



**Mwanza v Nzivu (Environment & Land Case 18 of 2020)
[2023] KEELC 17016 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 18 OF 2020**

**TW MURIGI, J
APRIL 19, 2023**

BETWEEN

JOSEPH MUSYOKI MWANZA PLAINTIFF

AND

MUSYOKI NZIVU DEFENDANT

RULING

1. Before me is a Notice of Motion dated 4th July, 2022 brought pursuant to the provisions of Sections 1A & 1B of the Civil Procedure Act and all other enabling provisions of the law, in which the Applicant seeks the following orders:-
 1. That this matter be transferred to Makueni Chief Magistrate Court for hearing and determination.
 2. That the cost of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Musyoki Nzivu sworn on even date.

The Applicant's Case

3. It is the Applicant's case that justice will be best served if this suit is transferred to Makueni Chief Magistrate's Court for hearing and determination since the value of the suit property does not exceed Kshs twenty million. The Applicant argued that the Respondent will not suffer any prejudice if the application is allowed.

The Respondent's Case

4. In opposing the application, the Respondent vide his replying affidavit sworn on 7th July, 2022 averred that he instituted this suit against the Defendant on 17th July, 2020. He argued that as a consequence



of failing to comply with the pre-trial directions, the Defendant was barred from filing any documents without the leave of the Court.

5. He further averred that the Defendant has not demonstrated that he will suffer any prejudice if this suit proceeds for hearing and determination before this Court. He argued that the Defendant has not presented a valuation report to demonstrate that the value of suit property is below Kshs 20 Million. He contended that this Court has the requisite jurisdiction to hear and determine this suit and urged the Court to dismiss the application with costs.
6. The parties were directed to canvass the application through written submissions.
7. At the time of writing this ruling, the Applicant had not filed his written submissions. Counsel for the Respondent urged the Court to dismiss the application with costs to the Respondents.

Analysis and Determination

8. Having considered the application and the affidavits, I find that the only issue that commends itself for determination is whether this suit should be transferred to Makueni Chief Magistrate's Court for hearing and determination.
9. The Defendant is seeking to have this suit transferred to Makueni Chief Magistrate's Courts for hearing and determination on the grounds that the value of the suit property does not exceed Kshs 20 Million. He contended that justice will be best served if this suit is transferred to Makueni Chief Magistrate Court for hearing and determination.
10. The power bestowed upon the High Court to transfer suits of a Civil nature is provided for in Section 18 of the [Civil Procedure Act](#) which provides as follows:-

- “(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) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding 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) re transfer the same for trial or disposal to the court from which it was withdrawn.
- (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.”



11. It is clear from the above provisions that this Court has power to transfer and re-transfer a suit to a subordinate Court which is competent to try or dispose the same. The Court can also suo moto transfer or re-transfer a suit to a Subordinate Court as long as the Court is competent to try or dispose the same.
12. Section 7 of the Magistrates Court Act provides that a Magistrate’s Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed Kshs 20 million where the Court is presided over by a Chief Magistrate.
13. In the case of *Hangzhou Agrochemicals Industries Ltd -Vs- Panda Flowers Ltd* (2012) eKLR the Court addressed the conditions to be considered in determining whether or not to grant an order transferring a suit as follows:

“..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.”

14. The Applicant herein has called upon the Court to find that the value of the suit property does not exceed Kshs 20 Million and thus Makueni Chief Magistrate’s Court is the best placed Court to hear and determine this suit.
15. The Respondent on the other hand argued that the Applicant has not presented a valuation report to demonstrate that the value of the suit property does not exceed Kshs 20 Million.
16. He averred that the Applicant has not demonstrated the he will suffer any prejudice if the suit proceeds for hearing and determination before this Court.
17. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides as follows: -

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

18. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.
19. The Defendant did not discharge the burden of proving that the value of the suit property does not exceed Kshs 20 Million. The Defendant did not tender any evidence in support of the assertion made therein.
20. For those reasons, I find that the application is devoid of merit. Accordingly, the Application dated 4th July, 2022 is dismissed with costs to the Plaintiff/Respondent.

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HON. T. MURIGI



JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF APRIL, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Mohammed

No appearance for the parties.

