



**Kinyanjui v Mbugua (Environment & Land Miscellaneous Case
E004 of 2022) [2022] KEELC 2903 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND MISCELLANEOUS CASE E004 OF 2022**

JM MUTUNGI, J

JUNE 30, 2022

BETWEEN

VIVIAN WANJIRU KINYANJUI PLAINTIFF

AND

MARY NYAMBURA MBUGUA DEFENDANT

RULING

1. The plaintiff/applicant instituted ELC case No.215 of 2021 vide a plaint dated December 8, 2021 at Nakuru Chief Magistrate Court. The plaintiff amongst other prayers sought judgment against the defendant for a declaration that she was entitled to exclusive and impended right of possession and occupation of land parcel Miti Mingi/Mbaruk Block 8/1197 (Kianjoya D) (herein after referred to as “the suit property”), vacant possession and general damage for trespass.
2. By a Notice of Motion application dated 25th February 2022 the plaintiff /applicant seeks an order that Nakuru CM ELC No 215 of 2021 be withdrawn from the subordinate court and the same be transferred to this court for trial and disposal. The applicant premises the application on the grounds set out on the body of the application inter alia that at the time of the institution of the suit the value of the suit property based on the applicant’s sale agreement was Kshs 17,000,000 but that the respondent has obtained a valuation of the suit property at Kshs 75,000,00 though the applicant’s valuer has placed a valuation of the property at Kshs 19,000,000. The application was further supported on the annexed affidavit sworn by Vivian Wanjiru the plaintiff/applicant.
3. The defendant filed a replying affidavit sworn on March 17, 2022 in opposition to the applicants application. The defendant vide the replying affidavit avers that in the lower court she had raised a preliminary objection that the court lacks the pecuniary jurisdiction to deal with the matter and that the court had scheduled the matter for directions on May 19, 2022 and hence the applicant’s instant application was premature. The defendant contends that as the issue of jurisdiction as pending



determination before the lower court, the applicant's application before this court is vexatious as it seeks to pre-empt the finding of the lower court on its jurisdiction.

4. The respondent further avers the applicant is not candid as upon making complaint to the CID on the alleged trespass by the respondent, the applicant furnished the CID with a copy of sale Agreement dated 9th July 2021, that showed the purchase price for the suit property was Kshs 25,000,000 yet the sale agreement she annexed in support of her application showed the purchase price was Kshs 17,000,000. The respondent further avers the applicant's valuer grossly undervalued the property at Kshs.19,000,000/= while her valuer has placed the value of the suit property at Kshs 75,000,000. The valuation by the respondent's valuer was made in January 2022 while that of the applicant's valuer was made in 2022.
5. The applicant filed a further affidavit in reply to the respondent's replying affidavit and by way of explaining the existence of two conflicting sale agreements she stated the agreement showing the consideration for the purchase of the land at Kshs 25,000,000 was made as part of the initial negotiations and that upon conclusion of the negotiations the value was set at Kshs 17,000,000 and the transaction concluded on that basis.
6. The parties canvassed the application by way of written submissions which I have duly considered. The issue for determination is whether the applicant has made a basis to justify the transfer of the suit pending before the lower court to this court. The applicant has invoked section 1A, 1B and 3A of the Civil Procedure Act that enjoin the court to endeavor in all matters to seek to give effect to the overriding objective of the Act, which is to render substantial justice in a just, efficient and timely manner and at a cost affordable to the parties ("oxygen Principle"). The application is further premised on section 18 of the Civil Procedure Act which empowers the court in appropriate cases to transfer cases instituted in the subordinate courts. Although section 18 of the Civil Procedure Act does not spell out the factors that a court may consider in deciding whether to transfer a suit from the subordinate courts, the courts have in determining such applications, established some of the factors to be considered as, the convenience of the parties, the financial implications, the residences of the parties and distances the witnesses and/or the parties may require to cover to access the court.
7. The respondent has contended that the lower court lacked the pecuniary jurisdiction to entertain the suit since its pecuniary jurisdiction by virtue of section 7 of the Magistrate's Courts Act is limited to a maximum of Kshs.20 million. The respondent points to the sale agreement dated July 9, 2021 which the applicant furnished to the offices of the CID for investigation of a claim of trespass by the defendant onto the suit land. The applicant does not deny the existence of the Agreement but explains it was drafted in the course of the negotiations but the parties eventually agreed at the purchase price of Kshs.17,000,000/=. The applicant however did not explain how the sale Agreement for Kshs.25 million and the one for Kshs.17 million were both signed and attested on the same date by the same advocate Wangui Kinyanjui on July 9, 2021. The respondent additionally contended the applicant deliberately caused the property to be grossly undervalued by her valuer in order to fit in her fraudulent scheme to wrestle the property from the defendant/respondent. The respondent has further submitted that having raised a preliminary objection to the jurisdiction of the lower court, this court would be acting pre-maturing in entertaining the present application.
8. The applicant has submitted that the court's power to transfer a suit is discretionary. She submitted that the court ought in determining whether to transfer a suit from the lower court, consider the interests of justice and whether any party will be occasioned any prejudice. She placed reliance on the case of Crest Security Service Ltd -vs- Multiple ICD Kenya Ltd (2020) eKLR. In the case though PJO Otieno, J held the Chief Magistrate's court Mombasa lacked jurisdiction to determine the matter, he invoked the overriding objective of the court to administer justice efficiently and ordered that in the interest



- of doing substantial justice that the suit be transferred to Mombasa High Court Civil Division for hearing and determination.
9. The defendant for her part submitted that if the lower court lacked jurisdiction to entertain the suit, the suit filed before it was a nullity and could not be transferred since there was in reality nothing to transfer. She argued firstly, that as the issue of jurisdiction had been taken up before the Chief Magistrate's Court, that court ought to be allowed to pronounce itself on the issue. In that regard she relied on the case of *Boniface Waweru Mbiyu -vs- Mary Njeri & Another* (2005) eKLR. Secondly, she submitted that a matter could only be transferred if the court before which it is pending had initial jurisdiction over the matter and for this submission the defendant placed reliance on the case of *Gaikia Kimani Kiarie -vs- Peter Kimani Kiramba* (2020) eKLR.
 10. I have considered the rival submissions of the parties. The applicant's position is that at the time of filing the suit the Chief, Magistrate's Court had the pecuniary jurisdiction based on the agreement for sale. She attached the agreement for sale indicating the purchase price to have been Kshs.17 million in July 2021. In case this was the agreement that was furnished to the advocate while drawing the pleadings for filing the suit, the advocate cannot be faulted for filing the suit before the Chief Magistrate's Court. There is no requirement that before a suit is filed a valuation report of the subject matter be furnished. The respondent for her part maintained the value of the suit property was well over the pecuniary jurisdiction of the magistrates court pointing to the sale agreement that indicated the purchase price was Kshs.25 million but which the applicant stated was drafted in the course of negotiations but was not the agreement that was used to conclude the transaction. There was also the two conflicting valuation reports, one for Kshs.19 million and the other for Kshs.75 million.
 11. The plaintiff claims ownership of the suit property and the defendant, as is evidenced by the defendant's defence and counter claim equally claims ownership of the suit property. The defendant's position is that the value of the land the subject matter of the suit was well above the jurisdiction of the magistrates court. The plaintiff takes the position that the magistrate's court had jurisdiction at the time the suit was filed but in view of the defendant's assertion that the magistrate's court lacked pecuniary jurisdiction she was prepared to have the suit withdrawn and transferred to this court for hearing and determination.
 12. It appears to me the value of the subject matter is disputed and there are conflicting documents in form of sale agreements and valuation reports that support the positions taken by either of the parties. The ultimate issue ought to be the determination of the ownership of the suit property. The determination of the jurisdictional issue of the Magistrate's court will not resolve the issue. There is no dispute that this court would have the jurisdiction to determine the suit on its merits. I do not consider postponing the day of reckoning would be advantageous to either of the parties. Even if the Magistrate's Court was to find it lacked jurisdiction to handle the matter, it would mean having to have the suit struck out and/or dismissed for the parties to initiate an appropriate suit before a competent court.
 13. On the basis of the facts presented by the parties, the court cannot outrightly find the chief magistrate's court lacked jurisdiction at the time the suit was instituted without making some detailed inquiries which could perhaps entail seeking to be advised what the value of the property was at the time the suit was filed. As observed both the plaintiff and the defendant claim ownership of the suit property and this is the issue which ultimately requires to be determined. It has not been demonstrated by any party that they stand to suffer prejudice if the suit is ordered transferred to this court for hearing and determination. Sections 1A and 1B of the *Civil Procedure Act* enjoins the court to foster the overriding objective of the Court to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act. It would be inimical and an affront to furthering the overriding objective of the Act, if the court was to apply a straight jacket interpretation of the law and the



rules to the prejudice of administering substantial justice without paying undue regard to procedural technicalities.

14. In the present matter the court is satisfied that indeed the value of the land the subject matter of the suit in the lower court may very well have outstripped the pecuniary jurisdiction of the Magistrate's court but when did that happen? It would not be serving the interests of justice to have the suit in the lower court annulled when it is not absolutely clear the court lacked jurisdiction. That would be to take the parties back to the beginning, and of necessity that would require that a fresh suit be filed before a court with jurisdiction and that would entail additional expenses and delay contrary to the dictates of section 1B of the *Civil Procedure Act* which provides as follows: -

1B Duty of Court

- (1) 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

15. I am in the premises persuaded the applicant's application is not without merit and I allow the same in terms of prayer (3) of the Notice of Motion. The costs of the application shall abide the outcome of the suit.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF JUNE 2022.

J M MUTUNGI

JUDGE

