



REPUBLIC OF KENYA



**Nzyoka v Kibunyi (Environment & Land Case E032 of 2021)
[2023] KEELC 20907 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20907 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E032 OF 2021**

JG KEMEI, J

OCTOBER 18, 2023

BETWEEN

PETER KITUKU NZYOKA PLAINTIFF

AND

FRANCIS KAMITA KIBUNYI DEFENDANT

RULING

1. Francis Kituku Nzyoka, the Applicant herein, filed suit by way of Originating Summons on the 4/10/2021 seeking the determination of among other issues the question whether or not he entitled to title by way of adverse possession.
2. The Respondent resisted the claim of the Applicant vide his Replying Affidavit filed on the 24/2/2023 and stated that the Applicant has encroached on his land. It would appear that the Applicant is the registered owner of the parcel Kakuzi/Ithanga Gituamba/Block1(Mavoloni)669 but has settled on parcel Kakuzi/Ithanga Gituamba/Block1(Mavoloni)643 registered in the name of the Respondent. It is not in dispute that the parties have filed another case in the lower Court to wit; CMELC No 3 of 2023 in which the parties are *Francis Kamita Kabunyi Vs Peter Nzyoka*. The Plaintiff has sued the Defendant for orders of eviction from his parcel of land namely parcel No. 643.
3. The Applicant seeks the orders of transfer of this suit for purposes of consolidation of the suit together with the one in lower Court for hearing and determination. Secondly that the Court has jurisdiction to hear both matters.
4. The Respondent argued that it is a waste of judicial time to transfer the suit as there is a pending Preliminary Objection that he has raised in the pending suit at Kenol Court. The Respondent did not explain to the Court the nature of the Preliminary Objection nor exhibit the pleadings therein.
5. I have read and considered the submissions filed by the Applicant. Despite directions having been taken the Respondent failed to comply.



6. The single issue for determination is whether the suit should be transferred to the Chief Magistrate's Court.

7. Section 11 of the *Civil Procedure Act* stipulates where suits should be filed. It states as follows;

“Every suit shall be instituted in the Court of the lowest grade competent to try it, except that where there are more subordinate Courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate Courts:

Provided that—

- (i) 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 in the Court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his Court; and
- (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one Subordinate Court in the same County.”

8. Section 18 of the *Civil Procedure Act* empowers the Court to transfer suits as follows;

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- (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. re-transfer 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.”



9. The power to transfer a suit is within the discretion of the Court which discretion must be exercised and applied judiciously. In exercising discretion the circumstances of each case must be looked into and the Court must satisfy itself.
10. Factors that Courts consider before allowing transfer of suits are; motive and the character of the proceedings, the nature of the relief sought, the interests of the litigants, administration of justice and expenses incurred by the parties and the convenience of the parties to be heard at the nearest access to justice.
11. The jurisdiction of a Magistrate Court is provided for in Section 15 of the Magistrate's Act as follows;
 - “(1) A Magistrate's Court shall have and exercised such jurisdiction and powers in proceedings of a Civil nature in which the value of the subject matter does not exceed-
 - a. Twenty million shillings, where the Court is presided over by a Chief Magistrate;
 - b. Fifteen million shillings, where the Court is presided over by a Senior Principal Magistrate;
 - c. Ten million shillings, where the Court is presided over by a Principal Magistrate;
 - d. Seven million shillings, where the Court is presided over by a Senior Resident Magistrate; or
 - e. Five million shillings, where the Court is presided over by a Resident Magistrate.”
12. The subject matter of this suit is land. In the case of this application, the Applicant has not tabled any valuation to persuade the Court as to the pecuniary jurisdiction of this matter. It is therefore presumed that the pecuniary jurisdiction is that of the lower Court. In any event the Court at Kenol in the absence of evidence to the contrary is the Court nearest to the subject matter of this suit.
13. In the end I grant the orders for the reasons set out above. I make no orders as to costs.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kisini for Plaintiff/Applicant

Wangari for Defendant/Respondent

Court Assistants – Phyllis/Lilian

