



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MURANG'A

MISC. APPLIC. NO. 11 OF 2018

JAMES PETER MWANGI THANDE.....APPLICANT

VERSUS

JOSEPH MWENJI MWANGI.....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated the 9/7/18 and filed on even date. It is brought under Sections 17 and 3A of the Civil Procedure Act and under all other enabling provisions of the law. In it the Applicant seeks orders that the SPMCC No 154 of 2008, Kangema and CMCC 447 of 2008, Muranga be consolidated and heard at the chief Magistrates Court at Murang'a. The Applicant avers that the subject matter of both suits is LOC 13/KARUNGE/54. He deponed that the Respondent in this application is the Plaintiff in SPMCC No 154 of 2008, Kangema and an interested party in CMCC 447 of 2008 Muranga. The Applicant herein is the Plaintiff in the CMCC 447 of 2008.

2. That there are consent judgements in both cases as to how the same land is to be shared which needs to be reviewed because they are conflicting. That the Applicant has applied to be enjoined as a party in CMCC 447 of 2008 Murang'a.

3. The Applicant is opposed by the Respondent who deponed that he was enjoined as an interested party in CMCC 447 of 2008 Murang'a. That the SPMCC No 154 of 2008, Kangema was concluded and a decree issued. He averred that the consent dated the 26th May 2015 has not been adopted by the Court and the same is being challenged as shown in the letter dated the 12/10/2009. Interestingly the letter challenging the proposed consent came before the consent which is dated the 26/5/2009.

4. In his further affidavit the Applicant sought that the two files should be consolidated so that an application for review of SPMCC No 154 of 2008, Kangema should be done. That if the Respondent herein is enjoined as an interested party in CMCC 447 of 2008 Muranga, he will unfairly use the judgement in SPMCC No 154 of 2008, Kangema to unfairly acquire 1.75 acres fraudulently.

5. By way of background the CMCC 447 of 2008 Murang'a was filed on the 10/11/2008 and the Plaintiffs are James Peter Mwangi Thande, Teresia Njeru Irungu and Phylis Wangui Mwangi while the Defendant is Stephen Mwangi Thande. The Plaintiffs claim is for orders that Defendant transfer to the 1st, 2nd and 3rd Plaintiffs 1 acre to each Plaintiff from the suit land. The Defendant denied the Plaintiffs claim in his defense that he is the sole proprietor of the suit land.

6. The SPMCC No 154 of 2008, Kangema was filed on the 11/11/2008 and the Plaintiff is Joseph Mwenji Mwangi and the Defendant is Stephen Mwangi Thandi. The claim of the Plaintiff in this case is that the Defendant to transfer 1.75 acres to the Plaintiff out of the suit land. On the 12/11/2008 the parties herein filed a consent which consent was adopted as an order of the Court on the 29/1/2009 as follows;

“it is hereby entered by consent that ;

- a. The Defendant to transfer 1.75 acres out of parcel No LOC 13/KARUNGE/154 to the Plaintiff.
- b. Costs of the suit be in the cause.

7. I have perused the two files and the following are germane;

- a. The suit land was registered in the name of Stephen Mwangi Thande who is a common party in both suits.
- b. The said proprietor is the Defendant in Kangema SPMCC 154/08 after he was sued by James Peter Mwangi who alleged to purchase ½ an acre of the suit property.

c. The proprietor was also sued as Defendant in Murang'a CMCC 447/2000 where the Applicant herein filed suit jointly with his sisters to recover family land from the Defendant. They have alleged that the Defendant held the land in trust.

d. The parties in Kangema SPMCC 154/08 entered into a consent where the proprietor was to transfer 1.75 acres of the suit land to the purchaser and as such allowing the Plaintiff's suit.

e. The Defendant proprietor did not file a defence.

f. The Applicant herein filed an application dated where he sought to be enjoined in Kangema SPMCC 154/08. He had lodged a caution against title to prevent further dealing with the land. His application was successful after the Court noted that any orders issued would also affect him.

g. The Plaintiff (Purchaser) in Kangema SMPCC 154/08 filed an application to have caution removed. The Court declined to grant the orders and directed that parties await determination of Murang'a CMCC 447/2000 which can determine that issue since the Court does not know why it was lodged.

h. The suit in Murang'a CMCC 447/08 is still pending. The purchaser was also enjoined as an interested party since he bought portions of the land.

i. There was also a consent in Murang'a CMCC 447/08 where the Defendant agreed to give the Plaintiff ½ acre (Applicant herein) of the land. However further proceedings from the file indicate that this consent was never adopted and the Defendant's brother became evasive.

8. Section 18 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya 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 of 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.”

9. It is therefore trite that the High Court (read ELC) has the power to withdraw a suit pending in a Court subordinate to it and transfer the same to either the High Court itself or to another competent Court subordinate to it for hearing and disposal.

10. The power of the Court to transfer a suit under Section 18 of the Civil Procedure Act has been a subject of legal discourse by the High Court before. **Nyamweya, J.** in the case of **Aberdare Investments –Vs- Bernard Wachira & 5 Others [2014] eKLR** held as follows:

“It is clear from those provisions [Sections 17 & 18 of the Civil Procedure Act] that the Court with jurisdiction to transfer a suit from or to a subordinate Court is the High Court, or Courts of similar status.

11. The threshold for transfer of cases was set out in the case of **Kithita Ngeana v Mwaniki Kisume [2018] eKLR** the Court held as follows.

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...”

12. The order is a discretionary power of the Court and the Court must be guided by Sections 1A, 3A and 1B to achieve the overriding objectives of the Court. This is read together with the overarching principles set out in Article 159 of the Constitution which is to do substantive justice to the parties.

13. As to whether the suit may be consolidated, the Kangema matter was determined by a consent judgement. The only pending matter in that suit is the execution of the decree. From the record execution may have been hampered by a caution that is subsisting on the title. I have seen the ruling of the honourable Court dated the 18/9/2013 which directed the parties to await the determination of the suit in Muranga. The Court declined to issue removal of the caution. It is trite that a consent judgement is a judgement arrived after the consent of the parties that is to say the parties agreed to determine their matter in the manner stated in the consent judgement. That judgement is as well a valid judgment of the Court once the Court adopted it. I have not seen any evidence to suggest that the same has been reviewed, set aside appealed and or varied. Consequently, the suit in Kangema Court was determined and there is no active suit to transfer. The Applicant has stated that the suit should be transferred to enable the review of the said judgement. I note that no application for review has been made and, in any event, if review were to be done the right forum would be the Court in Kangema. It is to be noted that the suit in Murang'a comprised of other parties not involved in the Kangema suit. The proposed consent dated the 26/5/2015 has not been adopted as a consent judgement of the Court. This suit is active. It is to be noted that the Respondent is already an interested party in the Murang'a case and the allegations that he will unfairly use the judgement in Kangema to the disadvantage of the other parties in the case was not proved.

14. The upshot is that the application is disallowed for the foregoing reasons.

15. The costs shall be in the cause.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF FEBRUARY 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Onyango HB for Wandai Karuga for the Applicants

T M Njoroge HB for Mrs Kimani for the Respondent

Njeri and Irene, Court Assistants