



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC MISC APP E045 OF 2021

CONSOLATA WANGUI MURIUKI(suing on behalf of the estate of LAWRENCE

WANDERI MURIUKI, Deceased).....APPLICANT

VERSUS

THE LAND REGISTRAR -RUIRU.....1ST RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI.....2ND RESPONDENT

UJENZI LAND INVESTMENT FORUM.....3RD RESPONDENT

MUTHOGA NGEERA.....4TH RESPONDENT

RULING

1. The Applicant filed the instant Application dated 19th October 2021 seeking orders that;

a. Spent.

b. This Honorable Court be pleased to order the transfer of RUIRU CMELC NO. 135 OF 2020, CONSOLATA WANGUI MURIUKI –VS- THE LAND REGISTRAR RUIRU AND 3 OTHERS currently pending before Principal Magistrates Court at Ruiru to this Honorable Court for hearing and determination

c. Costs be provided for.

2. The application is based on the grounds thereto and the Supporting Affidavit of **Consolata Wangui Muriuki**, the Applicant sworn on even date. She averred that initially she filed her suit in this Court before it was transferred to Ruiru Magistrate Court, *suo moto*. That the suit was registered as RUIRU MCELC No. 135 of 2020 on 9/12/2020 and interim injunctive orders granted in her favor on 23/3/2021. However, that during the main hearing, the 4th Respondent raised a preliminary objection on the Court's pecuniary jurisdiction to hear the suit. This is pursuant to valuation report dated 5/10/2021 in respect of the suit property valuing it at Kshs. 26.4 Million.

3. The application is opposed by the 4th Respondent through his grounds of opposition dated 1/11/2021. The 1st and 2nd Respondents do not oppose the application.

4. The 4th Respondent termed the application as an afterthought having been filed after he raised a Preliminary Objection on the lower Court's jurisdiction. That there is no suit capable of being transferred to this Court and thus Section 18 Civil Procedure Act is inapplicable. Accordingly, that the suit in the trial Court is a nullity which cannot be cured by the transfer orders sought.

5. The application was argued orally before Court on 16/11/2021. The Applicant through her Learned Counsel Kirimi reiterated the contents of his motion as brought under Section 1A and 1B of the Civil Procedure Act. He conceded that the 4th Respondent's counsel objected to the Court's jurisdiction in the lower Court and urged the Court to allow his application

6. In opposition, Learned Counsel Kamau was categorical that Section 18 Civil Procedure Act empowers a Court to transfer suits and that such power can only be exercised where a suit is pending before a Court with competent jurisdiction. That a suit in a Court that lacks jurisdiction is a nullity and a non-starter and as such there is nothing to be transferred. To support that position, he relied on the cases of **Equity Bank Ltd vs Bruce Mutuku, Gaikia Kimani Kiarie vs Peter Kimani Kiramba [2020] eKLR**. He beseeched the Court to dismiss the application.

7. In a brief rejoinder, the Applicant pointed out that it is common ground that the Applicant had rightfully filed her suit before this Court before it was transferred *sua moto* to the lower Court. Further that there is no finding, as yet, that the lower Court suit is in the wrong Court.

Analysis and Determination

8. The germane issue for termination is whether the application is merited.

9. As rightly submitted by the parties Section 18 of the Civil Procedure Act provides;

“18. Power of High Court to withdraw and transfer case instituted in subordinate Court

(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.”

10. Further the Applicant relied on **Sections 1A, 1B, 3A and 4** of the Civil Procedure Act that generally stipulate the overriding objectives, inherent powers and pecuniary jurisdiction of the Court. It is also apparent under Section 18 above, that this Court has power to order transfer and re-transfer of a suit on its own motion or on application by a party.

11. In the celebrated case of **The Owners of Motor Vessel Lilian S Vs Caltex Kenya Ltd. (1989) KLR** it was held that jurisdiction is everything and without it a Court must down its tools. A Court can only exercise jurisdiction conferred upon it by statute or constitution or both. Nothing more or less. So serious is this issue that parties cannot consent to clothe a Court with jurisdiction that it lacks.

12. The Applicant deponed that she had initially filed her suit in this Court before it was transferred to Ruiru *sua moto*. No details were given of such suit and the Respondent did not dispute that averment. Further the Applicant annexed a copy of the valuation report dated 5/10/2021 as annexure ‘**CWMI**’ (sic) which was requested by Mr. Muthoga Ngera (*4th Respondent*) – see page 2 thereof. The *4th* Respondent has not contested that report. If I understand his objection is that, the lower Court lacking pecuniary jurisdiction to hear the suit, there is no suit capable of being transferred. In fact he submitted that suit should be filed in the right forum.

13. The *4th* Respondent cited the case of **Gaikia** supra whose facts are almost similar to the instant case. The Applicant sought to have the lower Court suit (that had been transferred by the ELC Court) transferred back to ELC for hearing. According to him, the trial Court lacked jurisdiction to entertain his defence and counterclaim against the Respondent. Dismissing the application, the Court held that where a Court lacks jurisdiction to entertain a suit before, no order for transfer can be made as the suit is a nullity in law.

14. Similarly, the Respondent relied on the CoA case of **Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour& Travel [2016] eKLR** whereby the Appellant impugned a high Court decision to transfer a suit filed in the lower Court that lacked jurisdiction to entertain it despite a pending Preliminary Objection challenging the same. Allowing the appeal, the Learned Judges held that the High Court should have declined to entertain the application for transfer of suit and instead direct the parties to the trial Court for hearing of the case and/or the pending Preliminary Objection.

15. Recently the Court of Appeal in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga T/A Newspaper Service [2019] eKLR** whereby the main issue on appeal was whether the subordinate Court had jurisdiction in the first place to entertain the Respondent’s suit. According to the Appellant, the Court had no jurisdiction and the suit was a nullity *ab initio* and it could not therefore be transferred to the High Court whether by consent or otherwise. On the other hand, the Respondent’s position was that the subordinate Court had jurisdiction to hear the suit but only award damages that were within its pecuniary jurisdiction. Allowing the appeal, Court emphasized that jurisdiction must exist at the time of filing a suit and the suit having been filed before a Court devoid of jurisdiction, the same was a nullity.

16. The foregoing authorities are all clear that a Court cannot order transfer of a suit before a Court lacking jurisdiction. The facts of the instant case are however distinguished in that the Applicant claims to have filed her original suit before this Court. As already mentioned, no details of such case were given for the alleged the transfer. The Respondent seemed to submit that the instant motion is an attempt to regularize the Applicant’s case having filed a Preliminary Objection in the lower Court. The befitting order in line with the binding Court of Appeal decision finding is that this application fails and parties are directed to prosecute the Ruiru suit as is. That is prosecute the Preliminary Objection if any that is pending hearing and in any event, the Applicant be at liberty to file her case in the right forum.

17. The application is therefore devoid of merit. It is dismissed with costs.

DELIVERED, SIGNED & DATED ON THE 24TH DAY OF FEBRUARY, 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Mr. Kirimi for the Plaintiff

Defendant 1, 2 and 3 – absent

Kamau for 4th Defendant

Ms. Phyllis – Court Assistant