



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2018

SHAIWAZ SADRUDIN JIWAAPPLICANT

VERSUS

ABDILLAHI HASSAN ABDIRIHAMAN.....RESPONDENT

R U L I N G

This is in respect to the Plaintiff's Notice of Motion dated 8th August 2018 premised under the provisions of **Section 18 of the Civil Procedure Act** seeking the following orders:-

1. That BUNGOMA CMCC NO 269 of 2018 be transferred to this Court for hearing and determination.

2. Costs

The application is based on the grounds set out therein and supported by the affidavit of **MR OMUNDI BW'ONCHIRI** who is Counsel for the Plaintiff.

The gravamen of the application is that **BUNGOMA CMCC NO 269 OF 2018** was filed in the Chief Magistrate's Court Bungoma on 30th May 2018 after which the defendant filed a defence to which was annexed a valuation report showing that the value of the properties in dispute which are land parcels **NO MALAKISI/TOWNSHIP/375, 413 AND 419** are **VALUED** at Kshs. 64,000,000/=. The report is annexed to the Supporting Affidavit. Therefore, since the subject matter in **BUNGOMA CMCC NO 296 OF 2018** exceeds the monetary jurisdiction of the Chief Magistrate's Court, the plaintiff seeks the transfer of that suit to this Court.

The application is opposed and the defendant has filed a Replying Affidavit stating, inter alia, that the application is brought for the sole purpose of defeating his defence in **BUNGOMA CMCC NO 269 OF 2018** since the plaintiff knew all along that the properties in dispute were valued at over Kshs. 64,000,000/= since at that time the defendant had already filed **BUNGOMA HCC NO 2 OF 2018** where a copy of the valuation report was annexed. That since the Subordinate Court had no jurisdiction in the matter before it, there is nothing to be transferred to this Court because Section 18 of the Civil Procedure Act applies where a suit is being transferred from one competent lower Court to another and not the High Court. The defendant asked the Court to decline the application.

When the application came up for hearing on 17th September 2018, both **MR BW'ONCHIRI** for the Plaintiff and **MR MAKOKHA** for the defendant agreed that it be canvassed by way of written submission to be filed on or before 1st October 2018.

On 1st October 2018 **MR OLONYI** holding brief for **MR BW'ONCHIRI** informed the Court that **MR BW'ONCHIRI** had filed and served **MR MAKOKHA** with his submissions. The Court gave **MR MAKOKHA** 7 days to file his submissions and fixed the next mention for 11th October 2018 but on that day, **MR MAKOKHA** was not present in Court and neither had he filed submissions though served with a mention notice. This application is therefore determined without the input of the defendant's Counsel in the way of submissions.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by **MR BW'ONCHIRI**.

This application seeks the transfer of **BUNGOMA CMCC NO 269 OF 2018** from the Chief Magistrate's Court to this Court. **Section 18(1) of the Civil Procedure Act** which empowers this Court to transfer cases provides that:-

“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 and 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) re – transfer the same for trial or disposal to the Court from which it was withdrawn.”

I have looked at the Plaintiff in **BUNGOMA CMCC NO 269 OF 2018** which was filed on 30th May 2018. The plaintiff sought Judgment against the defendant in the following terms:-

(a) Permanent injunction restraining the defendant by himself, his agents, servants and workers howsoever from entering, invading and or interfering in MALAKISI/TOWNSHIP/375, 413 and 419.

(b) Damages

(c) Costs

(d) Interest

(e) Any other relief.

The basis of the plaintiff's suit is that whereas he is the registered proprietor of land parcels **NO MALAKISI/TOWNSHIP/375, 413 and 419** (the suit land) the defendant had without lawful excuse invaded it resulting in loss of 176 chicken and 40 eggs as well as record books. That the illegal and criminal acts had been reported to **MALAKISI POLICE STATION**. Plaintiff then pleads in paragraph 10 that:-

“This Honourable Court has jurisdiction.”

The defendant filed a defence denying those allegations and putting the plaintiff to strict proof thereof. He added further that this suit is calculated to defeat his suit in the High Court being **HIGH COURT CIVIL SUIT NO 2 OF 2018** and that this suit is therefore sub judice and an abuse of the Court process. In paragraph 12 of his defence, the defendant made the following important averment:-

12: “The pecuniary jurisdiction of the Honourable Court is denied as the suit property is valued at more than 64 million.”

Annexed to that defence was a report dated 4th April 2018 by a firm of Valuers known as **CHRISCA REAL ESTATES** valuing the suit land and the developments thereon at Kshs. 64,000,000/=.

In determining whether or not it has jurisdiction in any dispute placed before it, the Court can only look at the pleadings as filed by the parties and no more. This is because it is those pleadings that set out the dispute which the parties desire the Court to resolve. Therefore if from a plain reading of the pleadings placed before it the Court is satisfied that it has the jurisdiction to determine the dispute, then that will be sufficient material upon which the Court can proceed to hear the parties.

From the pleadings which the plaintiff filed in **BUNGOMA CMCC NO 269 OF 2018**, there was nothing to suggest that the value of the suit land was beyond the pecuniary jurisdiction of the Chief Magistrate which is currently Kshs. 20,000/=. In those circumstances, and given the fact that it was the plaintiff who had moved to that Court, it can only be concluded that the plaintiff was satisfied that the value of the suit land and whatever damages he anticipated would be well within the pecuniary jurisdiction of the Chief Magistrate's Court at Bungoma. It was not until the defendant filed the defence and valuation report that the value of the suit land was established to be Kshs. 64,000,000/=. Clearly therefore, it was only after the defence was filed that the value of the suit land placed the dispute beyond the jurisdiction of the Chief Magistrate's Court and it is from that time that **BUNGOMA CMCC NO 269 OF 2018** because a suit in the “*wrong*” Court if I may use that terminology. As I stated earlier, a Court considering the issue of jurisdiction cannot go beyond the pleadings placed before it. I am therefore satisfied that when **BUNGOMA CMCC NO 269 OF 2018** was filed in the Subordinate Court by the plaintiff without any mention on the value of the property in dispute, there was nothing to suggest that it was filed in a Court without jurisdiction. Where a suit is filed in a Court with jurisdiction and subsequent events emerge which change the status of the matter in dispute, it would not be proper to claim that the suit was filed in a Court without jurisdiction. That is the scenario obtaining in this case.

Having said so, and even assuming that **BUNGOMA CMCC NO 269 OF 2018** had been filed in a Court without jurisdiction, would that mean that the suit could not be transferred to this Court? **MR BW'ONCHIRI** has submitted, citing the case of **GRACE THOGORI KOMO .V. DAN NJAGI NDWIGA 2013 eKLR**, that in view of the overriding objectives introduced by **Section 1A and 1B of the Civil Procedure Rules**, the just, expeditious proportionate and affordable resolution of will best be served if this application is allowed. I agree with that submission and the reasoning of **H.P.G WAWERU J** in the **GRACE THOGORI KOMO** case (supra) where he said:-

“If a suit finds itself in the wrong Court, surely it is in the interest of justice and in the interests of all concerned that the suit be forwarded to the appropriate Court with jurisdiction so that the issue in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event. After all, the overriding objectives of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act (Section 1A).”

The dicta that a case filed in a Court without jurisdiction cannot be transferred to another Court has been followed by superior Courts in this

country following the jurisprudence in **KAGENYI .V. MUSIRAMO & ANOTHER 1968 E A 43** a Ugandan case decided long before the promulgation of the 2010 Constitution which behoves the Courts to administer justice without undue regard to procedural technicalities. I agree with **H.P.G. WAWERU J** that the **KAGENYI CASE** (supra) should no longer be persuasive authority to this Court. I took the same view in **LUCIA MUTHONI & ANOTHER .V. BETHA WANJIRU MURIUKI 2016 eKLR**. To disallow this application for transfer would only mean that the Plaintiff will have to go back to the Chief Magistrate’s Court, withdraw **BUNGOMA CMCC NO 269 OF 2018** and file it afresh in this Court. That would be an extravagant utilization of resources and judicial time both of which are scarce.

I have also considered what prejudice the defendant will suffer and I don’t see any. And although the defendant has deponed in his Replying Affidavit that the transfer of this suit will lead to a miscarriage of justice and the Court will be aiding an illegality, my view is that the order of transfer sought is well founded and will promote the expeditious disposal of this suit.

The up-shot of the above is that the plaintiff’s Notice of Motion dated 8th August 2018 is allowed with no order as to costs.

Boaz N. Olao.

J U D G E

30th May 2019.

Ruling dated, delivered and signed in Open Court at Bungoma this 30th day of May 2019.

Ms Mutunda for Mr Bwonchiri for plaintiff present

Mr Makokha for the Respondent present

Respondent present

Joy/Felix – Court Assistants – present

Boaz N. Olao.

J U D G E

30th May 2019.