



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCC No. 265 OF 2011

OLYMPIA HOSPITAL (KENYA) LIMITED.....1ST PLAINTIFF

SAMSON KEENGU NYAMWEYA.....2ND PLAINTIFF

VERSUS

DR. BENJAMIN AKENGA.....DEFENDANT

RULING

1. This ruling is in respect of defendant's Notice of Motion dated 25th October 2018. The following orders are sought in the application:

1. THAT this instant application be certified extremely urgent and its service be dispensed with forthwith.

2. THAT the trial court order this file/matter transferred to the High Court at Nakuru and merged with High Court ELC 265/2011 for further orders by the trial Judge.

3. THAT the cost of instant application and the transferred suit abide in the fate of the consolidated file in Nakuru High Court ELC 265/2011.

2. The application is supported by an affidavit sworn by the applicant. The plaintiffs responded to the application through an affidavit sworn on 24th January 2019 by Caleb Bichanga Nyamwange advocate, who is on record for them. The applicant also filed written submissions while counsel for the respondents made oral submissions.

3. From the material placed on record, I note that pursuant to judgment dated 19th February 2015, L.N. Waithaka J dismissed this suit with no order as to costs. There is a decree on record issued on 20th August 2018 which reads as follows:

DECREE

Prayers for:

1. A declaration that the purported transfer of the suit property LR NAKURU MUNICIPALITY/BLOCK XVI/102 from the 1st plaintiff to the defendant was ultra vires, illegal and/or null and void;

2. An order directing the District Land Registrar Nakuru to cancel the purported registration of the said transfer of the said transfer to the defendant from the register held in respect of the said suit property.

3. A permanent injunction restraining the defendant by himself, or his servants, agents or assignees from transferring, leasing, charging, mortgage, disposing of, alienating or in any way dealing with the suit property.

4. An order restraining the defendant from acting in a manner ultra vires and/or detrimental to the 1st plaintiff's interests in the suit property.

5. Costs of this suit.

6. Any other relief that the court may deem fit to grant.

This matter coming up for Judgment on 19th February 2015 before Hon. Justice L.N. Waithaka in open court, and it is hereby ordered that:

1. THAT this suit is hereby dismissed with no order as to costs.

4. I further note that there is currently pending before the Chief magistrate's Court at Nakuru, another case being **CM ELC No. 204 of 2018 (Nakuru) Dr. Benjamin Akenga v Samson Keengu Nyamweya** wherein the defendant herein is the plaintiff while the 2nd plaintiff herein is the defendant. A copy of the plaint as well as defence and counterclaim in the said matter have been annexed by the plaintiffs herein. The plaintiff in **CM ELC No. 204 of 2018 (Nakuru)** avers that he is the proprietor of Nakuru Municipality/Block 16/102, which is also the suit property herein, and urges the subordinate court to among others order eviction of the defendant in the said suit from the said property. The defendant therein counterclaimed *inter alia* for KShs 40,000,000 being funds which he claims to have spent at the request and instance of the plaintiff.

5. The present application seeks an order that "*this file/matter transferred to the High Court at Nakuru and merged with High Court ELC 265/2011 for further orders by the trial Judge*". It seems to me that the applicant, who is unrepresented, seeks transfer of **CM ELC No. 204 of 2018 (Nakuru)** to this court and subsequently its consolidation with this suit. That too is how the respondents understood the application. In oral submissions, counsel stated that the respondents do not oppose transfer of **CM ELC No. 204 of 2018 (Nakuru)** to this court. They however took the view that since there is a judgment in this matter, it cannot be consolidated with **CM ELC No. 204 of 2018 (Nakuru)**. Parties were thus in agreement that the issue before this court is whether the said subordinate court case could be transferred to this court and consolidated with this suit.

6. I have considered the application, the affidavits filed as well as submissions by parties. Pursuant to **Section 7 of the Magistrates' Courts Act, 2015**, the jurisdiction of the subordinate court in civil matters is limited to matters in which the value of the subject matter does not exceed KShs 20 million. The counterclaim for KShs 40,000,000 has clearly pushed the subject matter in **CM ELC No. 204 of 2018 (Nakuru)** beyond the pecuniary jurisdiction of the subordinate court. Transfer to this court is thus necessary. As previously noted, the plaintiffs herein do not oppose transfer. Needless to state, merits of the case in view of the judgment herein will be considered if and when the issue is raised in this court after transfer.

7. There is no dispute that pursuant to judgment dated 19th February 2015, L.N. Waithaka J dismissed this suit with no order as to costs. The court is therefore *functus officio* and there would be no basis upon which to consolidate this matter with **CM ELC No. 204 of 2018 (Nakuru)** which is yet to be heard and determined. I therefore agree with the plaintiffs that an order of consolidation is not available.

8. In view of the foregoing, I make the following orders:

a) **CM ELC No. 204 of 2018 (Nakuru) Dr. Benjamin Akenga v Samson Keengu Nyamweya** is hereby withdrawn from Chief Magistrate's Court Nakuru and transferred to this court for hearing and determination.

b) Upon transfer to this court, **CM ELC No. 204 of 2018 (Nakuru) Dr. Benjamin Akenga v Samson Keengu Nyamweya** shall be allocated its own case number and shall not be consolidated with this case.

c) Costs of Notice of Motion dated 25th October 2018 shall be in the cause in **CM ELC No. 204 of 2018 (Nakuru) Dr. Benjamin Akenga v Samson Keengu Nyamweya**.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Defendant/applicant present in person

Ms Cheloti for the plaintiffs/respondents

Court Assistants: Beatrice & Lotkomo