



Mubichi v Mworja (Environment and Land Miscellaneous Application E017 of 2023) [2023] KEELC 20791 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E017 OF 2023**

CK YANO, J

OCTOBER 19, 2023

BETWEEN

ANN KECH MUBICHI APPLICANT

AND

JOSHUA KIOME MWORIA RESPONDENT

RULING

1. The application for determination is the applicant's notice of motion dated April 27, 2023 brought under Section 18 (1) (b) and 3A of the Civil Procedure Act and order 50 of the civil Procedure Rules seeking orders to withdraw and transfer E&L suit NO. 50 of 2020 before the Chief Magistrate's court at Meru to this court for hearing and final determination.
2. The application is supported by the affidavits of Ann Kech Mubichi, the applicant and is premised on the ground that the value of the suit land is Kshs 22,600,000/= which exceeds the pecuniary jurisdiction of the Chief Magistrate's court. The applicant has exhibited a valuation report and averred that at the time of filing the suit at the Magistrate's court, this information was not available to her. The applicant has also annexed copies of the plaint, verifying affidavit and defence in E&L suit No 50 of 2020. The applicant contended that it is just that the application be allowed and that no prejudice would be caused to the respondent.
3. In her supplementary affidavit, the applicant stated that the issue in dispute is the status of LR NO Kiirua/Naari/572 as a whole as her contention is that the same has never been subdivided whatsoever and that any alleged subdivision is hotly contested, adding that LR No Kiirua/Naari/2186 which is said to be a subdivision of LR NO Kiirua/Naari/572 came into existence on February 20, 2019 when the original owner had died back on June 1, 2017. The applicant has annexed a copy of the death certificate and argued that the sale agreement dated August 21, 1997 exhibited by the respondent is fraudulent as it never received the requisite consent of the Land Control Board and that the respondent neither paid the agreed consideration nor taken possession of the land.



4. The application is opposed by the respondent through a replying affidavit sworn by himself on June 12, 2023. The respondent averred that the market value of his property LR. Kiirua/Naari/2186, the suit property is Kshs. 3,375,000/=. The respondent has also annexed a copy of a valuation report.
5. The respondent further contended that LR No Kiirua/AARI/572 is non-existent and has exhibited a copy of the green card of LR 2186 showing it is a resultant from LR 572. It is the respondent's contention that the magistrate's court has proper pecuniary jurisdiction to hear and determine the suit before it. The respondent added that the applicant lacks locus standi for failing to take out letters of administration Ad litem to institute this application. The respondent however maintained that he bought the land from the deceased for Kshs 600,000/= vide the sale agreement dated August 21, 1997, a copy of which he has exhibited.
6. The application was canvassed by way of written submissions. The applicant filed her submissions dated June 27, 2023 and supplementary submissions dated August 31, 2023 through the firm of Mwirigi Kaburu & Co Advocates while the respondent filed his dated August 28, 2023 through the firm of Mutuma & Koskei Advocates.
7. In their submissions, learned counsel for the applicant cited section 18 of the Civil Procedure Act which gives the High court in its supervisory jurisdiction the power to withdraw or transfer to itself or other courts subordinate to it for trial and final disposal suits instituted in the subordinate courts. That this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The applicant's counsel relied on the case of AO Basid Limited Vs Asl Credit Limited [2019] eKLR which cited with approval the decision in David Kabungu Vs Zikarengu & 4 others, Kampala HCCS No. 36 of 1995.
8. The applicant's counsel also cited Section 7 (1) (a) of the Magistrate's court Act No. 26 of 2015 which limits the jurisdiction of the magistrate's court to a sum not exceeding Kshs. 20 million. The applicant's counsel also relied on the case of Owners of Motor Vessel "Lilian S" Vs Caltex Oil Kenya Ltd (1989) KLR 1 which held that without jurisdiction a court cannot do better than down its tools.
9. Learned counsel for the applicant submitted that this court should take into consideration the balance of convenience, questions of expenses, interest of justice and possibilities of undue hardship. That where the claims are above the pecuniary jurisdiction of the subordinate court, the matters should be transferred to the High Court as per the decision relied on.
10. In their submissions, learned counsel for the respondent contended that the main issue for consideration before this court is whether the applicant herein has locus to institute the application herein. It is the respondent's contention that from the pleadings filed, the applicant is suing as the legal representative of the estate of Patrick Mubichi M'Amburugua and therefore ought to have applied for grant ad litem before instituting the current motion. Counsel for the respondent further submitted that the application for transfer of suit by the applicant is fatally defective and totally incurable for lack of grant ad litem. That the applicant has not annexed any proof of the grant ad litem granted to her to institute this application. Learned counsel for the respondent cited Section 2(1) of the Law of Succession Act and relied on the case of Basirico V K Boat Service Ltd & Guirri NBI CA 276 of 1998 (CA), Civil case NO. 111 of 2004 (OS) Francis Kamau Mbugua & another Vs James Kinyanjui Mbugua and Meru ELCA 81 of 2019, Beatrice Kuri Francis Vs Susan Gatiria M'Mukira which quoted Alfred Njau & others Vs City Council of Nairobi (1982 -88) 1KLR.
11. Counsel for the respondent submitted that it is trite law that a party, even if entitled to administration, cannot file proceedings on behalf of an estate before letters of administration are granted and relied on Rajesh Praujivan Chadasama Vs Sailesh Pranjivan Chudasama [2019] eKLR, Macfoy Vs United



Africa Ltd (1961) 3 ALL ER 1169, *Virginia Wamboi Otiemo Vs Joseph Ochieng Ongo & another* CA 31 of 1998, *Isaya Masira Momanyi Vs Daniel Omwoyo & Another* [2017] eKLR.

12. On whether this court has power to order transfer of the suit, the respondent's counsel submitted that the orders cannot issue since the suit is over a non-existent parcel of land and urged the court to find that the application is fatally defective and dismiss it with costs.
13. In the supplementary submissions, learned counsel for the applicant took issue with the respondent's submissions on the issue of locus standi and submitted that the same was not pleaded in the replying affidavit and therefore cannot be raised in submissions as it amounts to an ambush. The applicant's counsel relied on the case of *Daniel Otiemo Migore Vs South Nyanza Sugar Co. Ltd* [2018] eKLR and added that the issue of locus standi was settled by this court in a judgment delivered in Meru ELCA No. E005 of 2021 and argued that any attempt to re-litigate the same issue is not permissible and is covered by the doctrine of res judicata.
14. I have considered the application, the response as well as the submissions by the parties. Two issues arise for determination in this application as follows:
 - i. Whether this court should determine whether or not the applicant has locus to file this application herein and the suit in the subordinate court.
 - ii. Should Meru CMC ELC NO. 50 of 2020 be withdrawn and transferred to this court for hearing and final determination.
15. Regarding the first issue, the respondent argued that the applicant herein has no locus to institute the application for failing to take out letters of Administration Ad Litem. Though this issue of capacity may determine the competency of the application herein and the suit still pending in the subordinate court, it is my view that the main issue to determine in this application is the transfer of the suit as sought by the applicant. As it is, the suit is still pending before the subordinate court and therefore this court will be preempting a decision to be made by the court that will hear and determine the suit. In my view the matter is still in the magistrate's court and this application seeks to transfer it to this court. It is my view that it would be premature to determine the issue of the applicant's capacity which is an issue that goes to the merits of the case when the matter is not yet in this court. I therefore deem it essential to refrain from deciding over a suit that is still pending in another court and confine my decision in this ruling to the application for transfer. However, in the event the suit is transferred to this court, the respondent will be at liberty to pursue his application questioning the capacity of the applicant to institute the suit.
16. Regarding the prayer for transfer of suit, the applicant states that the value of the suit land is Kshs. 22,600,000/= which exceeds the pecuniary jurisdiction of the magistrate's court. The applicant avers that this information was not available to her at the time of filing the suit at the magistrate's court. The applicant has exhibited a copy of a valuation report dated 7th January, 2023 in respect to title No. Kiirua/Naari/572. The suit was filed in 2020. On his part, it is the respondent's contention that the value of his property LR Kiirua/Naari/2186 is Kshs. 3,375,000/= and has also attached a valuation report for the same. I note however that the applicant's suit relates to the two parcels of land among others.
17. Section 18(1) of the *Civil Procedure Act* 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 proceedings 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 proceedings 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 proceedings 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.
18. The power to transfer a suit is discretionary and therefore a party seeking to transfer a matter from one court to another has the burden of providing sufficient reason as to why the transfer is merited. However, a matter can only be transferred if the court from which the applicant is seeking to have the same transferred from has jurisdiction over the said matter.
 19. In this case, the applicant informed the court that the pecuniary value of the suit land is Kshs. 22,600,000/= which is way above the Chief Magistrate’s monetary jurisdiction thus her reason for seeking to transfer it to this court. The respondent admits that the magistrate’s court has jurisdiction over the matter though for different reasons. The foregoing provision presupposes that the suit was filed in a court with the jurisdiction to try and dispose of it. In the instant case, it is not in dispute that the suit was filed before a court that had pecuniary jurisdiction to entertain it. According to the applicant, the value has now exceeded the pecuniary jurisdiction of that court.
 20. In *Phoenix of EA Assurance Company Limited Vs SM Thiga t/a Newspaper Service* [2019] eKLR, the Court of Appeal held that: “...jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer Jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.”
 21. The same position was taken by the Court of Appeal in *Equity Bank Limited Vs Bruce Mutie Mutuku t/a Diani Tour travel* [2015] eKLR thus “in numerous decided cases, courts, including this court has held that it would be illegal for the High Court in exercise of its powers under S. 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.”
 22. In the case of *Abraham Mwangi Wamigwi Vs Simon Mbiriri Wanjiku & Another* [2012] eKLR, the court held as follows;-

“The law relating to transfer of suits from subordinate courts to the High court or any transfer for that matter is very clear. In *Kagenyi Vs Musiramo* (Supra) Sir Udo Doma CJ made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In *Ali Abdi Sheikh Vs Edward Nderitu Wainaina & others* (supra) Koome, J as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value



exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under Section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same judge in Rainbow Manufacturers Limited Vs National Bank of Kenya (supra).”

23. In this case, both the applicant and the respondent are in agreement that the magistrate’s court had competent jurisdiction to hear and dispose of the suit, save for the fact that the value has now exceeded the pecuniary jurisdiction of that court. Of course, the applicant and the respondent are not agreed on the subject matter of the suit and its value. In my view, sufficient material has been placed before this court by the applicant to enable the court grant the prayer for transfer. The application for transfer is thus allowed.
24. In the end, the application dated April 27, 2023 is allowed in terms of prayer 1 thereof.
25. I order that each party to bear its own costs.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF OCTOBER, 2023

In The Presence Of

Court Assistant – V. Kiragu/Lena M.

Karanja for applicant

Mutuma for respondent

C.K YANO

JUDGE

