



Baru & another (Suing as the Personal Representatives of the Estate of George Muriithi Gitahi) v Gitahi & 3 others (Environment and Land Miscellaneous Application E047 of 2024) [2025] KEELC 3405 (KLR) (23 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E047 OF 2024
MD MWANGI, J
APRIL 23, 2025**

BETWEEN

**ELIZABETH WAIRIMU BARU 1ST APPLICANT
FELIX GITAHI MURIITHI 2ND APPLICANT
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
GEORGE MURIITHI GITAHI**

AND

**REGINA WAIRIMU GITAHI 1ST RESPONDENT
JOSEPHAT FRANCIS WAINAINA MUTURI 2ND RESPONDENT
JANE WAMBUI WAINAINA 3RD RESPONDENT
SIMON WEKESA WASIKE 4TH RESPONDENT**

RULING

Background

1. The Notice of Motion by the Applicants herein seeks orders that this court be pleased to transfer the suit Kajiado MCELC/E036/2023 from the Kajiado Chief Magistrate’s court to this court for hearing and determination. The Applicants aver that at the time they filed the suit before the Chief Magistrate’s court, the court had the jurisdiction to adjudicate the same since the 4 parcels of land, the subject matter of the suit, were then valued at Kshs. 20,000,000/-. However, the 2nd and 3rd Defendants have since developed the parcels of land and have filed valuation reports indicating that the Chief Magistrate’s Court lacks jurisdiction. They have further proceeded to file a preliminary objection before the trial court arguing that the court lacks the jurisdiction to adjudicate over the suit filed by the Applicants.



2. The averments on the face of the application are repeated in the supporting affidavit of Elizabeth Wairimu Baru sworn on 14th October 2024. She deposes that the 2nd to 4th Defendants in the suit before the Chief Magistrate's Court have filed two valuation reports which indicate that the parcels of land they claim are worth more than Kshs. 20,000,000/- and therefore beyond the pecuniary jurisdiction of the Chief Magistrate's Court.
3. The deponent argues that at the time of filing the suit, she was not aware of the developments on the suit properties. She avers that Section 18 (1) of the Civil Procedure Act empowers this court to withdraw any suit or other proceedings pending in any subordinate court and try or dispose of the same. She further makes reference to various provisions of the Constitution to support her application, principally Articles 48, 50 and 159 of the Constitution. She prays that her application be allowed in the interest of justice.

Response by the Respondents.

4. The 4th Respondent herein filed grounds of opposition dated 8th November 2024 in opposition to the application herein. He termed the application as misconceived, fatally defective, bad in law, and lacking in merit. It therefore ought to be dismissed.
5. The 4th Respondent asserts that a preliminary objection has been raised by the 2nd and 3rd Respondents before the trial and the same is yet to be heard. This application therefore has been brought in bad faith; is a non-starter and is devoid of merit. It is an attempt at forum shopping.
6. The 2nd and 3rd Respondents associated themselves with the grounds of opposition filed by the 4th Respondent. The 1st Respondent however did not participate in the application.

Court's Directions.

7. The court's directions were that the application be canvassed by way of written submissions. The Applicants and the 2nd to the 4th Respondents filed their respective submissions which the court has had an opportunity to read and consider in writing this ruling.

Issues for Determination.

8. Having carefully considered the application, the response by the 4th Respondent and the submissions filed by the parties, the sole issue for determination is whether the application before the court as framed is merited.

Analysis and Determination

9. Section 18 of the Civil Procedure Act gives the High Court the power, either upon an application of any of the parties or on its own motion, at any stage of the proceedings;
 - a. To transfer any suit, appeal or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try it and dispose the same; or
 - b. Withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter;
 - i. Try or dispose of the same; or
 - ii. Transfer the same for trial and 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.



10. In exercising its powers under Section 18 of the Civil Procedure Act, the court is expended to make certain considerations as highlighted in various decided cases. The key issues to be taken into consideration are balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. Courts are further required to consider the real motive or character for transfer of a case from one court to another as observed by Kemei J, in the case of Kirui (suing as the Chairman Kessir Youth Bunge Self Help Group v Kecha Sammy Matonyi t/a Kibochi Ventures (Miscellaneous Civil E007 of 2023) (2023) KEHC 20720 KLR (21 July 2023), ruling, quoting the case of Hangzhon Agrochemicals Industries Limited v Panda Flowers Limited (2012) eKLR.
11. The factors to be considered include the motive and nature of proceedings, the nature of relief sought and the interest of the litigants and the more convenient administration of justice, the expenses which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of the justice and possibilities of undue hardship. The burden is upon the Applicant to convince the court that he has good grounds to support the transfer of the case. The law is however well settled that lack of jurisdiction cannot be the basis of a transfer of a case under Section 18 of the Civil Procedure Act.
12. The Court of Appeal was emphatic on the issue in its decision in the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tours & Travel (2016) eKLR, where it stated as follows;

“In numerous decided cases, courts, including this court have held 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 to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court with jurisdiction would be to muddle up the waters and allow confusion to reign. A court of law cannot through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”
13. It is clear to my mind from the reading of the application and the response thereto that the filing of the application before me was prompted by the filing of a preliminary objection challenging the jurisdiction of the trial court to entertain the suit before it. It is obviously an attempt to pre-empt the ruling of the trial court on the preliminary objection. Clearly, from the above cited decisions, the ground of lack of jurisdiction of the court cannot be the basis of transfer under Section 18 of the Civil Procedure Act.
14. Consequently, the application dated 14th October 2024 is unmerited. I dismiss it with costs to the Respondents.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 23RD DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mugwuku for the 2nd & 3rd Respondents

Mr. Leibor for the 4th Respondent



N/A for the applicants and the 1st Respondent

Court Assistant: Mpoye

