



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**ELC CASE NO. 299 OF 2015 (ORIGINATING SUMMONS)**

**SAMUEL NGARI KIGORO.....APPLICANT**

**VERSUS**

**NJUKI KIGORO.....RESPONDENT**

**RULING**

1. By a notice of motion dated 22<sup>nd</sup> March 2017, the Applicant sought an order for transfer of *PMCC No. 22 of 2015* which was pending at Siakago Law Courts to this court for trial and disposal. The said application was based on two grounds only. The first was that the parties in the instant suit and the aforesaid suit were the same and the subject matter i.e. *No. Nthawa/Siakago/641* (hereinafter called the *suit property*) was the same. The second was that it was meet to make an order for transfer in order to avoid the two courts making conflicting decisions.
2. The material on record indicates that the Respondent herein was the Plaintiff in the suit before Siakago Law Courts whereas the Applicant was the Defendant. The Respondent's claim against the Applicant was for the removal of the caution which the Applicant had placed on the suit property. The Appellant's defence to the action was that he had acquired ownership to the suit property through adverse possession. It would appear that soon after filing his statement of defence, the Applicant filed the instant originating summons for adverse possession against the Respondent.
3. When the Applicant's said notice of motion was listed for hearing on 30<sup>th</sup> May 2017, the Respondent did not attend court hence the said application proceeded in his absence. The court heard and allowed the prayer for transfer of suit as prayed.
4. The Respondent did not take any steps to apply for either review or setting aside of the said order. Instead, he filed a notice of motion dated 17<sup>th</sup> January 2018 seeking transfer of the two suits to Siakago Law Courts for hearing and determination. The said application was based upon the grounds that the suit property fell within Mbeere Sub-county and that its monetary value could not exceed Kshs 2 million. The Respondent also contended that the Court of Appeal had determined that the Magistrate's Court had jurisdiction to handle land matters vide *Nairobi Civil Appeal No. 287 of 2016*.
5. The said application was supported by an affidavit sworn by the Respondent on 17<sup>th</sup> January 2018 in which he reiterated the grounds of the application. He further contended that *Siakago PMCC No. 22 of 2015* was transferred to this court on account of perceived lack of jurisdiction on the part of that court to hear and determine the land case. He contended that it would be fair and just for the two suits to be transferred to Siakago Law Courts for trial and disposal.
6. The Applicant filed a replying affidavit sworn by Macharia Muraguri Advocate on 12<sup>th</sup> March 2018 in opposition to the said application. It was contended that the Respondent's application was misconceived since a claim for adverse possession can only be heard and determined by the superior court. It was contended that the Magistrate's Court had no jurisdiction to entertain a claim for adverse possession.
7. When the Respondent's said application was listed for hearing on 15<sup>th</sup> March 2018, he prosecuted it on the basis of the grounds shown on the face of his application and the supporting affidavit. The Applicant's Advocate, on the other hand, opposed the said application on the basis of his replying affidavit.
8. The court has considered the Respondent's said application for transfer, the Applicant's replying affidavit as well as the parties' oral submissions. The court is in agreement with the submission by the Applicant's Advocate that the application is misconceived in some respects. First, it is not true that *PMCC No. 22 of 2015* was transferred to this court on account of lack of jurisdiction on the part of the Magistrate's Court to try and dispose of that suit. It was transferred for the reasons alluded to in paragraph 1 hereof. Second, the Respondent is not at liberty to ignore the transfer order made on 30<sup>th</sup> May 2017 and without applying for either its setting aside or review to proceed to file a fresh application for transfer of suit. This is not a ping-pong game.

9. The court also agrees with the submission by the Applicant's Advocate that the originating summons for adverse possession can only be heard and determined by a superior court by virtue of the provisions of **section 38 of the Limitation of Actions Act (Cap 22)**.

10. The court is also of the opinion that it would be prudent for the two suits to be consolidated or at least heard together in order to avoid two different courts arriving at contradictory decisions. The court shall give appropriate directions on the consolidation of the two suits at the time of delivery of this ruling. It would appear that common questions of law and fact may arise in both suits which would make it convenient for both suits to be heard and determined together.

11. The upshot of the foregoing is that the court finds no merit in the Respondent's notice of motion dated and filed on 17<sup>th</sup> January 2018. The same is consequently dismissed. Costs of the application shall be in the cause.

12. It is so decided.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 18<sup>th</sup> day of OCTOBER, 2018.**

In the presence of the Applicant in person and the Respondent in person.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**18.10.18**