



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION NO. 11 OF 2020

ZACHARIA OTEL WAMALWA.....APPLICANT

VERSUS

ZAKAYO WASIKE.....RESPONDENT

R U L I N G

ZACHARIA OTEL WAMALWA alias **ZACHARIA CHACHARIA** (the Applicant herein) filed at the **BUNGOMA CHIEF MAGISTRATE COURT CIVIL CASE No 239 of 2016** against **ZAKAYO WASIKE** (the Respondent herein) seeking general damages equivalent to the market value of 12 acres of the land parcel **NO EAST BUKUSU/NORTH KANDUYI 151** (the suit land).

In a Judgment delivered on 31st August 2018, the trial Magistrate **HON. S. O. MOGUTE (PM)** found in favour of the Applicant.

The Applicant has now moved to this Court vide his Notice of Motion dated 11th March 2020 and anchored under **Sections 1A, 1B, 3A and 18 of the Civil Procedure Act** and **Order 51 of the Civil Procedure Rules** seeking the following remedies: -

- 1. The Honourable Court be pleased to transfer BUNGOMA CMCC No 139 of 2016 to this Court for adoption of the said Judgment and further directions.**
- 2. Cost be provided for.**

The application is premised on the grounds set out therein and is also supported by the affidavit of the Applicant.

The gravamen of the application is that having heard the parties herein, the trial Magistrate delivered a Judgment on 31st August 2018 and directed that a valuation be conducted on the suit land to determine its value. That valuation was done by the firm of **CRISCA REAL ESTATES** who assessed the value at approximately Kshs. 28 million and since that amount is beyond the pecuniary jurisdiction of the trial Court, the file in **BUNGOMA CMCC No 139 of 2016** should be transferred to this Court to enable the Applicant realize his Judgment.

The application was placed before me on 29th October 2020 when **MR WANYONYI** Counsel for the Applicant informed the Court that the application was not opposed. He urged me therefore to grant the orders as sought.

Although the application was not opposed, I informed Counsel that I would consider it and make my ruling thereon.

I have considered the application, un – opposed as it is. I have also called for the file in **BUNGOMA CMCC No 139 of 2016** to appraise myself of the Judgment therein.

I notice from the said Judgment that at page 9 thereof, the trial Magistrate states as follows: -

“The plaintiff through his oral testimony told the Court that the current value of one acre is Kshs. 1 million but no evidence was tendered from a land valuer to confirm the same. In the end, I enter Judgment for the plaintiff against the defendant for compensation in respect of land (12 acres) awarded to him in LDT No 104/84 as prayed in the plaint subject to valuation plus costs and interest.

Orders accordingly.”

I am not seized of any appeal from that decision and so I will desist from commenting on that order which is calling for evidence post - Judgment. What is clear to me however is that there is no provision in law empowering this Court to transfer a Judgment of the Subordinate Court to itself for execution purposes. My reading of **Section 18(1) of the Civil Procedure Act** which deals with the transfer of cases shows

that such transfer can only be done where the suit in the Subordinate Court is still pending. That provision reads 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 desire to be heard, or of it’s 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.” Emphasis added.

The reference to High Court must of course include this Court since 2010. Therefore, the transfer of **BUNGOMA CMCC No 139 of 2016** to this Court can only be done where that suit is pending hearing and final determination. I do not think **Section 18 of the Civil Procedure Act** allows the transfer of a suit that has been heard and a Judgment delivered by the Subordinate Court. Similarly, I do not think that **Order 46 of the Civil Procedure Rules** which deals with the filing of award to this Court is applicable in this case.

Most importantly, other than for the orders of costs, it is doubtful if there is any Judgment delivered by the Subordinate Court capable of being transferred to this Court for execution. In concluding the Judgment in **BUNGOMA CMCC No 139 of 2016**, the trial Magistrate, if I may repeat, stated as follows: -

“The plaintiff did not tender evidence to show the current value of the said land. The plaintiff through his oral testimony told the Court that the current value of one acre is Kshs. 1 million but no evidence was tendered from a land valuer to confirm the same. In the end, I enter Judgment for the plaintiff against the defendant for compensation in respect of the land 12 acres awarded to him in LDT NO 104/84 as prayed in the plaint subject to valuation plus costs and interest.”

In his plaint and as properly captured by the trial Magistrate at the commencement of his Judgment, the plaintiff sought the following reliefs: -

“(a) General damages equivalent to the current market value of land parcel measure 12 acres as compensation.

(b) Costs

(c) Interest”

Clearly therefore, the trial Court ought to have assessed the general damages available to the plaintiff. That is a requirement under **Order 21 Rule 4 of the Civil Procedure Rules** and was not done. Even assuming that this Court can transfer to itself the Judgment in **BUNGOMA CMCC No 139 of 2016** for adoption and execution, all that the plaintiff would be able to execute are the costs and interest thereon because that is all that was awarded. No general damages were assessed nor awarded yet that is what the Court set out to determine.

The up – shot of the above is that the Notice of Motion dated 11th March 2020 is devoid of merit.

It is accordingly dismissed with no orders as to costs.

Boaz N. Olao.

J U D G E

5th November 2020.

Ruling dated, signed and delivered at **BUNGOMA** this 5th day of November 2020 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

5th November 2020.