



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO.292 OF 2016

JAMES ROTICH ARAP RONO.....PLAINTIFF

VERSUS

SAMUEL BARCHAR CHEPTOO.....DEFENDANT

RULING

This ruling is in respect of two applications 24th August 2020 by the plaintiff/applicant seeking to transfer this suit to Kabarnet Chief Magistrate's Court and one dated 18th February 2020 by the defendant/applicant for dismissal of this suit for want of prosecution.

Counsel relied on the application and the affidavits as filed. The court gave direction that the two applications be handled together. The application for transfer is based on the grounds that this is a land matter, which land is situated at Ravine and that the Chief Magistrate's court has jurisdiction to hear and determine the matter. That in order to minimize costs it would be in the interest of justice to transfer the matter to Kabarnet CM's Court.

The defendant also prayed that the suit be dismissed for want of prosecution with costs.

ANALYSIS AND DETERMINATION

On the issue of dismissal for want of prosecution, it should be noted that this matter had been referred to the court annexed mediation which collapsed as the parties did not agree. When mediation does not bear any fruits, parties are at liberty to come back to court and proceed with the case in court. I notice that this matter was in court before the Deputy Registrar Mediation on 20th June 2019 and each party was at liberty to move the court for the hearing of the case.

The application for dismissal is not made in good faith and is therefore dismissed with no orders as to costs.

On the second application for transfer of this suit to Kabarnet Chief Magistrates court, the court has powers to do so *suo moto* even without an application if it is of the view that the recipient court has such pecuniary and geographical jurisdiction.

Section 18 (1) and (2) of the Civil Procedure Act provides as follows:-

18(1) On the Application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice the High Court may at any stage:

(a) Transfer any suit or other proceedings pending before it for trial or disposal to any subordinate to it and competent to try or dispose of the same; or

(b) Withdraw any suit of other proceedings pending in any court subordinate to it, and thereafter-

(i) Try or dispose of the same,

(ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same,

(iii) Transfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceedings 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 to retry it or proceed from the point at which it was transferred or withdrawn.

Section 18 gives the High Court a discretionary power to transfer any suit, appeal of other proceeding pending before it for trial or to transfer it to any subordinate court that is competent to try such a case. It also gives the High Court discretionary power to withdraw any suit or other proceedings pending in a subordinate court and thereafter try it and dispose of the same.

Finally, section 18 (2) empowers the High Court to give general directions in the case of an order of transfer whether to retry such a case or proceed from the point at which it was transferred or withdrawn.

Section 15 of the Civil Procedure Act provides that a suit should be instituted in the place where the cause of action arose or where the Defendant resides or carries on businesses. From the plaintiff's list of documents, the certificate of official search indicates that the said search was done at Koibatek District Land Registry at Eldama Ravine which is within the jurisdiction of Kabarnet Law Courts.

In the case of **David Kabungu –Vs. Zikarenga & 4 others, Kampala HCCS NO. 36 of 1995** where Okello J stated that;

“Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established 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. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, 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... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

I find that the application has merit and is therefore allowed as prayed with each party bearing their own costs.

DATED and DELIVERED at ELDORET this 21st DAY OF October, 2020

DR. M. A. ODENY

JUDGE