



REPUBLIC OF KENYA



**Tochima v Chebii (Environment and Land Miscellaneous Application
E041 of 2023) [2023] KEELC 22122 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E041 OF 2023
LA OMOLLO, J
DECEMBER 7, 2023**

BETWEEN

SYLAS KIPKOSGEI TOCHIMA APPLICANT

AND

KENNEDY KIPKOECH CHEBII RESPONDENT

RULING

Introduction.

1. This ruling is in respect to the Applicant's Notice of Motion dated 23rd June, 2023.
2. The application seeks the following orders:
 - i. Spent.
 - ii. That the Honourable court be pleased to issue an order transferring CMELC No 118 of 2023 from the subordinate court to the Environment and Land Court having the jurisdiction or competence to try and dispose it. (*sic*)
 - iii. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 23rd June, 2023 by one Sylas Kipkosgei Tochima.

Applicant's Contention.

4. The Applicant contends that an application dated 7th June, 2023 Nakuru CMELC E118 of 2023 was filed in the lower court. He further contends that upon valuation of the suit property, the report shows that the suit property has a value of over Kshs 200,000,000.



5. It is the Applicant's contention that based on the value of the suit property and as advised by his counsel, only the High Court or Environment and Land Court has the jurisdiction to hear and determine the suit.
6. The Applicant further contends that as advised by his counsel, he believes that the Chief Magistrate's court has jurisdiction to handle matters limited to a monetary value of Kshs 20,000,000.
7. He contends that the suit is yet to be heard by the subordinate court and adds that the Respondent will not suffer any prejudice if this suit is transferred to a court of competent jurisdiction.
8. He ends his deposition by stating that it would be in the interest of justice that the application seeking transfer of the suit be allowed.

Respondent's Response.

9. In response to the application, the Respondent filed a replying affidavit sworn on 24th July, 2022 by one Kennedy Chebii Kipkoech.
10. He deposes that the application is a non-starter, defective and an abuse of the court process.
11. He deposes that lack of jurisdiction derives the court of the power to make any orders other than to strike out the suit or application.
12. He further deposes that the issue of the value of the suit parcels was brought to the court's attention when he filed an application inviting the court to disqualify itself. He deposes that his application was on the ground that the subject matter was way beyond its pecuniary jurisdiction.
13. The Respondent deposes that the said application is pending before the trial court for disposal and adds that the Applicant upon learning of the value of the suit parcels through his valuation report has now rushed to court with the same report seeking transfer of the suit.
14. He deposes that the Applicant, in his pleadings at the subordinate, asserts that court that he has the ownership documents and has been in occupation of the suit land.
15. He further deposes that the Applicant was not been aware of the value of the suit land and had to wait for the Respondent to notify him of the same.
16. The Respondent deposes that it is clear that the Applicant has never been in occupation of the suit property and that he is the one who has been in occupation for a period of over 20 years without interruption.
17. He also deposes that as informed by his counsel which information he believes to be true, that where a suit is instituted in a forum having no jurisdiction, such suit cannot be transferred. He states that the reason is that the suit was filed without jurisdiction thus a nullity hence nothing to be transferred.
18. He further deposes that the circumstances of this case were well espoused in the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour and Travel* [2016] eKLR.
19. He deposes that as held in the above case that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction thus sanctifying an incompetent suit.
20. In conclusion, he deposes that since the lower court lacks the jurisdiction to entertain the subject matter, the instant application also fails and ought to be declined by this court.



Issues for Determination.

21. The Applicant filed his submissions on 16th October, 2023 and identifies the following issues for determination:
 - a. What is the jurisdiction of the Environment and Land Court.
 - b. Whether this Honourable Court can transfer the suit CMELC No E118 of 2023 to itself.
22. On the first issue, the Applicant submits that subordinate courts have jurisdiction to hear and determine land matters. He submits that CMELC No 118 of 2023 cannot be said to have been filed in a court void of jurisdiction.
23. The Applicant further submits that this court being an Environment and Land Court duly established under the *Environment and Land Court Act* has jurisdiction to transfer the matter to itself.
24. He relies on the judicial decision of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* Case No 2 of 2019 which cited the Court of Appeal in *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR. He submits that Section 18 of the *Civil Procedure Act* makes provision for transfer.
25. The Applicant further cited the in *Zipporah Njoki Kangara v Rock and Pure Limited & 3 others* and *Kharisa Kyango v Law Society of Kenya* [2014] eKLR. He submits that the claim was initially filed in a Court with the requisite jurisdiction thus this court will not be aiding an illegality if it allows for the transfer of the suit to this court.
26. On the second issue, the Applicant relies on the decision in ELC Misc No 17 of 2020 *Said Abdikaarim Abdi v Shukri Jattani Sokore & Daudi Soran Sora* where the court cited the judicial decision of *Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 others* [2005] 1 KLR 292. He submits that this Honourable Court has powers to ensure that justice is served in an efficient and time saving manner as guaranteed under Article 159 of the *Constitution* of Kenya.
27. In conclusion the Applicant submits that it is in the interest of justice and further in aid of an expeditious determination of this matter that this court orders the transfer of the suit in the subordinate court to itself.
28. The Respondent on the other hand filed his submissions on 27th September, 2023. He identified only one issue for determination;
 - a. Whether the court has jurisdiction to transfer a matter from a court of no jurisdiction to a court of competent jurisdiction.
29. The Respondent relies on Section 18 of the *Civil Procedure Act* and submits that the power to transfer a suit is discretionary. He submits that a party seeking to transfer a suit has the burden of providing sufficient reasons as why the transfer is merited.
30. He further submits that the matter can only be transferred if the court from which the Applicant is seeking to have the same transferred from had jurisdiction over the said matter. He relied on the judicial case of *Rebecca Chumo v Christina Cheptoo Chumo* [2021] eKLR.
31. The Respondent submits that the Applicant has informed the court that the pecuniary value of the suit land is Kshs 200,000,000 which is way above the Chief Magistrate's monetary jurisdiction. He cites Articles 23(2) and 169 (1) (a) and (2) of the *Constitution* of Kenya and Section 7 of the *Magistrate's Court Act*.



32. He submits that it is trite that if a matter is filed in a court with no jurisdiction it meant that the said suit is incompetent and the court lacks jurisdiction to transfer it. He cited the judicial cases of *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another* [2012] eKLR and *Waweru Mbiyu v Mary Njeri & another* [2005] eKLR.
33. In conclusion, the Respondent submits that since the suit was filed in the Chief Magistrate’s court that lacked jurisdiction, it is trite that such a suit cannot be transferred.

Analysis and Determination.

34. Upon perusal of the Application, Supporting Affidavit, Replying Affidavit, Annexures and Submissions filed in respect of this Application, it is my considered view that the following issues arise for determination:

- a. Whether the Applicant is entitled to the orders sought.
- b. Which party should bear the costs of this application.

34. Section 18 of the *Civil Procedure Act* makes provision for transfer of suits. It is 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”.

35. Section 7 of the *Magistrate's Courts Act* provides as follows:

- “A Magistrate's court shall have and exercise 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.”

36. The Applicant has filed the present application seeking that the matter be transferred from the subordinate court to the Environment and Land Court.
37. He argues that CMELC No 118 of 2023 cannot be said to have been filed in a court void of jurisdiction since this court being an Environment and Land Court has the jurisdiction to transfer the matter to itself.
38. The Respondent on the other hand argues that this court lacks the jurisdiction to transfer a matter from a court of no jurisdiction to a court of competent jurisdiction. He states that being the suit was filed without jurisdiction hence the same is a nullity as there is nothing to be transferred.
39. In the instant suit, the Applicant filed suit No CMELC No 118 of 2023 before the Chief Magistrate’s court in Nakuru involving a dispute of a parcels of land No LR No 16672/2, LR No 16672/3, LR 16672/4 and LR No 16672/5.
40. This court has perused a valuation report dated 15th June, 2023 conducted by Hectares and Associates and the value of the suit properties are estimated at Kshs 200,000,000/= which is way above the Chief Magistrates’ monetary jurisdiction of Kshs 20,000,000. The Respondent conceded that the suit property is valued at Kshs 200,000.
41. In the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No 36 of 1995, the Court had the following to say on the circumstances under which the order to transfer suits may be granted-

“Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo motu by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on 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 expenses, interest of justice and possibilities to 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. (Emphasis is mine) 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 could be refused.....”



42. In the present case, the Plaintiff's position is that the claim in the present case is more than Kshs 20,000,000/= which is above the pecuniary jurisdiction of the Magistrate's Court, thus it would be in the interest of justice to transfer the suit in the subordinate court to the Environment and Land Court for hearing and determination.
43. Considering that the pecuniary jurisdiction of the Chief Magistrates' Court is limited to the sum of Kshs 20,000,000/= and further considering that the suit property has been valued at Kshs 200,000,000, it is evident that the suit cannot be heard and determined by the Magistrate's Court.
44. I am satisfied that the Applicant has demonstrated that CMELC No E118 of 2023 though filed in a court with subject matter jurisdiction, falls beyond its pecuniary jurisdiction.
45. Section 1A of the *Civil Procedure Act* provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil Disputes governed by the Act.
46. Section 1B of the said Act provides as follows-
- “For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”
47. It is therefore in the interest of justice that CMELC No E118 of 2023 is transferred to the Environment and Land Court for hearing and determination in accordance to the provisions of Section 18 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

Disposition.

48. The upshot of the foregoing is that the Notice of Motion Application dated 23rd June, 2023 is allowed in the following terms;
- a. CMELC No 118 of 2023 is hereby transferred from the Subordinate Court to the Environment and Land Court for hearing and determination.
 - b. The costs of this application shall abide the outcome of the main suit.
49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY of DECEMBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -



Miss Moenga for the Applicant.

Mr. Motoke for the Respondent.

Court Assistant; Ms. Monica Wanjohi.

