



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISC APPLICATION NO. 16 OF 2020

ZAKAYO KAMENCU.....APPLICANT

VERSUS

JENNIFER KENARIO IKIAO.....1ST RESPONDENT

DOUGLAS KINYUA IKAMATI.....2ND RESPONDENT

JUDGMENT

1. This miscellaneous suit was filed vide an application dated 4.8.2020 where the applicant sought orders of stay of proceedings in Tigania PMCC NO. 17 of 2020, that the court do order the transfer of the aforementioned suit from Tigania court to this (ELC) court for hearing and determination and that the ruling delivered on 29.7.2020 by Honorable Sogomo P.M. in the Tigania matter be stayed.

2. The orders of stay of the proceedings of the Tigania matter were not granted at the exparte stage when this file was presented before the ELC duty Judge, Hon P.M.Njoroge on 12.8.2020. Instead, the matter was given the date of 23.9.2020 before this court. Come 23.9.2020 and it turned out that the respondent had not been properly served. Thus the court gave another date of 12.10.2020. On 12.10.2020, the matter was called out through the Microsoft Teams virtual platform whereby Mr. Otieno C. was present for the applicant while Mr. Mokua appeared for the respondent. However, Mr. Otieno C disappeared and the file was therefore put aside. The matter was called out later at 9.30 AM but still Mr. Otieno C did not appear. The court proceeded to give a date of ruling on 18.11.2020.

3. Thereafter, the applicant filed another application on 22.10.2020 seeking the following orders;

“That this matter be certified as urgent and be heard on priority basis. That pending the ruling of this court on the matter of jurisdiction, that this court be pleased to order the stay of proceedings in respect of ELC Case no. 17 of 2020 before the Senior Resident Magistrates court in Tigania including the ruling on contempt issued on 29.7.2020 and subsequent orders thereof”.

4. The gist of the latest application is that the applicant has been bonded to appear before the Tigania court on 3.11.2020, which date precedes the ruling date given by this court on 18.11.2020 touching on the issue of jurisdiction. The court set the ruling date for the application of 22.10.2020 on 3.11.2020.

5. Save for the request that the matter be heard on priority basis and to grant a stay of proceedings of the Tigania matter pending the delivery of the ruling in the earlier application of 4.8.2020, the applicant is not praying for anything else. In the circumstances, this court invokes the provisions of **Article 159 (2) of the Constitution** as well as the overriding objective set out under **Section 1A and 1B of the Civil Procedure Act** and the court will proceed to determine the earlier application (entire suit) at once, hence this decision is delivered in form of a judgment. **In the circumstances, the application filed on 22.10.2020 is marked as spent.**

The application dated 4.8.2020

6. The applicant contends that the proceedings in the Tigania case offend the provisions of section 7 (1) (c) of the Magistrates Court Act of 2015 in that the suit plot numbers 92, 133 and 134 at Kianjai market are valued at approximately Ksh. 15 million, hence the Principle Magistrate has no jurisdiction to determine the matter. The applicant further avers that he will suffer irreparably if this court does not stay the ruling delivered on 29.7.2020. The applicant has availed the valuation report marked as “ZK-2” to support his claim.

7. The two respondents opposed the application vide the replying affidavit of Jennifer Kanario Ikiao, the 1st respondent. They contend that they sued the applicant in the Tigania matter of which they also filed an application seeking injunctive orders against the applicant. The orders were granted in favour of the respondents as per annexure “JKI 2”. However, the applicant breached the orders of injunction

prompting the respondents to file a contempt application whereby again the ruling was delivered in their favour on 29.7.2020 (see annexure “JK1 3”).

8. The respondents aver that the applicant filed a Notice of Preliminary Objection (see annexure “JK14”) challenging the jurisdiction of the court and a ruling dismissing the said Preliminary Objection was delivered on 23.9.2020 - See annexure “JK15”. The respondents therefore contend that the applicant is forum shopping and that there are no sufficient grounds to seek the transfer of the suit.

9. I have considered all the issues raised herein. The first point of consideration is on transfer of the suit. **Section 18 of the Civil Procedure Act** clothes this court with the mandate to order, at any stage of the proceedings for withdrawal and transfer of any suit pending in any court subordinate to it and either try and dispose it or transfer it for trial or disposal to any court subordinate to it and competent to try it. However, the court can only transfer a matter which was in the first instance filed before a court that was competent to hear and determine the suit. See- **Simon Njogu Kariithi & another v Cleti Kembio Kimaiyo [2015] eKLR**. If the trial court at Tigania had no jurisdiction to hear the matter, then there would be no competent suit capable of being transferred and the provisions of section 18 of the Civil Procedure Act cannot be invoked.

10. The second point for consideration is that the issue of jurisdiction had already been raised before the trial court. The current applicant had filed a preliminary objection challenging the jurisdiction of the court citing the provisions of section 7(1) (c) of the Magistrates Courts Act. A ruling was delivered on 23.9.2020 dismissing the preliminary objection. This is the same argument being raised before me. This court cannot purport to determine the issue of jurisdiction all over again unless and until the ruling of 23.9.2020 delivered by the trial court is challenged by way of an appeal or review.

11. It is not lost to this court that the applicant approached this court only after the ruling citing him for contempt was delivered on 29.7.2020. It is therefore crystal clear that the applicant is attempting to scuttle those proceedings before the trial court. I am therefore in agreement with the respondent’s averment that the applicant is forum shopping which amounts to an abuse of the court processes.

12. In the final analysis, I find that the application dated 4.8.2020 is not merited and I proceed to dismiss this miscellaneous suit with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 3rd DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of the decision herein was given to the advocates for the parties on 22.10.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE