



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 146 of 2007

1. Land an Environmental Law Division

2. Subject of the main suit: Land

i) LR Ngenga/Nyamangara/833

ii) Related suit land LR Ngenda Land LR Ngenda Mutero/T51.

2. Application 21 June 2007

i) Stay of proceeding in CMCC 398/06 under section 6 n. Civil Procedure Act.

ii) To Transfer CMCC 398/07 to the High Court of Kenya

earing under section 18 Civil Procedure Act.

3. Opposition.

i. Under Order 6 Civil Procedure act there by stay of the High Court case as the CMCC 398/07 case was filed first.

4. Held:

1. Prayers under section 6 Civil Procedure Act and Section 18 Civil Procedure Act are conflicting.

2. Court prayers be under order XI r 1 and 2 Civil Procedure Rules for consolidation of suit.

3. Suo moto - Court orders that the suit be consolidated and proceeding be in this High Court file.

5. Case law – Nil

6. Advocates:

J.M. Njoroge of Muturi Njoroge & Co. Advocates for the plaintiff/applicant – present

J.W. Gathoga for Gathoga Wairegi & Co. Advocates for the defendant/respondent – present

GABRIEL NGARUIYA MWANIKIPLAINTIFF

VERSUS

JOSEPH WAITIRUKA KAMAU AKA JOSEPH NGOCHI MWANIKI ..DEFENDANT

RULING

1. Background

1. The main suit before this High Court of Kenya at Nairobi is Land.

2. Mwaniki Gituga (now deceased) was the father to Gabriel Ngaruiya Mwaniki (the plaintiff herein) and Joseph Waitiruka Kamau (the defendant herein). The two brothers had different biological mothers. There is another brother not party to the suit known as Patrick Muhoro.

3. There are two land parcels in question being Ngenda/Mitero/T.51 measuring 0.25 acres and Registered in the name of Mwaniki Gituga on 11 June 1959. The other land parcel is Ngenda/Nyamangara/833 measuring 2.1 acres also registered in the name of Mwaniki Gituga on 20 January 1958.

4. It is a fact that is alleged by the plaintiff that the defendant Joseph Waitiruka Kamau lives on land parcel Ngenda/Mitero/T.51. The plaintiff Gabriel Ngaruiya Mwaniki resides on land parcel Ngenda/Nyamangara/883.

5. It is agreed by both parties that on 20 February 1973 their late father Mwaniki Gituga transferred land parcel Ngenda/Nyamangara/883 to the defendant Joseph Waitiruka Kamau as a gift. The land certificate is in the name of the defendant.

6. The dispute therefore is over land parcel Ngenda/Nyamangara/883.

7. The defendant filed a land case in the Chief Magistrates Court at Thika Civil Suit No.398/2007 seeking an injunction to restrain the plaintiff from constructing, sinking a bore hole pending the hearing of the main suit. The main suit asked for the eviction of the plaintiff from the land.

8. The plaintiff in this case Gabriel Ngaruiya Mwaniki was restrained. He had by now filed this present suit in what he sought a declaration against the defendant that the land was given to the defendant as a gift in trust of the plaintiff and his other brother Patrick Muhoro Mwaniki who is not party to this suit.

II: Application 21 June 2007

9. The plaintiff filed an application by way of notice of motion of 21 June 2007 seeking:-

9.1. That this honourable court STAY ALL proceedings in respect of Thika Chief Magistrate Civil Suit 398/07.

9.2. That this Honourable Court be pleased to issue an order for transfer of the Thika Chief Magistrates Civil Suit No.398 of 2007 to the High Court for hearing and determination.

9.3. _____”

10. The application of 21 June 2007 is brought under section 6, 18 (1) (b) (i) of the Civil Procedure Act and section 3A and 63 (e) of the Civil Procedure Act order L r 1 Civil Procedure Rules Cap.21 Laws of Kenya.

II: Section 6, Civil Procedure Act reads:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of their claim litigating the same title where such suit or proceeding is pending in the same and any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation”

12. That section 6 Civil Procedure Act for stay of proceeding was opposed to by the respondent/defendant. The reasons being that the defendant suit was filed before this High Court suit. The court should therefore stay the High Court case then proceed with the Chief Magistrates Court case seeking the eviction of the plaintiff from the suit land.

13. The applicant plaintiff also relied on section 18(1) (b) (i) Civil Procedure Act that reads.

“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 much notice, the High court may at any stage:-

a) Withdraw any suit or other proceeding pending in any court subordinate to it and thereafter:-

b) Try or dispose of the same, or

ii) _____

ii) _____

2) _____”

14. The applicant/plaintiff actually wished for the subordinate court case to be brought to this High Court and tried.

15. Section 6 and section 18 of the Civil Procedure Act speaks of contrary matters. Whilst section 6 states that the suit be stayed and no action be taken on a suit until the finalization of the “previously instituted suit,” namely, the first suit be heard first – it means that no transfer would take place. The advocate for the defendants/respondents reasoning is correct. That the first suit that had been filed is heard first. This would mean that the case for eviction is first heard then should this case for trust be heard. Of course if the court follows this procedure the latter suit would be rendered nugatory if successful yet a defence may be filed subsequently.

16. As to Section 18, Civil Procedure Act, the issue is not that of transfer of the suit. You cannot have both a stay and a transfer.

17. I believe the correct prayer and intention of the parties falls under Order XI r 1 and 2 seeking for the consolidation of the 2 suit.

XI r1 and 2

17.1. “Where two or more suits are pending the same court in which the same or similar questions of law or fact are involved, the court may either, upon the application of one or the parties or of its own motion at its discretion and upon such terms as many seem fit.

a) Order a consolidation of such suits and

b) Direct that further proceeding in any of such suits be stayed until further order.

17.2. Application under this order may be made by

summons in chambers or orally in court.

18. I believe that the defendant does not wish to be shut out in his suit for eviction. He of course opposes his suit to be stayed.

19. I would agree that in this matter the correct option for the parties lies in order XIr 1 and 2 on the issue of consolidation. There is no application before me on consolidation but the rules allows the court suo moto and at its discretion and upon such terms to order for the suit to be consolidated.

20. I hereby order that the Chief Magistrates Civil Suit 389/07 Joseph Waitiruka Kamau v Gabriel Ngaruiya Mwaniki be and is hereby consolidated with High court Civil case 146/07 court case file.

21. That the proceeding will be recorded in the Hccc146/07 file.

22. There will be costs in the cause.

Dated this 1st day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

J.M. Njoroge of Muturi Njoroge & Co. Advocates for the plaintiff/applicant – present

J.W. Gathoga for Gathoga Wairegi & Co. Advocates for the defendant/respondent - present