



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISCELLANEOUS CIVIL APPLICATION NO. 15 OF 2017

DANIEL KIPKEMOI SIELE.....APPLICANT

VERSUS

KAPSASIAN PRIMARY SCHOOL.....RESPONDENT

RULING

What is before me is an application for transfer of a suit from the Principal Magistrate's court to the Environment and Land Court for hearing and disposal. The application dated 15th May 2017 is brought pursuant sections 1A, 1B, 3, 3A and 18 of the Civil Procedure Act and Sections 7 and 13 of the Environment and Land Court Act as well as Articles 48, 159 (2) (d) and 162 of the Constitution of Kenya 2010.

The application is based on the grounds stated in the Notice of Motion and the supporting Affidavit of Ouma Maurice Otieno, learned counsel for the applicant. The suit sought to be transferred is Kericho PMCC No. 308 of 2014 Daniel Kipkemoi Siele V Kapsasian Primary School & 2 Others. In the said suit the Plaintiff who claims to be the registered owner of land parcel number TRANSMARA OLOSAKWANA 'B'/1313 seeks a permanent injunction restraining the defendants from illegally acquiring or building on the suit parcel to the detriment of the plaintiff.

In his affidavit Mr. Otieno who appears for the defendant in the lower court avers that before the case could be set down for hearing, the issue of jurisdiction of Magistrates' courts to adjudicate cases involving environment land cases arose pursuant to Malindi HC Petition No. 3 of 2016. The decision in the said petition challenged the Magistrates court's jurisdiction to hear and determine land matters with the result that all land matters pending in the magistrates' courts were frozen. It is against this background that the applicant has made this application for the suit filed in the magistrates' court to be withdrawn and transferred to this honourable court for hearing and determination.

The application is opposed by the Respondent who has filed a Replying affidavit stating the application is frivolous, vexatious and an abuse of the court process.

The main issue for determination is whether this honourable court has the power to transfer a land matter from the magistrate's court to itself on the grounds that the magistrate's court lacks jurisdiction.

In his submissions, learned counsel for the applicant has correctly stated that jurisdiction is everything and that a court has to satisfy itself that it is seized with the requisite jurisdiction to preside over a matter. Indeed, in the celebrated case of **The Owners of Motor Vessel Lillian "S" V Caltex Oil Kenya Limited 1989 KLR 1653** the Court of Appeal held as follows:

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a

court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

What then is the fate of a matter that is filed in a court that has no jurisdiction? Can it be transferred to a court that has jurisdiction?

In **Kagenyi V Musiramo & Another 1968 EA 43** it was held that whereas section 18 of the Ugandan Civil Procedure Act (which is similar to section 18 of the Kenyan Civil Procedure Act), gives the High Court a general power to transfer all suits at any stage of the proceedings, even *suo moto* by the court, an order for transfer of a suit from one court to another cannot be made unless the suit has in the first instance been brought to a court which has jurisdiction to try it.

The holding in the Kagenyi case has been followed in many decisions in Kenya including the case of **Rob De Jong & Another V Charles Mureithi Wachira (2012) eKLR** where Ibrahim J (as he then was) held as follows:

“The second issue is whether this court can direct the transfer of the suit before the Magistrate’s court to the Industrial Court. I concur with the position taken by learned counsel for the Appellant that to invoke this power the case should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction, then the suit is a nullity and there is nothing capable of being transferred. This position was also followed by Makau J in Joseph Muiruri V Godfrey Gikundi Anjuri 2012 eKLR”.

However, in a departure from this position, Kasango J in **Wycliffe Mwangaza Kihugwa V Grainbulk Handlers Limited (2014) eKLR** held that the High Court can now transfer a suit to another competent court even where the suit had been, in the first instance, brought to a court which had no jurisdiction to try it. Such transfer must however, be in compliance with section 18 of the Civil Procedure Act and the Constitution of Kenya. With respect, I do not agree that jurisdiction is of no consequence.

In the recent case of **R V Karisa Chengo and 2 Others (2017) eKLR** the Supreme Court of Kenya revisited the issue of jurisdiction and observed that in almost all legal systems of the world, jurisdiction has emerged as a critical concept in litigation. Citing John Beecroft Saunders in his treatise Words and Phrases legally defined Vol 3 at P. 113 jurisdiction is defined as follows: By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance 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 limited by like means....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decisions amount to nothing”

The Supreme Court further cited the **Owners of Motor Vessel Lilian “S”** which held as follows:

“Lack of jurisdiction renders a court’s decision void as opposed to merely voidable. When an act is void,

it is a nullity ab initio, it cannot found any legal proceedings”

The Supreme Court further cited Lord Denning in **Benjamin Leonard Macfoy United Africa Company Limited (UK) 1962 AC 152** who succinctly stated as follows:

“A court has jurisdiction in matters that are voidable, not to proceedings that are a nullity, for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court”

If an act is void then it is in law a nullity, it is not only bad, but it is incurably bad and every proceeding which is founded on it is also bad and incurable bad. You cannot put something on nothing and expect it

to stay there, it will collapse”.

From the foregoing it is clear that jurisdiction is not just a procedural matter which can be glossed over. Its absence renders the suit void. Consequently, the suit herein PMCC No. 308 of 2014 Daniel Kipkemoi Siele V Kapsasian Primary School & 2 Others which was filed in the Chief Magistrate’s court cannot be transferred to this court as it is void. The application for transfer of the suit therefore fails and is dismissed with costs

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF SEPTEMBER 2017.

J.M ONYANGO

JUDGE

IN THE PRESENCE OF:

Ouma Otieno for the Applicant

Weldon Ngetich for the Respondent

C/A; Rotich