



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

MISC ELC CASE NO. 1 OF 2019

JOHN MUREITHI GITHINJI.....APPLICANT

VERSUS

THOMAS IRERI NGAI.....1ST RESPONDENT

PERAZIM MISSION CHURCH.....2ND RESPONDENT

RULING

1. By a notice of motion dated 24th January 2019 purportedly brought under **Order 40 Rule 1 of the Civil Procedure Rules**, the Applicant sought an order for re- transfer of *Siakago MCL & E 120 of 2018* to this court for hearing and determination. The said application was filed under certificate of urgency.
2. The application was based upon the following grounds which were set out on the face of the motion, that is:
 - a) *That Siakago law court has no jurisdiction to hear and determine the suit herein.*
 - b) *That the order sought herein is declaratory in nature and only High Court can issue such order.*
 - c) *That Siakago law court has indicated that it has no jurisdiction to issue orders sought and the file should be returned to this court.*
3. The said application was supported by an affidavit sworn by the Applicant on 23rd January 2019 which reiterated the grounds set out in the notice of motion.
4. The Respondents filed grounds of opposition dated 8th March 2019 in opposition to the said application. It was contended that it was the Applicant who had made an oral application on 23rd July 2018 for the suit to be transferred to Siakago Law Courts in the first instance. It was further contended that it was baseless, contradictory and not backed up by factual evidence. It was, finally, contended that it was an abuse of the court process.
5. When the said application first came up for hearing *ex parte* under certificate of urgency on 28th January, 2019 the court noted that the Applicant had not exhibited copies of the pleadings in the suit sought to be transferred to this court. The court consequently made an order for the Applicant to file copies of the pleadings within 21 days. The application was then fixed for *inter partes* hearing on 21st February 2019.
6. When the said application was listed on 21st February 2019, the court noted that the applicant had not filed copies of the pleadings as directed earlier. The Applicant's advocate, however, sought and obtained leave to amend the said application by replacing **Order 40 of the Civil Procedure Rules** with **section 18 of the Civil Procedure Act (Cap. 21)**.
7. The said application was consequently stood over to 27th February 2019 for hearing. On the said date, the Respondents sought seven days to file a response to the said application. The Applicant was given 21 days upon service by the Respondents to file and serve written submissions on the application for transfer whereas the Respondents were granted 21 days thereafter to file and serve theirs.
8. The court file shows that the Applicant filed a further affidavit sworn on 15th May 2019 in which it was claimed that the value of the suit property was over Ksh.24 million. There was, however, no valuation report or other documentary evidence exhibited to back that value of

Ksh. 24 million.

9. The court record also shows that none of the parties had filed written submissions by the time of preparation of the ruling.

10. The court has considered the Applicant's notice of motion, the further supporting affidavit and the grounds of opposition filed by the Respondents. The application is based upon the provisions of **section 18 of the Civil Procedure Act** which stipulates that:

“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 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 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.”

11. This court, being a court of equal status with the High Court, is thus empowered to order transfer of suits relating to immovable property falling within its jurisdiction. The court does not agree with the Respondents' submission that such power cannot be exercised where the Applicant had initially applied for transfer of the suit in issue to the Magistrate's court. As long as sufficient cause is shown, the court has jurisdiction to transfer and re-transfer suits.

12. The court shall now consider the grounds advanced by the Applicant in seeking transfer. The first is that the Magistrate's court at Siakago has no jurisdiction and that it has indicated that it has no jurisdiction to try it. There was no order or pronouncement to that effect from Siakago Law Courts which was exhibited. In any event, such expression of opinion would not be binding upon this court. This court would still be obliged to inquire whether as a matter of law such court has jurisdiction.

13. The Applicant did not demonstrate in what manner the Magistrates' Court at Siakago lacked jurisdiction to deal with *Siakago MCL & E 120/2018*. It was not contended that none of the judicial officers stationed there is gazetted to handle environment and land matters. It was not contended in the application that the said judicial officers have no pecuniary jurisdiction to handle the matter.

14. The second ground was that the reliefs sought in the suit were *declaratory* in nature and that only the superior court can grant them. This ground was not backed by any statutory provision or legal authority. As the court shall demonstrate hereafter, this ground was wholly untrue and misleading. Nevertheless, the court is not aware of any legal provision restricting the jurisdiction of Magistrates courts in granting declaratory relief in environment and land matters. At least, none was brought to the attention of the court by the Applicant.

15. The court has perused a copy of the plaint in the suit sought to be transferred to this court. The plaint is dated 30th May 2017 and seeks the following reliefs:

a) That the Defendants to revert to the original common boundary as per the mutation drawn by O.M. Wainaina – Licensed surveyor. (Sic)

b) An order that the lands office amends map for Nthawa/Siakago/2957 according to mutation drawn by licensed surveyor in the year 2000 so that the map and the ground area are the same. (Sic)

c) That the 2nd defendant to remove (sic) the concrete bacons and iron bars fence they have built on the Plaintiff's parcel of land at their own costs.

d) General damages to the Plaintiff and Kenya Roads Authority to be compensated for any losses arising as a result of the actions of the Defendants in determination of the common boundary which would guide Kenya Roads Authority on the course to follow in building the water furrows.

e) Costs and interests of this suit.

16. It is clear at once that those reliefs sought are not *declaratory* orders as claimed by the Applicant. There is nothing in those prayers which would preclude the Magistrate's court from handling the suit. It is thus clear that the Applicant was not forthright and candid in his application for transfer. That may perhaps explain why copies of the pleadings were not annexed to the supporting affidavit at the time of filing the application. The Applicant was hoping to mislead the court and get away with an order of transfer without detection.

17. The third ground which was advanced by the Applicant is contained in the further supporting affidavit sworn on 15th May 2019. It was contended that the value of the suit property was over Ksh. 24 million. The court is unable to accept that ground as genuine for the following reasons. First, there was no documentary evidence to back up the value. Second, the further affidavit cannot purport to support a ground

which was never contained in the notice of motion seeking transfer. The court is of the opinion that the alleged value of Ksh. 24 million was merely an afterthought which was plucked from the air by the Applicant in a bid to salvage his application. If it were a genuine ground, it would have been contained in the application as filed originally.

18. The court therefore finds and holds that the Applicant has not made out a case for re-transfer of *Siakago MCLE 120/2018* to this court. The court finds that there is no legal basis for making an order for transfer in spite of the Applicant's effort in fabricating grounds for that purpose.

19. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 24th January 2019. The same is consequently dismissed with costs to the Respondents.

20. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20TH day of JUNE, 2019

In the presence of Mr. Okwaro holding brief for Mr. Mugambi for the Applicant and Ms. Muthoni holding brief for Ms. Wairimu for the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.06.19