



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC MISC APPLICATION 22 OF 2021**

ANN KAGWIRIA MUTHUIRU.....1<sup>ST</sup> APPLICANT  
MARY KATHUURI MUTHUIRU.....2<sup>ND</sup> APPLICANT  
RUTH KARIMI MUTHUIRU .....3<sup>RD</sup> APPLICANT  
ESTHER RIGIRI MUTHUIRU.....4<sup>TH</sup> APPLICANT  
ALICE KATHURE MUTHUIRU .....5<sup>TH</sup> APPLICANT  
JOANINAH KAILU MUTHUIRU .....6<sup>TH</sup> APPLICANT

**VERSUS**

M'MUTHUIRU KAJOGI JOANA .....1<sup>ST</sup> RESPONDENT  
PAUL KUBAI MUTHUIRU .....2<sup>ND</sup> RESPONDENT  
STNALEY KILEMI MUTHUIRU .....3<sup>RD</sup> RESPONDENT  
JOSHUA LIMIRI MUTHUIRU .....4<sup>TH</sup> RESPONDENT

**RULING**

1. By an application dated 6<sup>th</sup> July 2021 the plaintiffs seek for transfer of Maua chief magistrates court ELC No. 209 to Tigania principal magistrates court for hearing and determination.
2. The grounds upon which the application is made are that the suit was filed on 7.8.2018; it proceeded up to defence stage; when it came up for defence hearing on 5.7.2021 the trial court raised the issue of geographical jurisdiction and directed parties to file the appropriate application and that the cause of action arose within Meru County.
3. The application is supported by an affidavit sworn by Ann Kagwira Muthuiru on 6<sup>th</sup> July 2021 in which she attached both the plaint and the defence.
4. In the affidavit it is averred the hearing commenced on 9<sup>th</sup> December 2019 in which both the plaintiff and the 1<sup>st</sup> defendant closed their testimony. On 5<sup>th</sup> July 2021 the trial court declined further defence hearing on account of jurisdiction leading to the filing of this application.
5. Mr. Omari for the applicant in brief submissions reiterated the contents of the application and urged the court to exercise its discretion and order for the transfer. There is no replying affidavit or grounds of opposition from the respondents. Similarly there was no appearance during interpartes on 21<sup>st</sup> September 2021.
6. Under **Section 15 of Civil Procedure Act** a suit shall be instituted in a court within the local limits of whose jurisdiction the defendants resides, works or carries on business, where the cause of action wholly or in part arises.
7. **Section 17 of the Civil Procedure Act** provides:

***“Where a suit may be instituted in any one of two or more subordinate courts and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion may at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections if any shall determine in which of the several courts having jurisdiction the suit shall proceed”.***

8. Section 18 thereof grants the High Court power to transfer or withdraw any suit pending in any court subordinate to itself or another court for trial or disposal. It may also retransfer the same for trial or disposal to the court from which it was withdrawn. Under section 18 (2) once transferred the court may issue special directions including either retrial or proceeding from where the matter had reached.

9. In the instant case the paragraphs 7, 8 & 9 of plaint dated 31.7.2018 states the defendants are all residents of Tigania East Sub- county, Meru County while paragraph 10 states the 4<sup>th</sup> defendant resides in Machakos County. Paragraph 12 and 13 of the plaint refer the subject matter as parcel No. Tigania East/Kiguchwa/761 registered in the name of the 1<sup>st</sup> defendant in trust for the plaintiffs, as family or ancestral land, which is allegedly to have been fraudulently subdivided by the defendants into parcel no’s 8292, 8293, 4419, 3208 and 3209.

10. The prayers sought are that the court declares the Suitland ancestral land, held in trust, invalidates the subdivision, permanent injunction restraining any further dealings over the land to the detriment of the plaintiffs and registration thereof in favour of the plaintiffs in equal shares.

11. By a joint defence dated 26<sup>th</sup> November 2018, the defendant admits paragraph 10 and 12 of the plaint but deny the alleged land is family or ancestral land held in any trust, that it is inherited land, deny any breach of trust and allege they have been in actual occupation of the suitland where they have undertaken extensive development as itemized in paragraph 17 of the defence.

12. At paragraph 20 of the defence the defendants specifically plead the court lacks jurisdiction to hear and determine the suit.

13. It is not very clear from the application if there was compliance with order 11 and whether prior to the hearing the trial court addressed the issue of jurisdiction. Be that as it may this court is called upon to exercise its discretion and order for transfer.

14. Under section 11 of the Magistrate’s Court Act it is provided that every suit shall be instituted in the court of lowest grade competent to try it.

15. There is a proviso that if a suit is instituted in a court other than a court of the lowest grade competent to try it the magistrate holding such court shall return the plaint for presentation before the court of the lowest grade, if there is no point of law involved or good and sufficient reason for instituting the suit in this court.

16. Similarly Section 12 of the Civil Procedure Act states a suit subject to pecuniary jurisdiction shall be instituted within the local limits where the property is situated.

17. In the instant suit it is not in dispute the suit land is at Tigania East Sub County within whose competent court was Tigania law courts. The applicants have given no explanation why they opted to file the case at Maua law courts yet Tigania law courts was the lowest court where the property is situated and it would have been more economical and expeditious to have the suit determined there.

18. Section 3 & 26 of the Environment and Land Act empowers the Chief Justice to gazette magistrates to preside over ELC matters. This was done vide gazette notice no. 1472 dated March 11<sup>th</sup> 2016.

19. Whereas the High Court has jurisdiction to transfer suits, the suit to be transferred should be before a court of a competent jurisdiction and ought to be transferred to a court of competent jurisdiction as well. If a suit was filed before a court without jurisdiction, then the court cannot clothe it with jurisdiction by transferring it.

20. In ***Equity Bank Ltd vs Bruce Mutia Mutuku T/A Diani Tour Travel 2016 eKLR*** the Court of Appeal held; ***“In numerous dated cases.... have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred”.***

21. In ***Phoenix of East Africa Assurance co. Ltd vs Son Thiga T/A newspaper service (2019) eKLR*** it held:

***“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction the only remedy is to withdraw it and file a complaint in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied”.***

22. In the instant suit, this court has taken judicial notice that Tigania Law courts was always available to hear and determine the instant suit. There was already a gazetted magistrate to hear and determine environment and land disputes. So Tigania law courts was the competent court but unfortunately the applicant herein filed the suit within a court without geographical jurisdiction hence the reason it has now declined to hear and conclusively determine the suit.

23. This court going by the decisions above cited would be sanctioning an illegality if it were to allow the application. The applicant’s recourse is not through this court.

24. The application lacks merits and is dismissed with costs. This file is closed.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021 IN PRESENCE OF:**

**NO APPEARANCE FOR ALL PARTIES**

**COURT ASSISTANT: KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**