



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C MISC. APPLICATION NO. 9 OF 2015

(Formerly MISC. APPLICATION NO. 52 OF 2014)

IN THE MATTER OF KARATINA SPMCCC NO. 102 OF 2013

JOHN MACHARIA KARIUKI.....APPLICANT

VERSUS

BENARD MURIITHI NDIRANGU.....RESPONDENT

RULING

1. By notice of motion dated **27th June, 2014** and filed on **30th June, 2014** the applicant **John Macharia Kariuki**, prays that the suit instituted at the Karatina Law Courts to wit, Karatina SPMCCC No. 102 of 2013 be transferred to this court for hearing and determination.
2. The application is premised on the grounds that the applicant has in his statement of defence and counter-claim raised issues that the lower court has no jurisdiction to hear and determine.
3. In reply and opposition to the application, the respondent **Benard Muriithi Ndirangu**, filed the replying affidavit he swore on **25th August, 2014**. In that affidavit, the respondent contends that the counter-claim having been filed before a court without jurisdiction, this court lacks jurisdiction to transfer it to itself for hearing and determination. The respondent contends that the applicant's recourse is to withdraw the counter-claim with costs to him and file a fresh suit in the proper court and thereafter seek to consolidate the two suits.
4. When the matter came up for hearing, counsel for the applicant **Mr. Kingori**, explained the circumstances that led to the filing of the application and submitted that the application is meant to cure the problem of want of jurisdiction on the part of the of the lower court.
5. Counsel for the respondent, **Mr. Kiama**, reiterated the respondent's averment that this court lacks power to transfer the counter-claim because it has been raised in a court without jurisdiction.

Analysis and determination:-

6. There is no dispute that the issues of trust and entitlement to the suit property raised in the applicant's statement of defence and counter-claim cannot be determined by the court seized of the matter. Whilst counsel for applicant believes that the issue of jurisdiction of the lower court can be cured by transferring

the suit pending before the lower court to this court for hearing and determination, counsel for the respondent maintains that once a suit has been filed in a court without jurisdiction, it cannot be transferred to the court with jurisdiction for purposes of hearing and determination.

7. Concerning the assertion by the respondent and his advocate, I begin by pointing out that the respondent did not cite any provision of law that bars this court in exercise of its inherent power from transferring the suit from the lower court to itself for hearing and determination. As can be noted from the cases cited hereunder, it is a common practice these days for courts to transfer suits to the courts with requisite jurisdiction whenever they think that they have no jurisdiction to do so. That practice is in tandem with the court's duty to do substantive justice to parties who appear before it under **Article 159** of the Constitution and under **Sections 1A, 1B and 3A** of the Civil Procedure Act.

8. Faced with a similar issue, **Gikonyo J.** stated:-

“The authority of the High Court to transfer cases should be exercised in the interest of justice without unnecessary limitations. See case of *Matayo K. Kaboha v Abibu Bin Abdalla and Others* (1936-51), 6 U.L.R. 121. In transferring a case to the appropriate court for disposal, the High Court will not be deciding on a substantive issue in the case; it is simply exercising its power to transfer cases as a superior court. That power, it bears repeating, is a constitutional power vested in the High Court, and should not be limited by a practice of by-gone years: which is out of tune with our Constitution. What is imperative is for the court to pay homage to the Constitution by developing strong deprecation against any position that negates the demands of the Constitution. It is the kind of legal evolution that is necessary in any country that is advancing in the polity of legal, socio-political and economic realities.” See the case of **Milkah Nanyokia Masungu v. Robert wekesa Mwembe & 2 others (2013) e KLR** .

9. In the case of **Wycliffe Mwangaza Kihugwa v. Grain Bulk Handlers Ltd (2014)e KLR** **Kasango J.**, had this to say about the issue:-

“...The High Court has the power to withdraw a suit pending in a court subordinate to it and transfer the same to either the High Court itself or to another competent court subordinate to it for hearing and disposal, even in instances where the suit was filed in the subordinate court without jurisdiction to try the case.....”

10. Similar sentiments were expressed in the case of **Nairobi Imaging Center Ltd v. Kenya Medical Association & 2 others (2013) e KLR** where **Makau J.**, stated:-

“.....Further to the above, the Practise Directions Relating To The Filing Of Suits, Applications and Reference in Proper Court, 2009 Gazette Notice No 1756 it is clearly stipulated as follows:-

1. The place of suing is to be determined in accordance with the provisions of Section 11 and 18 of the Civil Procedure Act and not according to the preference or convenience of the plaintiff...

2. Where suits have already been filed in the wrong court, the Court should exercise its authority ...to return the plaint to be presented to the court in which suit should have been instituted, without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the court process. (Emphasis supplied).

11. It is clear from the foregoing, that this court has power to transfer the suit pending in the lower court to itself or any other court with jurisdiction to hear and determine it if it is satisfied that there exist good reasons for doing so.

12. In the circumstances of this case, I cannot comprehend what justice will be served by the procedure suggested by the respondent for dealing with the problem. All what that procedure would do is to delay

the hearing and determination of the case and make the process more costly. Certainly that is not in the interest of any of the parties to this dispute.

13. There being no dispute that the lower court has no jurisdiction to hear and determine all the issues raised in the suit filed before it and being of the view that no prejudice will be occasioned on any of the parties if the suit is transferred to this court for hearing and determination, I find and hold that the applicant's application has merit and allow it in terms of prayer (1).

The costs of the application shall be in cause.

Dated, signed and delivered at Nyeri this 7th day of October, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. King'ori for the applicant

N/A for the respondent

Court assistant - Lydia