



**Ndaro & 4 others (Suing on behalf of 158 others) v Bindo & 2 others (Miscellaneous Application E16 of 2023) [2023] KEELC 20741 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20741 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
MISCELLANEOUS APPLICATION E16 OF 2023  
EK MAKORI, J  
OCTOBER 16, 2023**

**BETWEEN**

**WINSTON HARIRI NDARO ..... 1<sup>ST</sup> APPLICANT  
ADI MOHAMED YUSUF ..... 2<sup>ND</sup> APPLICANT  
JOHANA SALIMU MWAMUNGA ..... 3<sup>RD</sup> APPLICANT  
JOSEPHAT SHIKOLI MASHETI ..... 4<sup>TH</sup> APPLICANT  
MACMILLAN KONDE MDOE ..... 5<sup>TH</sup> APPLICANT  
SUING ON BEHALF OF 158 OTHERS**

**AND**

**RAMA HAMISI BINDO ..... 1<sup>ST</sup> RESPONDENT  
COMMISSIONER OF LANDS - NAIROBI ..... 2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL - MALINDI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicants in this matter filed Kilifi E016 of 2023, as plaintiffs where they sought the following orders:
  - i. A permanent injunction restraining the 1<sup>st</sup> Defendant from cultivating, planting, constructing, developing, damaging, alienating, or in any manner interfering with the Plaintiff's property Plot No. 1408/IV/MN CR 80173 measuring approximately 12.05 hectares situated in Kilifi County.
  - ii. An order of revocation of the 1<sup>st</sup> Defendant's Title Deed Plot Nos. 1408/IV/MN CR 80173



- iii. An order of mandamus (sic) compelling the National Commissioner of Lands (sic) to issue title deed of Plot Nos. 1408/IV/MN CR 80173 to the rightful owners who have been in occupation of the suit property.
  - iv. An order of certiorari quashing the 1<sup>st</sup> Defendant's Title plot Nos. 1408/IV/MN CR 80173
  - v. Costs and interests of the suit.
  - vi. Any other relief the court may deem just to grant.
2. The orders sought by the applicants are buttressed on the averments contained from paragraphs 5 to 16 of the plaint; suffice to say the claim by the plaintiff is based on the doctrine of adverse possession on grounds that the plaintiffs and their ancestors have been on the suit land for over 100 years.
  3. In paragraph 16 plaintiff averred that by way of fraud:
 

“The 1<sup>st</sup> Defendant herein took advantage of the Plaintiff's helpless situation and jumped ship ahead of them and possessed the title documents in his favour. He did this fully aware that there are people who have been in occupation of the suit land for more than 100 years.”
  4. I did not have the advantage of having a glimpse of the defence by the respondents in the suit before the Kilifi Magistrates Court.
  5. An application under Certificate of Urgency seeking injunctive orders was brought before the trial court (Kituku SPM) on 14<sup>th</sup> February 2023. ex parte injunctive orders were issued and extended to 14<sup>th</sup> March 2023. An application was filed by the 1<sup>st</sup> Respondent to vacate the orders and the suit to be struck out. I did not have the advantage of seeing that application, but on 29<sup>th</sup> March 2023, the trial court vacated the ex parte injunctive orders and downed its tools. The reasons why the court did that have not been explained to this court nor am I told whether those orders were appealed against.
  6. The applicants aver that a valuation has long been done and it has been realized the suit property is valued at over 24 million and that was an oversight on the part of the applicants when filing suit at the Magistrates Court.
  7. The applicants now seek the entire suit to be transferred to this court for final disposal.
  8. That application is opposed because the applicant seeks to steal a march from the 1<sup>st</sup> respondent on the reason that there will be no suit to transfer. The 1<sup>st</sup> respondent cites section 18 of the *Civil Procedure Act* on the general powers of the High Court to withdraw and transfer cases instituted in Subordinate Courts. Several authorities have also been quoted by the 1<sup>st</sup> respondent on the considerations before the transfer or withdrawal of a suit is done – see *Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd* [2012]eKLR
  9. The 1<sup>st</sup> respondent submitted that jurisdiction is everything an incompetent and incurable suit cannot be subject to a transfer, the 1<sup>st</sup> respondent has cited the cases of *The Owner of Motor Vessel Lilian 'S' v Caltex Kenya Ltd* [1989]KLR 1, *Rebecca Chumo v Christina Cheptoo Chumo* [2021]eKLR, *Boniface Waweru Mbiyu v Mary Njeri & Another* [2005]eKLR and *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR.



10. The issue that falls for the determination of this court is whether a transfer of Kilifi E016 of 2023 is apt. The factors to consider before the transfer of a suit are as stated by Odunga J. in - [Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd](#) [2012]eKLR:

“In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. 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. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case. If for example, the plaintiff, knowing that the defendant will not afford the cost of travelling all the way to defend a suit, decides to institute the same at a place farthest from where the defendant is with a view to either inflicting suffering on the defendant or forcing the defendant to settle, the court would be forced to intervene. In my view, since it is the plaintiff who has accused the defendant, the defendant should not be placed at the position of a disadvantage based on mere allegations. To the contrary, the plaintiff should institute the proceedings where the defendant is all factors being equal.”

11. The respondent cited authorities to the effect that taking into account the appropriate factors, a court cannot transfer a defective suit to itself or other Subordinate Courts or Tribunals see Oundo J. in [Rebecca Chumo v Christina Cheptoo Chumo](#) [2021]eKLR:

“Quite clearly from the above powers bestowed upon the Chief Magistrate’s court, the pecuniary jurisdiction is Ksh 20,000.000/= . Could it then be said that the impugned matter was filed in a court of competent jurisdiction? It is now trite that if a matter is filed in a Court that has no jurisdiction when the claim was filed, it would mean that the said suit is incompetent and the Court does not have jurisdiction to transfer the matter.

20. 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 Udoma, 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).



21. Further in *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR the court had held that:
- “Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.
22. And lastly in *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR the Court held that:-
- “Furthermore, according to *Kagenyi v Musiramo and Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”
23. It is therefore clear that since this suit was instituted before the Chief Magistrate’s Court that had no jurisdiction. Such a suit, it is trite cannot be transferred in pursuant to the provisions of Section 18 to the Environment and Land Court, where it ought to have been instituted in the first instance, as the same was a nullity in law. The court can only transfer a cause whose existence is recognized by law.
12. I agree with the 1<sup>st</sup> respondent on the issue of jurisdiction. As held by the Court of Appeal in the case of *The Owner of Motor Vessel Lilian ‘S’ v Caltex Kenya Ltd* [1989]KLR 1:
- “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”
13. The power to transfer or order the withdrawal of a case by the High Court is provided in section 18 of the *Civil Procedure Act*:
- “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.”

14. The pecuniary powers of the Magistrates Court to deal with Civil matters when properly filed before it can be found in the [Magistrates Court Act](#), 2015 as provided under section 7 of the [Act](#) - when presided over by Chief Magistrate - 20 million, Senior Principal Magistrate - 15 Million, Principal Magistrate - 10 Million. Senior Resident Magistrate - 7 Million and Resident Magistrate - 5 Million.
15. The Valuation Report - now the basis of the current application indicated that the value of the land is over 24 Million well beyond the scope of the Chief Magistrate's pecuniary jurisdiction. This valuation was introduced oblivious that it is the applicants who choose to file the suit before the Magistrates Court and not the ELC. In my view, it was a gimmick to clothe the suit with competence after the injunctive orders in place were lifted. After all that mess, this court is now being asked to clear up the mess.
16. The applicants all along knew that the bringing of the suit before the trial court was contra section 7 of the Magistrates Court Act by virtue of the pecuniary jurisdiction of that court.
17. I can also see there are supervisory orders sought like mandamus and certiorari, which that court has no jurisdiction to grant. See [Jephter Juma Ambuchi & another v Hezron Barasa Kisache](#) [2018] eKLR:

“It is clear that this application is misconceived. Article 165(6) of the [Constitution](#) which grants the High Court powers of Judicial Review reads:

“The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi Judicial function but not over a superior Court”. Emphasis added.

Similar powers are donated to this Court by Section 13(5) of the [Environment and Land Court Act](#), which reads:

“The Court shall have supervisory Jurisdiction over the subordinate Courts, local tribunals, persons or authorities in accordance with Article 165(6) of the [Constitution](#).”

18. The Subordinate Court was being asked to issue supervisory orders in the form of mandamus and certiorari and without jurisdiction. As drawn, the claim also reverberates like an adverse possession one. It ought to have been initiated by way of Originating Summons as provided in the [Civil Procedure Rules](#). Clearly, from the forgoing the pending suit before the Subordinate Court seems to me defective on various frontages – it was filed in a court without requisite pecuniary jurisdiction, and some of the



prayers sought like supervisory orders or prerogative writs cannot be issued by that court. In the suit, the applicants knew or ought to have known very well the pecuniary jurisdiction of the Subordinate Court was up to 20 Million but proceeded to file the action there anyway. A defective suit cannot be transferred in the first place as enunciated by the authorities I have quoted above.

19. In other words to order for the transfer of that suit to this court in Kenyan slang, 'I will be inviting trouble for this court or I want trouble for myself' - since there will be no suit to transfer for trial in this court.
20. The upshot is that the application dated 5<sup>th</sup> April 2023 be and is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 16<sup>TH</sup> DAY OF OCTOBER 2023.**

**E. K. MAKORI**

**JUDGE**

