



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 26 OF 2019

JOSHUA MUNYAO NZAU.....APPLICANT

VERSUS

BENJAMIN KIVINDYO MUINDE.....RESPONDENT

JUDGMENT

1. In the Notice of Motion dated 14th May, 2019, the Applicant is seeking for the following reliefs:
 - i. That there be stay of proceedings in Machakos ELC No. 758 of 2012 pending before the Chief Magistrate's Court at Machakos.*
 - ii. That this Honourable Court do please withdraw and transfer ELC No. 758 of 2012 pending before the Chief Magistrate Machakos to this court for hearing and determination.*
2. According to the Applicant, he is the Defendant in Machakos Chief Magistrate's Court (CMCC) ELC. No. 758 of 2012; that in his Defence and Counter-claim, he pleaded the doctrine of Constructive Trust; that he pleaded the doctrine of Constructive Trust because the Respondent is holding the Title for the land he purchased in trust for him and that the Respondent will not suffer any prejudice if the lower court file is transferred to this court.
3. In response, the Respondent deponed that he filed CMCC ELC. No. 758 of 2012 which is pending for hearing and determination; that the Magistrates have jurisdiction to determine the issues in CMCC No. 758 of 2012; that he has filed an Application in the lower court to have the Counter-claim dismissed because the lower court does not have jurisdiction to deal with the Counter-claim and that a transfer of a suit from one court to another cannot be made unless the suit has been filed in a court with the requisite jurisdiction.
4. The Applicant's counsel submitted that the duty of the court is to do justice to all the parties and to avoid unnecessary technicalities; that what the Applicant is seeking to transfer is CMCC No. 758 of 2012 and not the Counter-claim and that this court has powers to exercise its discretion and withdraw the suit and transfer it for hearing and disposal.
5. Counsel submitted that the Respondent will suffer no prejudice at all if this court hears the matter which was filed in the lower court; that the Applicant filed the Counter-claim to avoid a multiplicity of suits and that the Application should be allowed.
6. On his part, the Respondent's advocate submitted that the Magistrates have power to determine land matters; that after the Applicant filed a Counter-claim praying for Constructive Trust, they raised a Preliminary Objection and that the Application intends to defeat the said Preliminary Objection.
7. The pleadings annexed on the current Application shows that the Respondent sued the Applicant in Machakos CMCC No. 758 of 2012. In the said suit, the Plaintiff (*Respondent*) is seeking for an injunction restraining the Defendant/Applicant from interfering with the boundaries in respect of the land known as Iveti/Mungala/109.
8. In response to the Plaintiff's claim, the Defendant/Applicant filed an Amended Amended Defence in which he averred that having purchased the suit land, the Plaintiff is holding the Title Deed for the land in trust for him.
9. The main reason the Applicant has sought for the withdrawal and transfer of the suit to this court is because this court is "*sued to determine the issue of trust*". The issue of whether the lower court has jurisdiction to determine the issue of Constructive Trust is pending before the lower court. Indeed, it is not for this court to determine at this stage if the lower court has or does not have jurisdiction to determine the issue of Trust.

10. That being the case, the lower court should be granted an opportunity to deal with the issue of jurisdiction first. I say so because it is only after the lower court's decision that the Applicant will be able to make an informed decision on what should happen. Any attempt to by this court to transfer the suit from the lower court would amount to stealing a match from the Respondent, and also deny the lower court to develop jurisprudence on the pending issue before it.

11. In the circumstances, I find the Application to be unmeritorious. The Notice of Motion dated 14th May, 2019 is therefore struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE