



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPL. NO. 102 OF 2016**

**CALEB JOMO ONG'UTI .....APPLICANT**

**VERSUS**

**MARTIN KHAEMBA .....RESPONDENT**

**RULING**

1. The Notice of Motion before me is the one dated 27<sup>th</sup> April, 2016. In the Application, the Plaintiff is seeking for the following orders:

***a. That the suit herein be transferred to the Environment and Land Court at Machakos for hearing and determination.***

***b. That the costs of this Application be costs in the cause.***

2. The Application is premised on the grounds that the matter in dispute involves a property known as plot number 38 that was hived from L.R. NO. 7340/79; that this matter was initially filed at the Chief Magistrate's Court Machakos because it started off as a civil suit and that it later emerged that the issues in the suit were in respect to a land dispute.

3. In his Replying Affidavit, the Respondent deponed that having delivered its Judgment, the lower court is *functus officio* and that there is a pending suit in HCCC. No. 14 of 2011 where ownership of the suit property is the subject matter.

4. The Plaintiff's advocate filed submissions which I have considered.

5. It is not in dispute that the Plaintiff herein sued the Defendant in Machakos SPMCC NO. 282 of 2012 in which he sought for a declaration that he is the legal owner of the suit property. The Plaintiff also prayed for an order that the Defendant to demolish structures and buildings erected on the suit property.

6. On 12<sup>th</sup> September, 2014, Hon. Kahuya delivered her Judgment and allowed the Plaintiffs' prayers. Indeed, a decree was issued on 22<sup>nd</sup> September, 2014 thus bringing the dispute to an end.

7. The Defendant subsequently filed an Application dated 26<sup>th</sup> March, 2015 in which he sought for a stay of the Judgment on the ground that the Magistrate acted in excess of jurisdiction.

8. I have gone through the annexures and I have not seen the Ruling of the Honourable Magistrate in

respect to the Application dated 26<sup>th</sup> March, 2015.

9. In the absence of evidence showing that the Judgment of 12<sup>th</sup> September, 2014 and the subsequent decree was set aside by the Magistrate, there is no pending suit that can be transferred to this court. Indeed, the Plaintiff is at liberty to enforce the said Judgment.

10. If the Honourable Magistrate finds that he did not have jurisdiction in the first place, then he has to set aside the entire Judgment to enable the Plaintiff to either file a fresh suit in this court or to seek for the transfer of the file.

11. In the absence of an order setting aside the Judgment of 12<sup>th</sup> September, 2014, I find that the Application dated 27<sup>th</sup> April, 2016 is unmeritorious and I dismiss it with costs.

**DATED AND DELIVERED AT MACHAKOS THIS 17<sup>TH</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**