



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

LAND AND ENVIRONMENT COURT

MISC.APPL. NO.156 OF 2011

MARGARET WANJA MUCUTHI.....APPLICANTS

VERSUS

PETER G. GITHERU

MUNICIPAL COUNCIL OF NANYUKI

MARTIN M. MUCUTHI..... RESPONDENTS

RULING

On the 17/11/2011, when this matter came up for the hearing of the Notice of Motion dated 11th August 2011, Thuita holding brief for Mr.J. Mwangi informed the court that Mr. Mwangi required time to file a further affidavit. Mr. Bwonwonga for the 1st respondent indicated to the court that there was no suit as the same had been withdrawn. Mr.Gichuki Mwangi for the second respondent agreed with Mr. Bwonwonga that the suit had been withdrawn. Mr. Thuita was shown the Notice of withdrawal and therefore appeared to have been given limited instructions hence left it to court.

Honourable Justice Serгон in the circumstances held that it was obvious that the suit sought to be transferred was withdrawn hence the Notice of Motion dated 11/08/2011 was rendered useless and therefore he dismissed it with costs.

On the 12th of January 2012, the applicant filed the application dated 20/12/2011 seeking this court to review its orders made on 17/11/2011 and reinstate the application dated 11/8/2011 for hearing on merits on grounds that the application was dismissed on the basis of a wider notion that the subordinate court lacked jurisdiction *ab initio* to entertain the suit and therefore the suit was not transferable. Moreover that the application to transfer the suit from the subordinate court was on the basis of lack of pecuniary jurisdiction only. Furthermore, that the suit before the subordinate court had been filed way back in the year 2006 and jurisdiction was never contested *ab initio* and lastly, that upon withdrawal of Nanyuki SPMCC No.94 of 2010 the two (2) other suits Nanyuki SPMCC No.48 of 2009 and Nanyuki SPMCC No.33 of 2006 are still pending for hearing and disposal the consolidation order notwithstanding.

The application was supported by an affidavit of Margaret W. Mucuthi who states that on 17th November 2011 her application dated 11th August 2011 came up for main hearing and it was dismissed. On that date when it was dismissed, her advocate on record sent his colleague to seek for leave to file a supplementary affidavit since she intended to respond to controvert the averments in paragraph 4 of the 2nd respondent's affidavit and paragraphs 6, 10, 11, 12, 13, 14, 15 and 16 of the 1st respondents replying affidavit. That she filed two (2) civil suits in respect to the suit property known as Nanyuki Municipality

Block 8/96. The first suit was filed in the year 2006 being Nanyuki SPMCC No.33 of 2006 against the 1st and 2nd respondents and subsequently she filed Nanyuki SPMCC No.48 of 2009 against the 2nd respondent.

The 3rd respondent also filed Nanyuki SPMCC No.94 of 2010 against 1st respondent and two other persons who are not parties to this application. The three suits were consolidated through a consent that was filed in Nanyuki SPMCC No.94 of 2010. However, the 3rd respondent withdrew Nanyuki SPMCC No.94 of 2010. On the 29th June 2011 the 1st respondent's counsel filed an application dated 6th May 2011 seeking that the three aforesaid suits be struck out for want of pecuniary jurisdiction. She believes that had the counsel holding brief for her advocate on record put across clearly the issue that what was being challenged was pecuniary jurisdiction, the application for transfer would not have been dismissed.

The valuation report which was annexed to the 1st respondent's application was done on 8th December 2010 whereas her first suit was filed in the year 2003 and therefore the court cannot be said to lack jurisdiction *ab initio*.

The **1st respondent** filed a replying affidavit deposing that from the outset that the application was heard on the 17/11/2011 in the presence of all the counsels and was dismissed on merit as demonstrated by the order of the court attached to the applicant's affidavit. There is nothing therefore to be reviewed and the only option available to the applicant was to appeal against the order. That the said application was dismissed because the matter that was sought to be transferred from Nanyuki Law Courts being Nanyuki SPMCC No.94 of 2010 which had been consolidated with Nanyuki civil No.48 of 2009 and 33/2006 had been wholly withdrawn and discontinued on the 10th August, 2011.

In view of the above, there is nothing to be transferred to the High Court and the application for review shall therefore be of no consequence and the court shall have acted in vain.

That since civil suits No.48/2009 and 33/2006 had all been consolidated into suit No.94/2010, and since civil case No.94/2010 had been withdrawn wholly after the consolidation, the effect of such withdrawal was that all the said matters were discontinued and nothing is pending before the lower court for hearing and disposal. He had been informed by his advocates on record information he verily believed to be true, that there is no error apparent on the face of the record and there is no sufficient cause to warrant the review of the orders of 17/11/2011.

That he had been further informed by his advocates on record information he verily believed to be true, that no discovery of new and important matter or evidence has been made by the applicant which was not within his knowledge at the time the application dated 11/8/2011 was dismissed and no irreparable damage has been suffered and none shall be suffered if this application is dismissed. He filed civil No.33 of 2006 and not the applicant and he withdrew the same when he realized that the court lacked jurisdiction to entertain the same. That the 3rd respondent who is the husband to the applicant had also filed civil No.94 of 2010 which he withdrew on the 10/8/2011 as already stated.

That he had been informed by his advocates on record information he verily believed to be true, that jurisdiction may be raised by a party or by a court on its own motion and at any time and that jurisdiction is everything and without it, a court has no power to make one more step and since the lower court lacked jurisdiction to entertain the matter sought to be transferred, there is no basis for a continuation of these proceedings pending other evidence.

That in the light and strength of the foregoing, he believed that the applicant's application is scandalous, frivolous, vexatious and a blatant abuse of the court process and should be dismissed with costs for want of merit.

Mr. Gichuhi Mwangi for the 2nd respondent filed grounds of opposition whose import is that the application is incompetent, bad in law, an abuse of the court process, fatally defective and nothing new has been advanced to warrant grant of the prayers sought. According to **Mr Gichuhi Mwangi** It is trite law that a suit cannot be transferred from a court without jurisdiction to one seized with competent

jurisdiction. The application is malafides and riddled with mischief by seeking similar orders through the back door hence urged the court to dismiss the application with costs.

On the 29/7/2013, the applicant filed a supplementary affidavit deposing that the 1st respondent sued her in Nanyuki SPMCC No.33 of 2006 and besides filing her defence she did set up a counterclaim. That after the 2nd respondent withdrew his suit, the court ordered that her counterclaim do proceed for hearing. That under no circumstances would the 1st and 3rd respondent be allowed to withdraw her counterclaim in Nanyuki SPMCC No.33 of 2006 and her claim in Nanyuki SPMCC No.48 of 2009 since they did not institute the same.

The applicant also filed written submissions. He submits that suits No. Nanyuki SPMCC No.94 of 2011, SPMCC No.33 of 2006 and Nanyuki No.48 of 2009 were consolidated and No.94 of 2011 was adopted as a running file after consolidation. The third respondent filed a Notice of withdrawal of Nanyuki SPMCC No.94 of 2010. He submits that the withdrawing of the suit NO.94 would not amount to withdrawal of the other suits hence there is an error apparent on the face of record.

The *gravamen* of the submissions by **J Mwangi** is that the 3rd respondent could not have withdrawn suits he had not filed.

Mr Bwononga for the 1st defendant/respondent submits that the plaintiff/applicant has not satisfied the principles of order 45 rule 1 of the Civil Procedure Rules 2010.

According to **Mr Ng'ang'a** where a test suit is withdrawn that fate falls on the other suits that were consolidated with it.

I have read the application herein, supporting affidavits and replying affidavit and do find the issue before me is not whether the suits in issue can be transferred to the High Court but whether there is an error apparent on record in the proceedings of 17th November 2011 or whether there are sufficient reasons for review.

The suits in issue were consolidated on the 4th of November 2010 by consent of the parties and upon consolidation the three suits were to proceed as civil suit no 94 of 2010.

On the 10/8/2011, the plaintiff in 94 of 2010 filed a Notice of withdrawal and discontinuation of suit under order 25 rule 1 of the Civil Procedure Rules 2010. The Notice of Withdrawal read ***“Take Notice that the plaintiff Martin M. Mucuthi has wholly discontinued and withdraw his suit against all the defendants and such a withdrawal shall not be a defence to any subsequent action by the plaintiff against the defendant”***

The effect of the withdrawal was that the other parties to the consolidated suit were left with a predicament as the withdrawal of SPMCC No.94 of 2010 appears to have left the parties without a basis. Though the consolidation was reached by consent of the parties when they allowed the application dated 7/10/2010, the withdrawal was done singularly by one party without notice to the other parties.

Order 25 of the Civil Procedure Rules provides that at any time before the setting down of a suit for hearing the plaintiff may by Notice in writing, which has to be served on all parties wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim and any such a withdrawal shall not be a defence to any subsequent action. The Respondents failed to bring to the attention of the Honourable Judge that the issue of withdrawal was contested and could not be determined without hearing the parties. The suits in the lower court which had been consolidated involved several parties therefore could not be withdrawn singularly. Whether the withdrawal of suit No. Nanyuki SPMCC NO.94 of 2010 meant to withdrawal of Nanyuki SPMCC No.33 of 2006 and Nanyuki SPMCC No.48 of 2009 is an issue to be canvassed in the Notice of Motion dated 11/8/2011. This court finds that there are sufficient reasons to review the decision made on 17/11/2011 as there was an error apparent on record as the issue of withdrawal of the consolidated suits was not addressed by the parties hence made the judge to believe that there was only one suit to be transferred and that the issue of the counter claim in SPMCC no

33 of 2006 was not brought the attention of the judge hence he fell into error.

I have perused the court file and do find that on the 17/11/2011 Hon. Justice Serгон made an error when he was misled that there was no suit as the same had been withdrawn and yet there was a pending counterclaim in suit no 33 of 2006 and suit no 48 of 2009 which had not been withdrawn. Had Mr. Bwonwonga informed the court the chronology of events in the suits in the lower court and their status, the Honorable Judge could not have dismissed the application dated 11/8/2011. Counsel for 1st respondent made the Honorable Court to believe that it was obvious that the suits sought to be transferred had been withdrawn and yet Mr. Thuita for Mr. Mwangi who was not properly seized of the case had only asked for leave to file a further affidavit. It will be an affront to Article 159 of The Constitution of Kenya to rely on technicalities to lock out a party from the seat of justice by declaring that the withdrawal of the test suit implies that all suits that were consolidated into the said test suit are deemed as having been withdrawn.

Consolidation is a process by which two or more suits or matters are by order of the court combined, united and treated as one suit or case. The main purpose for consolidation is to save on costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. It is meant to deal with cases efficiently and effectively. When considering consolidation, the court looks at the question of law and fact arising in the disputes, rights or relief claimed by the parties. Consolidation is a procedural action that can be undone where some parties choose to abandon their claims.

Ultimately, the application is allowed *ex debito justitiae*, orders made on 17/11/2011 are hereby reviewed and the application dated 11/8/2011 is hereby reinstated for hearing on merit.

Dated, signed and delivered on 20th day of June 2014.

A. OMBWAYO

JUDGE