



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

MISC. ELC NO. 28 OF 2015

GEOFFREY KIRECHO KAMIRU APPLICANT

-VERSUS-

MAINA KARUIRE RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated **27th November, 2015** seeking orders that this court be pleased to withdraw suit No. CMCC 368 of 2011 from the Murang'a Chief Magistrate's Court and transfer it to this court for hearing and determination. The applicant also prayed for costs.
2. The application is premised on the face of the application and the applicant's affidavit sworn on **4th December, 2015**. He depones that the Honourable Magistrate hearing the aforesaid suit had declined to hear the matter for lack of jurisdiction and had directed the parties to apply that the suit be transferred to the Environment and Land Court Nyeri. It is the applicant contention that the said transfer will not prejudice any of the parties.
3. The respondent filed Grounds of Opposition dated **7th May, 2016** that the application is misconceived, incompetent, bad in law, a gross abuse of the process of the Court, untenable, fatally and incurably defective, frivolous, vexatious, otherwise without merit and should be dismissed with costs.
4. The application was heard on **13th October, 2016**. **Mr. Nganga** appeared for the applicant and **Mr. Wahome** for the respondent. Mr Nganga submitted that by seeking that to transfer the suit to the Environment and Land Court Nyeri, the applicant was merely obeying the order of the Honourable Magistrate which order has not been appealed from, or set aside. Regarding the grounds of opposition, he submitted that it made no sense for the respondent to oppose the transfer of suit because he had instituted the suit in the first place.
5. In response, Mr Wahome submitted that the applicant, in raising a counterclaim for adverse possession in the lower court erred by not observing the procedure as outlined in **Order 37** of the Civil Procedure Rules. He relied on the two authorities he had attached;

1. Adero & another-vs- Ulinzi Sacco Limited (2002)

Nairobi HC Civil Suit No. 1879 of 1999.

2. Geoffrey Njoroge Kinyanjui -vs- Nyautha Gichungu

Nairobi Civil Appeal No. 55 of 1999

He specifically made reference to the case of **Adero & Another v Ulinzi Sacco Society Ltd [2002] 1 KLR 57**, where **Ringera J** (as he then was) held that a court either had jurisdiction or not and no party could grant a court jurisdiction when it had none.

6. In a rejoinder, Mr Nganga submitted that if anyone were to blame for the jurisdictional impasse faced by the court, it was the respondent as paragraph 5 of the applicant's Defence had challenged the jurisdiction of the lower court. He relied on **Article 159** of the Constitution and urged the court to administer justice without undue regard to procedural technicalities.

7. Under **Section 18 (b) (i)** of the Civil Procedure Act, the High Court upon application or on its own motion has power to transfer any suit from the subordinate court to itself for hearing and determination of the suit.

8. Whereas, I agree with the holding in the cases relied on by Mr. Wahome that a party cannot file a suit in a court with out jurisdiction, no matter how convincing its case is, the fact remains that it was the respondent who filed the suit in the lower court while it had jurisdiction, opening the gate for the applicant to file a defence and counterclaim arising from the facts in the plaint

9. In making this determination, I am guided by the decision in the case of **Onward Cargo System Company Limited v Eveready East Africa Limited [2015] eKLR**, where the Court of Appeal rendered itself thus:

“In our view, the suit was, in the first instance, brought before a court of competent jurisdiction. It is the counterclaim that exceeded the pecuniary jurisdiction of the magistrate's court. We do not accept Mr. Oriaro's submission that the respondent ought to have filed his counterclaim as a separate suit because it is clear that the issues raised in the counterclaim arise from the same facts as those alleged in the plaint. It would therefore have been improper for the respondent to file a separate suit for its claim when there was an avenue for it to do so in the suit then existing in the magistrate's court. Once the counterclaim was filed, then the magistrate's court ceased to have jurisdiction over the suit, and therefore, there was no error in the learned judge ordering the said transfer as that was the only logical step.”

10. Applying the aforesaid holding to this case, I find that the applicant's counterclaim arises from the same facts as those in the Plaint, and as such, the Plaint cannot be divorced from the Defence and the Counterclaim. In seeking orders that the respondent's title be revoked and a new one be issued in his name, the Magistrate was right to hold that the lower court had no jurisdiction to entertain the applicant's counterclaim and direct the parties to apply for transfer of the suit to a court of competent jurisdiction.

11. For the aforesaid reasons, I allow the application dated 27th November, 2015 and order that **CMCC No 368 of 2011** be transferred to this court for hearing and determination.

12. Costs of this application to abide the outcome of the suit.

Dated, signed and delivered in open court at Nyeri this 1st day of December, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Ms. Wanjira holding brief for Mr. Nganga for applicant

N/A for the respondent

Court clerk -Esther