



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
HCC MISC APPL. NO. 8 OF 2017

ANTONY AYIEKO OLUOCH

CHRISTOPHER AMEJA ATSIENO.....APPLICANTS

VERSUS

FRANCIS OLUOCH JUMA.....RESPONDENT

R U L I N G

1. The application before me is dated 18/1/2017 and was filed here on 6/2/2017. The Applicants – **ANTONY AYIEKO OLUOCH** and **CHRISTOPHER AMEJA ATSIENO** – filed it against the Respondent – **FRANCIS OLUOCH JUMA** – with whom they have a dispute in the lower court, the dispute being CMC land case No. 138 of 2011. The application is brought under Sections 1, 3A and 18 of Civil Procedure Act (cap 21) and is meant, in the main, to secure a transfer of the case in the lower court to this court for hearing, determination, and directions. The Applicants also want this court to make provision for costs of the application.
2. The background to the application is simple. The parties initially had a dispute concerning land parcel No. L.R. MALACHI/ELUKHARI/1280 before the now defunct Butula Land Disputes Tribunal. The tribunal ordered, *inter alia*, that the 1st Applicant be given half ($\frac{1}{2}$) an acre from the land. The findings of the tribunal were then taken to court where they were filed as CMC 138/2011. The findings and/or decisions were then adopted as judgement of the court.
3. From what the Applicants say, it would appear that when the lower court was approached for enforcement of execution of the tribunal decision, it declined to do so, citing lack of jurisdiction. That is what prompted the Applicants to file this application. They want the matter transferred to this court to ensure such enforcement or execution or to get other directions. But it would appear that there is a related case – ELC No. 85 of 2013 – concerning the same land and involving parties related to the ones in this case. That case is before this court and is still undetermined.
4. The Respondent opposed the application vide a replying affidavit dated 22/3/2017 and filed on 11/4/2017. From the Respondent's response, it is clear that he applied for stay of execution of the lower court matter pending determination of ELC No. 85 of 2013. And by a ruling delivered by the lower court on 23/11/2015, he was granted the stay.
5. The application herein was canvassed by way of written submissions. The Applicant's submissions were filed on 9/5/2017. From the submissions it is clear that the Applicants are relying on Section 18 of Civil Procedure Act (cap 21) to secure a transfer of the lower court matter to this court. In simple terms

that provision clothes the High Court with power to transfer matters from itself to the lower courts or withdraw and/or transfer matters from the lower court to itself or to other lower courts. The language of the provision addresses the pre-judgement stage, not the post-judgement stage. Infact the focus is on trial, which is always before judgement, and not execution, which is a post-judgment process.

6. The Respondents submissions were filed on 29/5/2017. The Respondent pointed out that the matter is not worth transferring to this court as only execution is remaining, judgement having been already entered. He also pointed out that there already exists a stay order granted by the lower court in the matter.

7. I have considered the application, the response made, and the rival submissions. It appears true that the lower court granted an order of stay of execution in this matter. It is always good to be honest and truthful in a court of law. The 1st Defendant lied at paragraph 5 of the supporting affidavit to the application when he deponed as follows:

“5:

That the application for stay vide application dated 18/8/2015 was declined”.

8. Elsewhere in this ruling, I have mentioned a ruling delivered by the lower court on 23/11/2015. That ruling was on the application dated 18/8/2015, the same application referred to by the 1st Applicant. It is very clear that the application was allowed, not declined. There already exists an order of stay of execution. That is the same execution that the 1st Applicant intends to seek here if the order of transfer is granted. The truth is that the 1st Applicant lied on oath. In law, there is a maxim: *FALSUS IN UNO, FALSUS IN OMNIBUS* (False in one, false in everything). There is no telling what other lies the 1st Applicant has told in his affidavit. This court feels dis-inclined to look on the 1st Applicant favourably. The court is not happy that the 1st Applicant appears to have no respect for truth.

9. But there is also another consideration namely: when one looks at the application and also the Applicants submissions, one realizes that the crucial provision of law relied on is Section 18 of Civil Procedure Act (cap 21). And the relevant parts of that Section as set out in the applicant’s submissions are 1(b) and (2), which are as follows:

“18(1) On the application of any of the parties, and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

(a)

(b) Without any suit or other proceeding pending in any court subordinate to it, and thereafter

(i) Try or dispose of the same

(ii)

(iii)

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

A careful reading of the whole of section 18 or even the particular aspects of that section that are set out here would make one appreciate that the provision is concerned with un-concluded matters. Subsection (2) above is particularly instructive and illuminating. It uses such words as “tries” and “retry”. In simple

terms, the section refers to matters that are not yet determined or fully tried.

10. In this case, the lower court entered judgement. The matter is therefore a concluded one, with execution being the only remaining stage. The Applicant said that the lower court declined to hear the matter citing lack of jurisdiction. What is curious is that the order expressing that position is not availed. It needed to be availed because it is doubtful how a court can cite lack of jurisdiction in a matter already concluded before it. It was not a matter coming for trial; it was for execution. It is easy to wonder how lack of jurisdiction would arise at the execution stage. The fact of the matter is that as a matter of practice, lower courts have been implementing execution even in superior court matters.

11. For all these reasons, I decline to allow the application herein and dismiss it with costs.

Dated, signed and delivered at Busia this 29th day of November, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant:

2nd Applicant:

Respondent:

Counsel of Applicants:

Counsel of Respondents: