



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**MISCELLANEOUS APPLICATION No. 21 OF 2016**

**ISABELLA WANGUI WAWERU .....APPLICANT**

**VERSUS**

**JOSEPH MUTHEE NG'ANG'A .....RESPONDENT**

**RULING**

1. This ruling is in respect of applicant's Notice of Motion dated 7<sup>th</sup> December 2015, an application seeking the following orders:

1. *Spent*

2. *That this Honorable Court be pleased to withdraw the suit in NAKURU CMCC NO. 351 OF 2015 ISABELLA WANGUI WAWERU vs. JOSEPH MUTHEE NG'ANG'A from the Nakuru Chief Magistrate's Court and transfer the same to this Honourable Court (The Environment and Land Court of Kenya at Nakuru) for hearing and disposal.*

3. *That upon transfer of the suit serialized as NAKURU CMCC NO. 351 OF 2015 this Honorable court be pleased to consolidate the suit with NAKURU ELC NO. 301 OF 2014 (O.S.) JOSEPH MUTHEE NG'ANG'A vs ISABELLA WANGUI WAWERU.*

4. *That this Honorable Court be pleased to issue orders of temporary injunction restraining the Respondent by himself, his agents, employees or assigns from accessing, entering, remaining, grazing, farming, destroying or otherwise dealing with the property in any manner contrary to the rights of the Applicant as the lawful proprietor of the property known as LR NO. LENGINET SETTLEMENT SCHEME 501/1 and more specifically the portion of the land utilized by the Applicant for Rhodes grass.*

5. *That costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the applicant. She deposed that she instituted NAKURU CMCC NO. 351 OF 2015 ISABELLA WANGUI WAWERU vs. JOSEPH MUTHEE NG'ANG'A against the respondent herein and that following a preliminary objection raised in the said matter by the respondent to the effect that there existed another matter in respect of the same subject being NAKURU ELC NO. 301 OF 2014 (O.S.) JOSEPH MUTHEE NG'ANG'A vs. ISABELLA WANGUI WAWERU, the subordinate court delivered a ruling on 11<sup>th</sup> November 2015 in which it ordered stay of the said matter pending hearing and determination of the O.S. According to the applicant, the subject matter in both NAKURU CMCC NO. 351 OF 2015 and NAKURU ELC NO. 301 OF 2014 (O.S.) is one and the same: the parcel of land known as LR NO. LENGINET SETTLEMENT SCHEME 501/1.

3. Though served, the respondent neither filed anything in response to the application nor attended court at its hearing. The application is thus unopposed and counsel for the applicant urged the court to allow it. I have carefully considered the application and the submissions. Although the applicant is a defendant in NAKURU ELC NO. 301 OF 2014 (O.S.), she has not annexed copies of pleadings in the said matter nor updated the court on its status. Nevertheless, I have perused the said file.

4. The applicant seeks transfer of a suit from the subordinate court and subsequent consolidation of the transferred suit with another suit pending before this court.

5. Principles applicable whenever the court is considering an application for consolidation of suits were restated in **Stumberg and Another vs Potgeiter 1970 E.A. 323** as follows:

***Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered***

6. From the material placed before the court and my perusal of the file in NAKURU ELC NO. 301 OF 2014 (O.S.), I am satisfied that there is indeed in existence two suits being NAKURU CMCC NO. 351 OF 2015 ISABELLA WANGUI WAWERU vs. JOSEPH MUTHEE

NG'ANG'A and NAKURU ELC NO. 301 OF 2014 (O.S.) JOSEPH MUTHEE NG'ANG'A vs. ISABELLA WANGUI WAWERU. I am further satisfied that the subordinate court delivered a ruling on 11<sup>th</sup> November 2015 in which it ordered stay of NAKURU CMCC NO. 351 OF 2015 pending hearing and determination of the O.S. I note that the suit property in NAKURU CMCC NO. 351 OF 2015 is the parcel of land known as LR NO. LENGINET SETTLEMENT SCHEME 501/1 while in NAKURU ELC NO. 301 OF 2014 (O.S.) the suit property is described as LENGINET SETTLEMENT SCHEME/1. It appears to me that despite the variations in descriptions, the dispute between the parties is over the same property. Indeed, the respondent stated categorically in the preliminary objection that was the subject of the ruling delivered on 11<sup>th</sup> November 2015 that NAKURU ELC NO. 301 OF 2014 (O.S.) was in respect of the same property as that in NAKURU CMCC NO. 351 OF 2015.

7. Additionally, I note that in NAKURU CMCC NO. 351 OF 2015 the applicant herein sought judgment against the respondent for an eviction from the parcel of land known as LR NO. LENGINET SETTLEMENT SCHEME 501/1, a permanent injunction restraining the respondent from dealing with the said property and general damages. On the other hand in NAKURU ELC NO. 301 OF 2014 (O.S.) the respondent herein a declaration that the applicant's interest in the property described as LENGINET SETTLEMENT SCHEME/1 was extinguished upon expiry of 12 years and an order that the said property be transferred to the respondent. Clearly, there are common questions of law and facts in both matters. Nevertheless, consolidation can only be ordered herein after transfer of the subordinate court matter to this court.

8. The sole reason why the applicant seeks transfer of the subordinate court matter to this court is that her said matter has been stalled by the stay order. The said order has neither been set aside nor stayed. This court has not been asked to set the order aside. Jurisdiction to do so would only exist if this court were considering an appeal against the said order. Needless to state, that is not the case.

9. This court's power to withdraw a case from the subordinate court and transfer it to itself arises from **Section 18** of the **Civil Procedure Act**. There are many authorities to the effect that the court can only do so if the subordinate court itself had jurisdiction. Suffice it to cite **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** where the Court of Appeal stated:

*In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.*

*...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer*

10. Although not expressly stated so in the preliminary objection itself or in the subordinate court's ruling, the preliminary objection appears to have been grounded on **Section 6** of the **Civil Procedure Act** which provides:

*No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

11. Needless to state, **Section 6** of the **Civil Procedure Act** raises a jurisdictional issue. If the suit in the subordinate court offends the foregoing provision, it would be futile to purport to transfer it to this court since such an exercise would be a nullity. It is best, as the wisdom of the **Civil Procedure Act** itself provides, that the matter remains stayed pending the outcome of NAKURU ELC NO. 301 OF 2014 (O.S.). No prejudice will be occasioned to the applicant since she can advance whatever case she has in the subordinate court as a defence in NAKURU ELC NO. 301 OF 2014 (O.S.). Parties should actively prosecute NAKURU ELC NO. 301 OF 2014 (O.S.). Unfortunately, my perusal of the file revealed that since its filing, none of the parties has ever taken any step to have the said matter prosecuted.

12. The applicant also sought an injunction against the respondent. To succeed in that quest the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

13. This is a miscellaneous cause. The applicant has no 'suit' or 'case' in the usual sense in these proceedings against the respondent. The applicant's 'suit' or 'case' is in NAKURU CMCC NO. 351 OF 2015 and not this matter. I therefore find no *prima facie* case in this miscellaneous cause. That being so, an injunction cannot issue as is sought.

14. In view of the foregoing, I find no merit in Notice of Motion dated 7<sup>th</sup> December 2015. It is dismissed with no order as to costs.

**Dated, signed and delivered in open court at Nakuru this 9<sup>th</sup> day of October 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Karanja for the applicant

No appearance for the respondent

Court Assistants: Beatrice & Lotkomoi