



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 113 OF 1997 (OS)

IN THE MATTER OF THE LAND CONTROL ACT

AND

IN THE MATTER OF THE CONTRACT ACT THEREUNDER MADE

BETWEEN

THE CHAIRLADY NYAKIAMBI WOMEN GROUP.....PLAINTIFF/APPLICANT

VERSUS

JOHN GICHUHI MUTEGO.....DEFENDANT

R U L I N G

1. The Applicant through an Application dated 23rd August 2021 brought under **Articles 162 (2)(b) and 165 (5)(b) of the Constitution of Kenya 2010, section 13 of the Environment and Land Court Act No.19 of 2011, Sections 1A,1B and 3A of the Civil Procedure Act Cap 21** seeks for the orders THAT; -

1. Spent.

2. This Court be pleased to transfer this matter to the Environment and Land Court.

3. Costs be in the Cause.

2. The application is premised on the grounds on its face and supported by an Affidavit of Pearlyne Omamo sworn on the even date.

3. She deponed that this matter relates to a dispute regarding the true ownership/title to the property known as L.R No. 1024 Mirera Suswa Southern Naivasha Municipality (the **"Suit Property"**) pursuant to a Sale Agreement dated 8th December 1989 and executed by the parties hereto (the Sale Agreement).

4. That pursuant to **Articles 162(2) (b) and 165 (5) (b) of the Kenyan Constitution 2010** and **Directions 5 of the Legal Notice No.5178 of 2014** this court lacks jurisdiction to hear and determine this matter.

5. She deposed that this matter has never proceeded to hearing of the main suit because parties executed a consent Agreement dated 12th October 1999 settling the suit in favor of the Applicant and that soon after the said consent was executed the defendant passed away on 13th February 2001.

6. She averred that following the death of the defendant, **Leornard Waweru Gichuki, Mary Wanjiku Gichuhi & Esther Wangari Thuita** were appointed as Co-Administrators/Legal Representatives of the Defendant's estate on 30th March 2017.

7. She further averred that the present application is the most urgent since the applicant has recently discovered that the legal representatives of the defendant's estate confirmed the Grant of Letters of Administration Intestate issued in his favor and are now in the process of transmitting the suit property to the beneficiaries of the deceased's estate and selling certain portions of the suit property as provided in the Certificate of Confirmation of Grant.

8. She deposed that the applicant therefore wishes to urgently take steps before the Environment and Land Court which shall include urgently

seeking the revival of the present suit and substitution of the defendant with his aforesaid legal representatives, to protect and enforce the applicant's defined interest in the suit property as provided under the sale agreement and consent agreement and any delay therefore shall be prejudicial to the Plaintiff/Applicant as the intended proceedings in the Environment Court shall be rendered nugatory.

9. The application was opposed by the respondent through the administrators of the deceased's estate Leonard Waweru Gichuki, Mary Wanjiku Gichuhi & Esther Wangari Thuita.

10. They deposed that the defendant's in this suit is one John Gichuhi Mutege who died on 13th February 2001 and therefore this suit abated on 12th February 2002.

11. They averred that the court cannot be asked to transfer nonexistent suit to the Environment and Land Court.

12. That the applicant has neither applied for revival of this suit nor substitution of the deceased with the legal representative and that contrary to this court's Ruling dated 31st May 2021 the applicant has not applied for reconstruction of this file before lodging the instant application.

13. They deposed that in accordance to the above Ruling the applicant lacks capacity to file this matter as it is not a legal person and they prayed that this suit be dismissed as it is unmeritorious, defective and an abuse of the court process.

14. Parties consented to dispose off the application by way of Written Submissions.

APPLICANT'S SUBMISSIONS

15. The Applicant's Submissions on whether this Honourable Court has jurisdiction over the matter reiterated the averments contained in its Supporting Affidavit and cited the case of **Sylvanus Olunga Makuba vs Anna Nanjala Sakwa [2021] eKLR** where the court while dealing with the jurisdiction issue observed that jurisdiction is the core of exercise of power by a court of law and without it a court ought not to move on with a matter.

16. In urging this court to transfer this suit to the Environment and Land Court the applicant placed reliance on the cases of;

1. **Kenya Power & Lighting Company vs Njumbi Residents Association & Another [2015] eKLR** where the court cited with approval the case in **Rapid Kate Services Ltd Vs Freight Forwarders Kenya Limited & 2 Others [2005] IKLR 292** where *Emukule J* stated as follows;

"...the court's power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever they began or whatever forum the plaintiff had initially chosen should be dealt with or heard or determined by the court most appropriate and suitable for those proceedings. When making or refusing an order for transfer the court will have regard to the nature and character of the proceedings and, the nature of the relief or remedy sought, the interest of the litigants and most important, the administration of justice...it is a matter of discretion for the judge and it must be for compelling reasons which would be the purpose of ensuring justice and this is all within the inherent powers of court under section 3A... whereas there is no express provisions in the Civil Procedure for the transfer of cases from one high court to another, it does not mean that in a proper case the court cannot transfer a case before it to another registry of the high court..."

2. **Pamoja Women Development Programme & 3 Others vs Jackson Kihumbu Wangombe & Another [2016] eKLR** where the court similarly observed that the High Court is vested with inherent authority and inherent (incidental) jurisdiction to transfer certain suits which have been filed in good faith in the High Court to equal status courts even in the absence of a specific statutory text bequeathing such powers to the High Court.

17. The applicant submitted that this court has inherent authority and inherent (incidental) jurisdiction strictly limited to transferring this matter to the Environment & Land Court (ELC) pursuant to **Direction 5 of the Legal Notice No.5178 of 2014**.

18. The applicant argued that consequently this court is bereft of any jurisdiction to render itself on the issues being un-procedurally and prematurely raised by the legal representatives of the defendant's estate concerning the reconstruction of the court file and substitution of the legal representatives of the defendant estate in the suit as such issues can only be dealt with by the ELC which has the requisite jurisdiction to render itself on the highlighted issues noting that the applicant intends to file the relevant applications in this respect at the appropriate time.

19. The applicant further argued that the firm of Walker Kontos advocate is properly on record noting they have filed an Affidavit of non-service sworn on 9th March 2021 which forms part of the court record confirming that the applicant's former advocate is now a member of the Bench.

20. They contended that the Replying Affidavit by the legal representatives herein ought to be struck out as they are yet to be substituted in this matter.

DEFENDANT'S/RESPONDENT'S SUBMISSIONS

21. The Respondents filed their submissions on 15th December 2021.

22. He submitted on the following issues;

(a) Whether this Honourable Court ought to transfer this matter to the Environment and Land Court.

(b) Whether the Plaintiff/Applicant is a legal person.

23. On the first issue, the respondent argued that this court should not transfer this suit for the reasons that; *The court file is not properly reconstructed as it was directed by this court vide its Ruling dated 31st May,2021 until reconstruction is done an application for transfer cannot be lodged; This suit abated on 12th February 2002 and the applicant never applied for its revival nor substituted the deceased defendant. To support this position the respondent cited the case of Clement Shikami Muhangi Vs Charles Fendo vs Jelesencia Iseri Namale ;(Applicant)Vincent Shikami Clement (Interested Party) [2021]eKLR where the court found that the suit had abated for a plaintiff who died in 2017 in an application filed in 2020 and explained that for a suit to be revived a proper application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to delay and abatement; That the defendant in the instant matter is a stranger and not party to the suit because the initial defendant as per the applicant's pleadings is one John Gichuhi Mutaro.*

24. On the second issue, the respondent submitted that the applicant lacks capacity to institute this proceeding due to the following reasons; *The applicant is not a legal person as it was held by this court Ruling delivered on 9th April 2020 and 31st May 2021. The deponent of affidavit dated 15.12.2020 one Mary Wanjiku Mangara lacks requisite authority to bring this suit on behalf of the members of the applicant herein. He cited the case of Senti Kumi Community Self Help vs Kenya Maritime Authority & Another [2019] eKLR where the court held that the person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is representative suit.*

ISSUES FOR DETERMINATION

25. Having considered the Application, Supporting Affidavit and response thereto plus the parties' Submissions, the issue for determination is whether there is a suit before this court that can be transferred to the Environment and Land Court.

26. It is undisputed that the defendant in this suit died on 13th February 2001 and the Applicant has neither applied for revival of this suit nor substitution of the deceased with the legal representative.

27. This suit therefore abated on 13th February 2002.

28. It is trite, following the provisions of **Order 24 Rule 3**, that a suit abates where no application for substitution has been made within one year of death. **Order 24 Rule 7(2)** of the same **Civil Procedure Rules** provides as follows: -

The Plaintiff or the person claiming to be the legal representative of the deceased Plaintiff or the trustee or official receiver in the case of a bankrupt Plaintiff may apply for an order to revive a suit which has abated or set aside an order of dismissal; and, if it is proved that he was prevented by sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

29. With regard to abatement of suits in the case of Kishor Kumar Dhanji Varsani vs Amalok Singh & 4 others [2016] eKLR the Court of Appeal adopted with approval the ruling in Titus Kiragu vs Jackson Mugo Mathai & Another [2013] eKLR and had this to say: -

... it was contended that the suit abated automatically as a matter of law; that there was therefore no suit in regard to which an application for substitution could be made; and that the court could not act in vain by making an order in favour of the deceased's wife in the absence of any suit..

30. In my Ruling of 31st May 2021 I found that the suit abated one year after the death of the deceased. I stated as follows;

...I find therefore that one year upon the death of John Mutego, there was no application for substitution and the suit abated. As it is now there is no suit upon which this court can issue the orders sought.

31. This Ruling subsists as it has not been appealed against. I cannot be heard to be making orders of transfer of a suit I have already determined is non-existent.

32. On the basis of the foregoing there is no suit pending capable of being transferred.

33. The Application therefore lacks merit and is dismissed with costs to the respondents.

DATED, DELIVERED AND SIGNED THIS 31ST DAY OF MARCH, 2022.

MUMBUA T MATHEKA,

JUDGE.

In the presence of:

Court Assistant: Edna

Murimi, Ndumia, Mbago & Muchela Advocates

Walker Kontos & Company Advocates

N. Ikua & Company Advocates