



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS APPLICATION NO. E046 OF 2021

ELIJAH WAINAINA NGURE.....APPLICANT

VERSUS

LUCY WAMBUI NJUGUNA.....RESPONDENT

RULING

1. **ELIJAH WAINAINA NGURE (Elijah)** has filed an amended Notice of Motion dated 21st September, 2021. His prayer in that application is for the transfer of Succession cause No. 657 of 2012 from Thika Chief Magistrate's Court to Ruiru Senior Principal Magistrate's Court. The grounds on which that prayer is based is that the land in question (he does state the title of that land) is situated in Ruiru Township and the estimated value of the land is Kshs.5.5 million.

2. The application is opposed by **LUCY WAMBUI NJUGUNA (Lucy)**. Lucy opposes the application on the grounds that the cause before the Thika Magistrate's Court has substantially been handled by that Court since 2012, and that what is pending determination before the court is application to review/set aside orders of confirmation of grant issued by the Thika Magistrate's Court and that therefore, the cause should be heard by that court. Further, Lucy stated that she resides in Gatanga and so does her three witnesses she intends to call and they will be inconvenienced by the transfer of the cause as sought. Lucy attached to her replying affidavit valuation report of **RUIRUWESTBLOCK1/2872** which showed the value of the property is Kshs.15,200,999. Lucy therefore stated that the cause should be heard in Thika which has the pecuniary jurisdiction.

3. Elijah by his further affidavit produced a valuation report showing the subject property is valued at Kshs.8.5million. he faulted Lucy's valuation report for not showing the local comparable values and for failing to take into account the negative effect of COVID-19 Pandemic. He said consequently, his valuation was more realistic. He also deponed that the distance between Thika and Ruiru Magistrate's court is 21.5 kilometres therefore Lucy and her witnesses will not be inconvenienced.

ANALYSIS

4. The High Court's power to order for transfer of cases is under Section 18 of the Civil Procedure Act which provides:-

“(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) retransfer 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.”

5. There is no doubt in mind that succession causes can be very convoluted. What I understand from the affidavit of Lucy, and Elijah did not contradict her, is that what is pending before the Thika Court is an application to set aside/review a grant confirmed by Thika Court. It is useful to consider what the court in the case **GKK VS. ANK & ANOTHER (2021) eKLR** said should guide the court when determining an application for transfer of a suit. The court stated in that case:-

“It was held in the Ugandan case of DAVID KABUNGU VS ZIKARENGA HCCC NO. 36 OF 1995 that:-

Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and 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... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

6. As stated before the Thika Chief Magistrate’s Court, in considering Succession Cause, is the setting aside/review of confirmation of a grant, which confirmation was by that very court, and also Lucy has stated that she and her witnesses will be inconvenienced by the travel to Ruiru Court. It is my finding that since the cause has been in the Thika Chief Magistrate’s court since 2012 it ought to continue to be heard in that court. I also find that the balance of convenience, question of expense and interest of justice will best be served by declining Elijah’s prayer for transfer of the cause.

DISPOSITION

7. With the above discussion in mind, I hereby dismiss the amended application dated 21st September, 2021 with no order as to costs.

I order this file be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 31ST DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

Coram:

COURT ASSISTANT : MAURICE

FOR APPLICANT ELIJAH WAINAINA NGURE: JANE KAIGAYU

FOR RESPONDENT LUCY WAMBUI NJUGUNA: - MR. LOIS WAHOME

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE