



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC MISC. APPLICATION NO. 44 OF 2020

JOHN MUCHIRI GIKERA.....APPLICANT

VS

JOHN MAINA MBURU.....ST RESPONDENT

GEORGE MWANIKI RUGU.....^{2ND} RESPONDENT

MARGARET WAMBUI NDAMBIRI.....^{3RD} RESPONDENT

PETER NJOROGE MUNGA.....^{4TH} RESPONDENT

MOUNTAIN TOP PUBLISHERS LIMITED.....^{5TH} RESPONDENT

LAND REGISTRAR RUIRU.....^{6TH} RESPONDENT

EQUITY BANK (KENYA) LIMITED.....^{7TH} RESPONDENT

RULING

1. The Applicant filed the instant Notice of Motion dated 25th November 2020 seeking Orders THAT;

a. This Honorable Court be pleased to issue an order transferring MCL & E NO. 95 OF 2019, between John Muchiri Gikera and John Maina Mburu and 7 Others at Senior Principal Magistrate's Court at Ruiru to Environment and Land Court at Thika.

b. Costs be in cause.

2. The Application is based on the grounds thereto and the Supporting Affidavit of **John Muchiri Gikera**, the Applicant, sworn on even date. He averred that the 5th Respondent has filed a List of Documents dated 5/11/2019 which disclose the presence of the 7th Respondent's charges on the suit property. That the first charge was in respect of Kshs. 17, 000,000/= followed by a further charge on 26/6/2019 for Kshs. 54,000,000/= which is beyond the pecuniary jurisdiction of the Senior Principal Magistrate's Court. He urged the Court to allow the Application as drawn.

3. The Application is opposed. The 5th Respondent's Director **Lawrence Njagi** swore a Replying Affidavit and Further Affidavit dated 12/1/2021 and 5/5/2021 respectively. He deponed that the Applicant admitted in the trial Court that the suit land (*namely RUIRU KIU BLOCK 2/3976*) is valued at over Kshs. 50M way beyond the pecuniary jurisdiction of Kshs. 15M of the Ruiru Senior Principal Magistrates Court. He annexed a copy of the trial Court proceedings as **LN1**. That accordingly, the trial Court proceedings were a nullity for want of jurisdiction and the trial Court file was closed.

4. Additionally, the Applicant filed a Supplementary Affidavit dated 16/7/2021. He maintained that the issue of pecuniary jurisdiction arose when the 5th Respondent filed his List of Documents dated 9/11/2019 which revealed the charge details on Ruiru/Kiu Block 2/8047. That the charge for Kshs, 17M was created on 18.1.12 whilst the Kshs. 54M further charge was created on the 26.9.19. That the said information prompted his advocates to file an Application to enjoin the 7th Respondent in the impugned proceedings.

5. Directions were taken on 31/5/2021 to canvass the Application by way of written submissions.

6. On behalf of the Applicant, the firm of **Prof. Kiama Wangai & Co. Advocates** filed submissions dated 16/7/2020 (*sic*). Rehashing the contents of the Application, the Replying Affidavit and trial Court proceedings, it was submitted that the trial Court directed that an Application be made before a competent Court to transfer the suit hence the Application. That Section 18 of the Civil Procedure Act (CPA) empowers this Court to order transfer of suits from any subordinate Court to it for final disposal.

7. The firm of **Kanyi Kiruchi & Co. Advocates** filed submissions dated 7/7/2021 on behalf of the 1st, 2nd, 3rd, 4th and 5th Respondents. Two issues were drawn for determination to wit; whether this Court can transfer a closed file for want of jurisdiction and who is liable to pay costs. They submitted that jurisdiction is either present *ab initio* or totally absent. That as evidenced by annexure LN1 the trial Court was bereft of jurisdiction to entertain the suit and the suitable remedy is fresh filing of the suit in a competent Court. Reliance was placed on the cases of **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) LTD (1989)** and **Macfoy v United Africa Co. LTD [1961] 3 All ER, 1169** as quoted in the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

8. On the issue of costs, they insisted that costs follow the event and in this case the Respondents (*sic*) ought to pay the same.

9. The 6th and 7th Respondents did not oppose the Application.

10. The germane issue for determination is whether the Application has merit.

11. As rightly submitted by the parties **Section 18** of the CPA 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.

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

13. 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 when the same is lacking.

14. The Applicant has illustrated that upon learning of the charges on the suit land, his Advocates duly informed the trial Court. Conceding the value of the said charges, the Court held that it lacked pecuniary jurisdiction to hear the suit and advised him to file an Application to transfer the suit. The Respondents admit this set of facts. Their only bone of contention is that there is no suit capable of being transferred in the eyes of the law. That upon reaching a conclusion that the Court lacked jurisdiction, the entire proceedings before it were a nullity and the available option is for the Applicant to file a fresh suit before a competent Court.

15. Recently the Court of Appeal in **Phoenix** supra 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, the 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. Similarly, the Court of Appeal considered the issue of transfer of suit in the 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.

17. The foregoing authorities are all clear that a Court cannot order transfer of a suit before a Court lacking jurisdiction. Jurisdiction being the lifeline of a Court, it is my considered view that jurisdiction must be present during the filing of the suit, the prosecution and the determination of the suit. If the veins of jurisdiction run dry at any stage then the Court must down its tools and take no step. In this case there is no suit capable of being transferred in the instant so much so that the Learned Hon Magistrate indeed closed the file for want of jurisdiction.

18. In the upshot I find the Application is bereft of merit and I proceed to so dismiss it with costs to 1st – 5th Respondents.

19. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 21ST DAY OF APRIL 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Prof. Wangai for the Applicant

Ms/ Muchemi for 1st – 5th Respondents

6th Defendant: Absent

Maina H/b for Dennis Juma for 7th Respondent

Court Assistant: Phyllis