



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC MISC.6 OF 2017
(FORMERLY KERUGOYA ELC NO.44 OF 2015)

SAMUEL KIMUNYA GACHUHI

T/A SAKIGA ESTATE.....PLAINTIFF/APPLICANT

VERSUS

NANGA KIHOTO FARMERS

CO-OPERATIVE SOCIETY.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **9th November 2015**, brought by the Plaintiff herein **Samuel Kimunya Gachuhi t/a Sakiga Estate AB 0571** seeking for the following orders:-

- 1) That this Honourable Court be pleased to order a transfer of Civil Case No.589/2014 from jurisdiction of the Subordinate Court at THIKA to the jurisdiction of this Honourable Court for the hearing and final disposal thereof.**
- 2) That costs of this application be provided for.**

This application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **John Muturi Njoroge Advocate**. The grounds in support of the application are:

- 1) That the subordinate court lacks jurisdiction thereof to have conduct of this matter.**
- 2) That the transfer sought will save both courts time and that of the parties to the suit.**
- 3) That the Respondent does not stand to suffer any prejudice if the said orders are granted.**

In his Supporting Affidavit, **John Muturi Njoroge**, an Advocate of the High Court of Kenya having conduct of this matter averred that; that the parties entered into a **Lease Agreement** of land on **12th November 2008**. That in the said contractual agreement, the Respondent was leasing out **320 acres** of growing coffee within **LR.No.10863** and **10864** located **East of Thika**. The Respondent is the registered proprietor of the Leasehold interest thereon. He further averred that a dispute arose allegedly out of breach of contractual obligations on the part of the Respondent and the Plaintiff filed a suit at **Thika Chief Magistrate's Court** being **CMCC No.589 of 2014**. It was his contention that due to the alleged

breach of the contractual terms on the part of the Respondent, the Applicant suffered loss of **Kshs.15,829,000/=**. He contended that the subordinate court lacks pecuniary jurisdiction to entertain this matter. He contended that it is in the interest of fairness, equity and justice that this Honourable Court takes conduct of this matter to its logical conclusion.

It was his further contention that the Respondent will not suffer any prejudice as a consequence of the orders sought and he urged the Court to allow the application.

This application **is contested** and the Respondent filed its **grounds of opposition** on **2nd December 2015**. These grounds are:

1) That there is nothing to be transferred from the Chief Magistrate's Civil No.589 of 2014 as the said suit was filed before a court without jurisdiction.

2) That the Civil suit No.CMCC 589 of 2014 is not only irregular but illegal, bad in law and incompetent as there is nothing to transfer.

3) That the Applicant's application is an afterthought as the Respondent have already raised the issue of the incompetence of the suit and its illegality before the Chief Magistrate's Court in Thika.

4) That the Respondent has already filed a Preliminary Objection before the said court requesting for the dismissal of the Plaintiff's suit.

5) That the Applicant's application is frivolous, vexatious and outright abuse of the court process.

6) That the Applicant's application is misconceived, ill-advised and not bonafide.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law and the Court will render itself as follows:

The application is anchored under Section 18 of the Civil Procedure Act. Section 18(1)(b) provides as follows:-

"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:-

b) Withdraw any such or other proceedings pending in any court subordinate to it and thereafter;

i) Try or dispose of the same or,

ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same or,

iii) Retransfer the same for trial or disposal to the court from which it is withdrawn.

It is therefore clear from the above provision of law that the **High Court** and in this case, the **Environment & Land Court**, has discretion to withdraw any suit or the proceedings. Pending in the subordinate court to itself. It is also evident that such transfer is from a court which is competent to try such a matter.

The Applicant has alleged that he has sought for transfer of **CMCC No.589 of 2014** to this Court because

the said subordinate court lacked pecuniary jurisdiction. The Respondent has contended that indeed the said subordinate court did not have jurisdiction and it raised a preliminary objection which was heard and allowed. The Respondent averred that there was nothing to transfer as the suit was long dismissed by the subordinate court for lack of jurisdiction. However, the said Ruling was never attached, and the Plaintiff/Applicant did not respond to that allegation made by the Respondent, that the suit referred to **CMC No.589 of 2014**, has long been dismissed by the subordinate court.

It is evident that the proceedings filed in **CMCC No.589 of 2014** were filed in a court which had no pecuniary jurisdiction. Jurisdiction is everything and where the court lacks jurisdiction, it has no option but to down its tools See the case of **Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

From the above findings of the court, it is evident that if the Plaintiff/Applicant had filed a suit in Court that had no jurisdiction, then the Court had no option but to down its tools.

From the available provisions of law and several decided cases, it is evident that this Court has discretion to order for withdrawal of a suit from a subordinate court to itself but that order can only be made if the matter was filed in a court with jurisdiction. See **“Richard Kuloba in “Judicial Hints on Civil Procedure” at Page 77**, where it is stated that:-

“The procedure in Kenya of whether to allow or to refuse to transfer a suit from one court to another under this Section is discretionary, unless the suit was in the first instance brought to a court that had no jurisdiction to try it”.

From the above statement, it is clear that lack of jurisdiction in the Subordinate Court is not a ground for the **High Court/Environment & Land Court**, to order a transfer of a matter to itself. See the case of **Muiru Mugeru...Vs...Chege Mukora HCCC Misc.No.75 of 1976**, where the Court held that:-

“A suit which has been filed in a subordinate court which raises a claim in excess of jurisdiction of that court should not be made the subject of transfer order under Section 18 of Civil Procedure Act”.

The Applicant has averred that the subordinate court herein had no pecuniary jurisdiction. Then that should not have been made a subject of transfer as the suit was filed in a court without jurisdiction. It has also been alluded to the fact that the suit sought to be transferred was dismissed for lack of jurisdiction. If that is the case, then this application is not tenable as there is nothing to transfer to this court. See the case of **Kagenyi...Vs...Musiramo and Another (1968) 1 EA 43**, where the Court held that:-

“An order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it”.

Since the Plaintiff/Applicant has in its application admitted that the subordinate court had no pecuniary jurisdiction to hear and try the matter in **CMCC No.589 of 2014**, then this court cannot order for a transfer of the said matter to this court.

In any event in the **Kenya Gazettee Supplement of 18th December 2015**, the **Chief Magistrate’s pecuniary jurisdiction was enhanced to twenty million (20 million)** as provided by **Section 7(1)(a)** of the **Magistrate’s Court Act No.26 of 2015**. If the said suit has not been dismissed, then the said matter can still proceed for hearing and final determination at the Chief Magistrate’s Court at Thika as the pecuniary jurisdiction of the Chief Magistrate has been enhanced and further the **Court of Appeal CA.No.287 of 2016 held that Magistrate’s Courts have jurisdiction to hear and determine land related matters or**

cases.

Having now carefully considered the **Notice of Motion** dated **9th November 2015**, the **Court finds it not merited and consequently, the Court dismisses the said application entirely with costs to the Respondent.**

It is so ordered.

Dated, Signed and Delivered at Thika this 17th day of November 2017.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

Mr. Mugambi for Defendant/Respondent

Court - Court clerk.

Court – Ruling read in open court in the presence of Mr. Mugambi for the Defendant/Respondent and absence of the Mr. Muturi Njoroge for Plaintiff/Applicant.

L. GACHERU

JUDGE

17/11/2017