



REPUBLIC OF KENYA



**Samuel v Rono (Miscellaneous Application E008 of 2023)
[2023] KEELC 22431 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION E008 OF 2023
JM ONYANGO, J
DECEMBER 14, 2023**

BETWEEN

WANGUBA OULULA SAMUEL APPLICANT

AND

NANCY CHEPKOECH RONO RESPONDENT

RULING

1. The applicant brought this notice of motion dated February 20, 2023 pursuant to section 18(1)(b) (ii) of the [Civil Procedure Act](#), cap 21 of the Laws of Kenya seeking orders that:
 - a. Spent.
 - b. Spent
 - c. Pending the hearing and determination of this application inter partes, the court be pleased to adopt the orders and/or directions issued on September 28, 2022 in Eldoret CMCC ELC Case No E090 of 2021 *Wanguba Olula Samuel v Nancy Chepkoech Rono* pending the hearing and determination of the main suit(sic).
 - d. The Honourable Court be pleased to withdraw Eldoret CMCC ELC case No. E090 of 2021 *Wanguba Olula Samuel v Nancy Chepkoech Rono* from the Chief Magistrate's Court and thereafter transfer it to the Environment and Land Court for hearing and disposal.
 - e. The court be pleased to adopt the orders and/or directions issued on September 28, 2022 in Eldoret CMCC ELC Case No E090 of 2021 *Wanguba Olula Samuel v Nancy Chepkoech Rono* pending the hearing and determination of the main suit.
 - f. The costs of the application be provided for.



2. The application is premised on the grounds outlined on the face of the notice of motion and the applicant's supporting affidavit sworn on the February 20, 2023. The gist of the application is that the value of the suit property which was less than Kes 20 million when the suit was filed has since appreciated to more than Kes 20 million and the Magistrate's Court does not have the jurisdiction to hear and determine the matter. In the meantime, on September 28, 2022 the court issued an order directing that neither of the parties should utilize the suit property without the other and the Applicant is of the view that the said orders ought to remain in place pending the hearing of the main suit.
3. In opposing the application, the respondent filed a replying affidavit sworn on March 15, 2023 in which she deposes that the application is incompetent and an abuse of the court process. She contends that by the time the plaintiff filed the suit in 2021, the value of the suit property was already in excess of Kes 20 million and this fact was pointed out in her defence dated May 17, 2021. It is her further contention that the fact the applicant has admitted that the Chief Magistrate's Court lacks jurisdiction means that this court has no jurisdiction to transfer a suit that was filed in a court without jurisdiction.
4. She denies the plaintiff's allegation that she has entered the suit property without his authority as she is a joint owner thereof. She therefore prays that the application and suit be dismissed with costs.
5. The application was canvassed by way of written submissions and both parties filed their submissions.
6. Having considered the application and Replying affidavit, there are two issues for determination:
 - i. Whether Eldoret CMCC ELC Case No. E090 of 2021 ought to be transferred to this Honourable court for hearing and determination.
 - ii. Whether the orders issued by the lower court on September 28, 2022 should stay in place.

Analysis and Determination

7. The provision relating to transfer of suits is found in section 18 of the *Civil Procedure Act* which 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 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. ”

8. Learned counsel for the applicant submitted that the court has the jurisdiction to transfer the suit from the lower court to this court. He relied on the case of David Kibungu cited in the case of [*Gaikia Kiarie v Peter Kimani Kiramba*](#) (2020) eKLR where the court observed as follows:

“What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and 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... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

9. On the other hand learned counsel for the Respondent submitted that the suit pending before he subordinate court is not capable of being transferred to this court for two reasons. The first one is that the applicant has admitted at paragraph 4 of his supporting affidavit that the magistrate’s court does not have jurisdiction to hear and determine the matter.

10. Secondly, counsel has pointed out that the sale agreement in respect of the suit property has an arbitration clause under which the parties expressly agreed that all claims and disputes arising under the agreement be referred to arbitration. Counsel relied on the case of [*Ismail Adawa Edo & another v Sameba Kassim Sheikh & 2 others*](#) (2004) eKLR where Fred Ochieng J adopted the reasoning in the Ugandan case of *Kagenyi v Musiramo* 1968 E.A 43 where Sir Udo Udoma (at page 45) stated as follows:

“It seems to me that the suit having been instituted in a court without jurisdiction, it would be incompetent for this court to have the suit withdrawn therefrom. When the attention of counsel for the Applicant was drawn to this aspect of the matter, he contended that regardless of the fact that the suit had originated in a court without jurisdiction, it was competent for this court to exercise the powers conferred upon it by S.18 of the [*Civil procedure Act*](#). I do not agree with this contention.

While it may be argued that since the provisions of S.18 of the Act do not restrict the powers of the High Court in this respect, it is difficult to see how a wrongly instituted suit could be transferred to another court for trial especially as the jurisdiction of the court of origin of the suit, which is a fundamental question is involved.”

11. Having delivered himself thus, Sir Udo Udoma arrived at the following conclusion:

“In the result, this application is refused. It is dismissed because the subject matter of the application on the admission and showing of the applicant having been instituted in a court without jurisdiction, namely, the court of a magistrate grade II, Bukoto, Kabila



is incompetent for this court to transfer the same to the High Court for hearing and determination.”

12. In the instant application, the applicant has conceded that the value of the suit property is more than Kes 20 million and therefore the magistrate’s court lacks the pecuniary jurisdiction to hear and determine the matter. In her supporting affidavit the Respondent has pointed out that she raised this issue in her defence which was filed in 2021. It is therefore not true that the Applicant only discovered that the value of the suit property had appreciated after he filed the suit.
13. In view of the foregoing, I concur with the above cited authorities that the court cannot transfer a suit that was filed in a court that has no jurisdiction.
14. Consequently, the application lacks merit and it is dismissed with costs to the respondent. Additionally, since the applicant has expressly sought orders to strike out Eldoret CMCC ELC Case No. E090 of 2021 as the lower court lacks jurisdiction it is only logical that the said suit be struck out. The end result is that the application is dismissed and the suit in the lower court is struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF DECEMBER 2023

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J.M ONYANGO

JUDGE

