Case of DAVID KABUNGU v ZIKARENGO & OTHERS KAMPALA HCCC NO. 36 OF 1995 quoted by Justice ODUNGO in HANGZHON AGROCHEMICALS INDUSTRIES vs PANDA FLOWERS LTD NAIROBI HIGH COURT SUIT NO. 97 OF 2009 where Justice Okello states as follows

In the application before me the reason advanced is that the subordinate court does not have jurisdiction to enforce the law of contempt by virtue of section 5 of the Judicature Act and that the applicant now wishes to enforce an order issued on 28th April 2005. It is further alleged that the applicant has no file where to serve notice to the Attorney General of intention to file the application for contempt.

- This question is answered by looking at the procedure set out under order 52 of the Supreme court rules which sets out the procedure that is to be followed by the High court of justice in England Order 52 rule 2 provides as follows:

ii) an application for such order must be made ex parte to a judge...

6. Based upon the procedure as set out herein the ex parte application for leave ought to be made in a miscellaneous file. It is also clear from the records therein that the file sought to be transferred from the Chief Magistrates court at Nyeri had already been transferred to Nairobi High court succession cause No. 1212 of 1997..

7. MARY WANGUI MAINA - 1ST DEFENDANT

WAHITO WACHIRA KAMOTHO - 3RD DEFENDANT.

GIKONYO KAMOTHO alias

MWIHAKI THUA alias

Whereas the parties before this court are as follows:

MARY WANGUI MAINA - 1ST RESPONDENT

MAINGI WANGUI - 3RD RESPONDENT.

9. I therefore find no merit on the application to transfer the file which had already been transferred to the High court registry at Nairobi and placed in succession cause No. 1212 of 1997 which is the court best placed to order its transfer back to the chief magistrate's

court and therefore dismiss the application dated 27th January 2014 with cost to the respondent.

10. Dated, signed and delivered at Nyeri this 11th day of July 2014.

JUDGE

No appearance by the advocate for respondents

J. WAKIAGA

11/7/2014

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