



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Miscellaneous Civil Application 303 of 2012**

**MUKSYOKI MUTUKU .....APPLICANT**

**VERSUS**

**1. MAKAU MULIKO KIVINDA**

**2. ONESMUS MUTUA MUTUKU**

**3. MULEKYE MUTUKU KYUI .....**

**RESPONDENTS**

**RULING**

By application dated 19<sup>th</sup> November 2012, the Applicant seeks this court's order transferring Kilungu PMCC No. 19 of 2011 to the Chief Magistrate's Court, Machakos for final disposal. There was also a prayer for stay of proceedings in the case, pending hearing of the application *inter parte*.

The application is premised on grounds that the applicant was apprehensive of justice not being done if proceedings in the Kilungu PMCC No. 19 of 2011 were to be heard to conclusion as it had been exhibited by the orders made by the Principal Magistrate presiding in the matter. This was prompted by the fact that the magistrate had made a drastic order summarily striking out the applicant's plaint, an order that was prejudicial to the applicant that resulted into him losing his land.

Secondly, the Principal Magistrate irregularly and un-procedurally issued execution orders against him which was detrimental to him. As a result of irregular orders made by the court which was biased, the respondents were unlawfully seeking to execute non-existent decrees which would result into unfair enrichment.

The application is supported by an affidavit deposed by the applicant that reiterates what is stated in the

grounds of the application.

The Respondents filed grounds of objection to the application whereby they stated that the Kilungu PMCC 19 of 2011 was concluded and judgment issued; what was pending was execution of the decree. There was no suit pending before court capable of being transferred pursuant to section 18 of the Civil Procedure Act. It was also stated that issues raised in the Notice of Motion should have been raised on appeal. They prayed for dismissal of the application. This application has been made pursuant to section 18 of the Civil Procedure Act, which provides as follows:-

***“(1) 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—***

***(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or***

***(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.***

***(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 retry it or proceed from the point at which it was transferred or withdrawn”.***

The court has the discretion to transfer a suit at any stage pending before a subordinate court to any other court for disposal. However, the discretion must be exercised judiciously. There must be a plausible reason prompting it to do so.

In the case of **PM Auctioneers vs Mary Njeri [2005] eKLR Justice Musinga** when confronted with a situation where he had to make a decision whether or not to withdraw proceedings from one subordinate court in order to transfer it to another one, had this to say;-

***“It is true this court has the power to order at any stage, the withdrawal of any suit or proceedings in any court subordinate to it and thereafter transfer the same for trial or disposal to any other subordinate court competent to try dispose it, but that power must be exercised reasonably and judiciously”***

In the instant application the applicant seeks withdrawal of case No. 19 of 2011 from Kilungu Court. It is his prayer that it be transferred to Machakos Chief Magistrate’s Court. The basis being that he is apprehensive that he would not get justice at Kilungu Court. His fear is actuated by the fact that he sought leave of the court to amend the plaint, instead of the court confining itself to determining that particular issue it struck out the plaint.

What follows was the execution stage. It was his averment that the magistrate irregularly and illegally approved separate sets of certificates of costs for the three (3) defendants in the matter. This would mean that he would be required to pay Kshs. 79,000/= in costs instead of 32,000/=.

Secondly, he avers that the defendants had boasted that following their influence at Kilungu court he would not get any justice. The applicant has filed an application in the court seeking stay of execution pending hearing and disposal of HCC 368 of 2012. The matter is between him and the same parties herein.

What is evident is the fact that the applicant was aggrieved by the decision of the magistrate at Kilungu Court. Procedurally he should have appealed against the order of the court striking out the plaint. A party being apprehensive of going before a court which reached a decision which was not favourable to him is not a good reason to have the matter withdrawn from the court.

He has filed an application of stay of execution in the same court. If the court refused to grant the order sought, the same can be obtained from the High Court (*see order 42 rule 6 of the Civil Procedure Rules*).

In the premises I find the application lacking merit. It is dismissed with costs to the Respondents.

**DATED, SIGNED and DELIVERED at MACHAKOS this 9<sup>TH</sup> day of MAY 2013.**

**L.N. MUTENDE**

**JUDGE**