



REPUBLIC OF KENYA



Ndesha v Mulata & 3 others (Environment and Land Case Civil Suit E034 of 2024) [2025] KEELC 1363 (KLR) (18 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT E034 OF 2024
MD MWANGI, J
MARCH 18, 2025**

BETWEEN

LEMARON OLE PARKEI NDESHA PLAINTIFF

AND

ELIJAH RAINGOT OLE MULATA 1ST DEFENDANT

KAMOOKO OLOLOTIM 2ND DEFENDANT

COUNTY SURVEYOR 3RD DEFENDANT

LAND REGISTRAR, KAJIADO 4TH DEFENDANT

RULING

(In respect of the Notice of Motion dated 3rd July 2024 brought under the provisions of Sections 1A, 1B, 3A & 18 of the Civil Procedure Act)

1. The application under consideration is the notice of motion dated 3rd July 2024 by the Plaintiff who seeks two (2) main orders namely;
 - a. That this Honourable Court be pleased to withdrawal and transfer Kajiado CMCELC 23 of 2020 and transfer it to this court for the purpose of ease of hearing and expeditious determination of the matter between the parties; and
 - b. That this Honourable Court consolidates the aforementioned case with this suit for trial and final disposal.
2. The application is premised on the grounds on the face it and on the supporting affidavit of Kelvin Mogeni sworn on 4th July 2024. Amongst the grounds listed on the face of the application are that;
 - i. The Magistrate's court lacks the pecuniary jurisdiction to hear and determine the suit as the value of the entire suit property exceeds Kshs. 20,000,000/-.



- ii. The same question of law arises in both suits regarding the fraudulent encroachment on the Applicant's parcel of land and the 1st and 2nd Respondent's connivance in the unlawful changing of the survey map presented by the Sajiloni Group Ranch with the intention of changing the acreage of KJD/Dalalekutuk/3086.

Response by the 1st Defendant

3. The application is opposed by the 1st Defendant vide the replying affidavit sworn by one Elijah Raingot Ole Mulata, the 1st Defendant herein, on 20th August 2024. He confirms the matter pending before the Magistrates' Court at Kajiado. He affirms that this case is sub judice as it raises the same facts and issues as the one before the Magistrates' Court. The Plaintiff/Applicant herein is also a party in the said case before the Magistrate's Court being the 4th Defendant therein though he has not filed any response.
4. The 1st Defendant/Respondent insists that the Magistrate's Court has the jurisdiction to hear and determine the matter filed before it. Further, he asserts that the suit property that the Plaintiff/Applicant claims in this suit is non-existent having already been subdivided into several portions which have been transferred to various proprietors. He therefore has no locus standi to bring this case in the first place
5. It is the 1st Defendant's position that the Plaintiff/Applicant has never raised an objection on the jurisdiction of the Magistrate Court in respect of the suit before it. He accuses the Plaintiff/Applicant of forum shopping and knowingly delaying the administration of justice. The 1st Defendant prays for the dismissal of the Plaintiff's application.

Issues for determination.

6. The only issue for determination is whether the Plaintiff's application is merited and consequently if the orders sought should be granted.

Analysis and determination.

7. Section 18 of the *Civil Procedure Act* gives the High Court the power, either upon an application of any of the parties or on its own motion, at any stage of the proceedings;
 - a. To transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try and 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 and 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.
8. In exercising its powers under Section 18 of the *Civil Procedure Act*, the court makes various considerations as highlighted in various judicial precedents. The principal matters to be taken into consideration are balance of convenience, questions of expense, interest of justice, and possibilities of undue hardship. Courts are further required to consider the real motive or character for transfer of a case from one court to another as observed by Kemei J in the case of Kirui (suing as the chairman of Kessir Youth Bunge Self Help Group) –vs- Kecha Sammy Matonyi t/a Kibochi Ventures (Misc.



Civil Application E007 of 2023) {2023} KEHC 20720 KLR (21 July 2023) ruling, quoting the case of Hangzhon Agrochemicals Industries Limited –vs- Panda Flowers Limited (2012) eKLR.

9. The Court in the Hangzhon case enumerated the issues to be considered to include such factors as the motive and nature of the proceedings, the nature of the relief sought, the interests of the litigants and the more convenient administration of justice, the expenses which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of the justice and possibilities of undue hardship. The burden is upon the Applicant to convince the court that he has good grounds to support the transfer of the case.
10. One of the listed grounds in support of the application for transfer, in this case and that immediately caught my eye, is that the Magistrate’s court lacks the pecuniary jurisdiction to hear and determine the suit before it. The averment is repeated in the supporting affidavit of Kelvin Mogeni at paragraph 12 thereof. This caught my eye because the law is well settled that a suit instituted in a court without jurisdiction cannot be transferred under Section 18 of the *Civil Procedure Act*.
11. The Court of Appeal in *Equity Bank Limited –vs- Bruce Mutie Mutuku t/a Diani Tours & Travel* (2016) eKLR, had this to say on the issue;

“In numerous decided cases, courts, including this court 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. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court with jurisdiction would be to muddle up the waters and allow confusion to reign.

....A court of law should not through what can be termed as judicial craftsmanship, sanctify an otherwise incompetent suit through a transfer.”

12. In the case of *Abraham Mwangi Wamigwi –vs- Simon Mbiriri Wanjiku & another* (2012) eKLR, the court held that;

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under Section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reasons for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and the court cannot purport to transfer nothing and mould it into something through a procedure known as transfer. In other words courts can only transfer a cause whose existence is recognized by law.”

13. The court in the above cited case quoted with approval the decision in *Kangenyi –vs- Musiramo* 1968 (EA) 43, where Sir Udo Udoma CJ, made it clear that an order for transfer of a suit from one court to another cannot be made unless the suit had in the first instance been brought to a court with jurisdiction to try it.
14. From the foregoing, the Plaintiff’s application is unmerited and is hereby dismissed with costs.
It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 18TH DAY OF MARCH 2025.



M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Chacha h/b for Mr. Mogeni for the Plaintiff/Applicant

N/A for the Defendants/Respondents

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

