



REPUBLIC OF KENYA



KENYA LAW
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**Onunga v Onyango & 4 others (Miscellaneous Civil Application
E8 of 2021) [2022] KEELC 3659 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E8 OF 2021**

**A OMBWAYO, J
MAY 13, 2022**

BETWEEN

ROSE AKINYI ONUNGA APPLICANT

AND

CHARLES AKETCH ONYANGO 1ST RESPONDENT

HENRIETA ANNA ONDIELO 2ND RESPONDENT

BEATRICE RAKURU 3RD RESPONDENT

FREDRICK OTIENO ODHIAMBO 4TH RESPONDENT

LAND REGISTRAR 5TH RESPONDENT

RULING

1. The Applicant herein filed a Notice of Motion Application on March 18, 2021 under sections 1A, 1B, 3A and 18 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* seeking for the following orders:
 1. That this matter be certified urgent and service thereof be dispensed with in the first instance.
 2. That this Honourable court be pleased to withdraw and transfer Kisumu CMC ELC No. 440 of 2018 to the Environment and Land Court.
 3. That upon granting prayer (b) above as a means of final disposal of this suit the Honourable court be pleased to hear and determine the suit herein.
 4. That the costs of this Application be provided for.
2. The Application was based on grounds that the Plaintiff/Applicant herein filed a suit against the Defendants/Respondents in the subordinate court to wit Kisumu CMC ELC Case No. 440 of 2018



and the subject matter of the suit filed by the Applicant in the subordinate court was the gist of another matter filed in the Probate and Administration Division of the High Court at Kisumu In Kisumu High Court Succession Cause No. 1226 of 2014.

3. The High Court at Kisumu delivered its decision in the succession cause which decision therefore has significant impact on the suit filed by the Applicant in the subordinate court and the subordinate court in which the Applicant filed her suit has no jurisdiction to make a binding decision overturning the findings of the High Court at Kisumu which heard the succession cause.
4. That this court has equivalent jurisdiction to the High Court and can therefore make a binding decision overturning the decision of the High Court in the succession cause. That it is in the interest of justice and fair play that the orders sought be granted as no prejudice whatsoever shall be occasioned to the Respondents of the orders sought are granted and that the Application has been made in good faith and without inordinate delay.
5. The Application was supported by the Affidavit of Rose Akinyi Onunga who deposed and stated that she filed a land case against the Respondents in the subordinate court in Kisumu being Kisumu CMC ELC Case No. 440 of 2018 and subsequent to filing the suit in the subordinate court the suit was fixed for pre-trial and a date finally set for hearing of the main suit.
6. She stated that when the matter in the subordinate court was coming for hearing on the material day the Respondents' counsel informed the trial court that there is a Judgment that had been delivered by the High Court at Kisumu in a succession cause and that the subject matter and some parties were similar to the ones before the trial court.
7. It was the Applicant's case that counsel on record thereafter sought for a copy of the Judgment and advised her accordingly on the way forward. That upon perusal of the Judgment her Advocate discovered that the High Court had made findings touching on the subject matter of the suit before the subordinate court and such findings had significant impact to her suit.
8. She further stated that her Advocate advised her that the subordinate court cannot interfere with the findings of a superior court and therefore the subordinate court lacks jurisdiction to hear the suit and that this court has equivalent jurisdiction to the High Court that heard the succession cause thus prompting the present application seeking withdrawal and transfer of the suit from the subordinate court to the Environment and Land Court.
9. The 2nd and 3rd Respondents herein filed grounds of opposition to the Application on April 15, 2021 on grounds that:
 - a) The application is incompetent, frivolous and vexatious and ought to be dismissed with costs.
 - b) The Applicant is seeking to challenge the judgment of a high court sitting in a succession cause in the Environment and Land Court despite the fact that the courts exercise concurrent jurisdiction.
 - c) The Applicant is seeking to appeal against Judgment of the High Court in a succession matter in the Environment and Land Court.
 - d) The Application is a clear abuse of the court process and a tactic which is intended to create a legal morass, frustrate the 2nd and 3rd Defendants/Respondents and elevate expenses unnecessarily.
 - e) The Application is misconceived for the reason that if the Applicant is dissatisfied with the decision of Hon. T.W Cherere in Succession Cause No. 1226 of 2014 and has prospects of



overturning such decision then her only recourse is to file an appeal or review and not to transfer the case from one court to another.

10. The matter came up before court for Mention on 25th October 2021 where parties were directed to file and serve submissions.

Applicant's Submissions

11. The Applicant filed submissions on March 17, 2022 where she submitted that this court has statutory power to withdraw and transfer any suit from the subordinate court and proceed to hear and determine the same. It was stated that the High Court in the succession cause delivered its judgment which was in relation to land parcel number Kisumu/Chiga/3169 whereas the Applicant seeks the cancellation of several title deeds besides the ones cited by the 2nd Respondent.
12. It was the Applicant's submission that she was not a party to Succession Cause before the High Court and the fact that the superior court had dealt with a Succession cause that touched on one of the parcels that formed part of the Plaintiff's claim in the subordinate court is what prompted the Applicant to file this Application before this court which constitutionally is equivalent to the High Court and this is for purposes of uniformity with regards to Jurisdiction and therefore this court has jurisdiction to hear and determine the issues pertaining to other land parcels which were not dealt with in the Succession Cause and that it will also settle the issue of ownership which is purely the substratum of the Plaintiff's suit in the subordinate court.
13. She stated that Counsel for the 2nd Respondent has irregularly filed submissions on behalf of the 1st and 3rd Respondents and that the Grounds of Opposition dated April 16, 2021 is not properly before the court since it was filed on April 15, 2021 whereas the Grounds of Opposition is dated April 16, 2021. She further stated that only the 2nd Respondent has filed Grounds of Opposition while the other Respondents do not oppose the Application to have the subordinate suit withdrawn and transferred to this court.
14. It was stated that the Grounds of Opposition filed by the 2nd Respondent do not elucidate the real issues by the Respondent save for the issue of the High Court having presided over a Succession Cause to suit Succession Cause No. 1226 of 2014 in which only one parcel of land being Kisumu/Chiga/3169 was dealt with while in the subordinate court the Applicant seeks to have several title deeds being Kisumu/Chiga/3170, 3545 and 3544 to be cancelled and revoked.
15. It was therefore submitted that at this stage this court is only being asked to withdraw and transfer the subordinate court suit as it has discretionary powers to withdraw and transfer any suit from the subordinate court. The Applicant therefore prayed that the Application be allowed with costs.

1st, 2nd and 3rd Respondents' Submissions

16. The 1st, 2nd and 3rd Respondents filed their submissions on February 25, 2022 where a number of issues were raised for determination which are discussed below:
 - a) Whether the Environment and Land Court has jurisdiction to overturn the decision of the High Court.
 - b) Whether the Plaintiff/Applicant's Application is merited.
 - c) Who should bear the costs of the said Application.
17. It was stated that jurisdiction of a court can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in the constitution or in statute as



was held in the case of *Samuel Kamau Macharia & Another v Commercial Bank Limited & 2 Others* (2012) eKLR.

18. It was further stated that the Environment and Land Court has the same status with High Court as provided for under Article 165(2) and 162 (2) of the *Constitution*. That the Applicant cannot purport to challenge the decision of a court in another court of concurrent jurisdiction as was held in the case of *Stephen Mwaura Njuguna vs Douglas Ngotho & Another* (2012) eKLR.
19. It was submitted that the Applicant cannot not transfer the instant suit from the subordinate court to the Environment and Land Court in a bid to challenge the decision of the High Court that handled succession cause and if the Applicant is dissatisfied with the decision of the High Court, he can either choose to apply for a review of the decision of Cherere J or elect to appeal in the court of Appeal. The 1st, 2nd and 3rd Respondents therefore prayed that the suit be dismissed with costs to the 2nd and 3rd Respondents.

Analysis and Determination

20. The Applicant herein in KisumuCMC ELC No. 440 of 2018 sued the Respondents herein seeking for an order of permanent injunction restraining the Respondents, their employees, servants and or agents from subdividing, transferring or dealing with land parcels no. Kisumu/Chiga/3170,3169,3545 and 3544, an order of revocation and cancellation of all the titles emanating from land title number Kisumu/Chiga/2396 and costs and interest of the suit.
21. I have also looked at the Judgment of the Kisumu High Court Succession Cause No. 1226 of 2014 between Charles Aketch Onyango and Henrieta Anna Ondielo where the court dismissed an Application filed by Charles Aketch Onyango seeking for revocation of the Letters of Administration and for cancellation of the transfer in favour of the Petitioner and her two sons and the same be registered in the name of the Objector and the deceased. It is clear from the Judgment that the subject matter of the suit was Kisumu/Chiga/2396 which was subdivided into for portions namely land parcel number Kisumu/Chiga/3169,3170,3171 and 3172. It was noted that Kisumu/Chiga/3171 was subsequently subdivided into land parcel number Kisumu/Chiga/3544 and 3545.
22. The Applicant in the present suit filed this Application seeking for orders that this court be pleased to withdraw and transfer KisumuCMC ELC NO. 440 of 2018 to the Environment and Land Court, that upon granting prayer(b) as means of final disposal of this suit, the Honourable Court be pleased to hear and determine the suit herein and that costs of this Application be provided for.
23. In line with the jurisdiction of this court to hear and determine disputes relating to the environment and the use and occupation of and title to land as provided for under Article 162(2) (b) of the *Constitution* of Kenya, 2010 and at Section 13 of the *Environment and Land Court Act*, 2011. The said Section 13 provides as follows:
 13. Jurisdiction of the Court
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes—



- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.

24. The *Magistrates' Courts Act*, 2015 under Section 9 (a) provides:

A magistrate's court shall -

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -
 - (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally.

25. Justice M.C. Oundo in the case of *Rebecca Chumo v Christina Cheptoo Chumo* [2021] eKLR stated in paragraph 14 that Section 18 of the *Civil Procedure Act* bestows upon the High Court (read ELC) the powers to transfer suits of a civil nature. The said provisions of the law provides 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”.

26. In the case of *Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another* [2012] eKLR, the Court held as follows; -

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi v Musiramo (supra)*, Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In *Ali Abdi Sheikh v Edward Nderitu Wainaina & Others (supra)*, Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited v National Bank of Kenya*[2010] eKLR”

27. In the case of *Boniface Waweru Mbiyu v Mary Njeri & Another* [2005] eKLR the court had held that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

28. In the case of *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR the Court held that: -

“Furthermore, according to *Kagenyi v Musiramo and Another, supra*, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”

29. The Applicant in her Replying Affidavit stated that the High Court in the Succession matter had made findings touching on the subject matter of the suit before the subordinate court and such findings had significant impact in here suit and that the subordinate court cannot interfere with the findings of a superior court and therefore the subordinate court lacks jurisdiction to hear the suit. She further alleged that this court has equivalent jurisdiction to the High Court that heard the succession matter.

30. It should be noted that only the 1st and 2nd Respondents were parties to the High Court Succession cause and that the Applicant herein was not a party to the Succession Cause. It is this court’s view that if the subordinate court lacked jurisdiction to hear and determine the matter before it, this court does not have jurisdiction to transfer Kisumu CMC ELC 440 of 2018 to the Environment and Land Court. The Applicant herein ought to have been careful before instituting a suit in the subordinate court by ascertaining whether the subordinate court has jurisdiction to determine the suit or not. This Application is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022



ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

