



Gitehi & 2 others (Suing on behalf of Kirimukuyu Residents) v Trustees Presbyterian Foundation & 4 others; National Land Commission (Interested Party) (Environment and Land Miscellaneous Application E009 of 2021) [2022] KEELC 3744 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3744 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2021

JO OLOLA, J

JUNE 9, 2022

BETWEEN

GITHINJI GITEHI 1ST PLAINTIFF

NDERITU GITHUA 2ND PLAINTIFF

MBUTHIA KAMONJO 3RD PLAINTIFF

SUING ON BEHALF OF KIRIMUKUYU RESIDENTS

AND

TRUSTEES PRESBYTERIAN FOUNDATION 1ST RESPONDENT

LYDIAH NGAHU SESSION CLERK TUMUTUMU WEST

PARISH 2ND RESPONDENT

J M MBAE – PARISH MINISTER TUMUTUMU PARISH 3RD RESPONDENT

COUNTY GOVERNMENT OF NYERI 4TH RESPONDENT

LAND REGISTRAR – NYERI COUNTY 5TH RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. By their Notice of Motion dated July 9, 2021 and filed herein on July 14, 2021 Githinji Gitehi, Nderitu Guthua and Mbuthia Kamonjo on behalf of Kirimukuyu residents (the plaintiffs/applicants) pray for an order that this court be pleased to transfer MCELC/E004 OF 2021 from the Resident Magistrate's court at Karatina to this court for hearing and determination.



2. The application which is supported by an affidavit sworn by the plaintiffs' Advocate on record Stephen Gichuki Wanjohi is based on the grounds:
 - (i) That the plaintiffs had filed the said suit before the Resident Magistrates Court at Karatina;
 - (ii) That the matter proceeded for determination of the preliminary objection application which was dismissed with costs but it was later realized that the court lacked pecuniary jurisdiction to hear the matter.
 - (iii) That there is need to have the matter transferred to this court that has appropriate jurisdiction; and
 - (iv) That the Respondents will suffer no prejudice if the orders herein sought are granted.
3. The application is opposed by the 1st to 4th respondents. In a replying affidavit sworn on their behalf by the 3rd respondent – Japson Micheni Mbae, the respondents aver that the application is misconceived, incompetent, bad in law and untenable. The respondents assert that it would be illegal for this court to use its power under section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction as there is no competent suit that exists in the Lower Court.
4. The respondents further aver that pursuant to the Lower Court's orders of June 24, 2021, they filed a Valuation Report which puts the value of the land in dispute at Kshs.34,600,000/-. It is accordingly their case that the application lacks merit and that the same ought to be dismissed with costs.
5. I have carefully perused and considered the application and the response thereto. I have similarly considered the rival submissions placed before me by the Learned Advocates acting for the parties.
6. The three applicants herein describe themselves as residents of Kirimukuyu who have brought the suit both in their individual capacities and on behalf of other residents of Kirimukuyu. From the material placed before me, the applicants are the plaintiffs in Karatina PMELC No. 4 of 2021 wherein they have sought a number of orders against the respondents herein.
7. From the affidavit filed by their Advocate on record in support of the application, they assert that it was realized after the suit was filed that the value of the land was in excess of Kshs.7 million and that therefore the Magistrates Court at Karatina lacked the pecuniary jurisdiction to hear and determine the same. As a result, the applicants by this present application urge this court to have the matter transferred to itself for hearing and determination.
8. Section 18 (1) of the *Civil Procedure Act* bestows upon this court the power to transfer suits of a civil nature in the following manner:
 - (1) On the application of any of the parties 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 proceedings 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.”

9. As was stated in *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another* [2012] eKLR:

“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 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.”

10. Dealing with a similar issue in *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR, Prof. J. B. Ojwang J (as he then was) expressed himself as follows:

“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.”

11. Guided by the above decisions, it is trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 of the *Civil Procedure Act*. In that respect, I am persuaded by the Respondents submissions that the suit pending as filed by the plaintiffs before the Karatina Principal Magistrates Court is incompetent and incapable of being transferred as sought by the Applicants.

12. It follows that the Motion dated 9th July, 2021 must fail. It is dismissed with Costs to the respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 9TH DAY OF JUNE, 2022.

In the presence of:

Mr. Theuri holding brief for Wahome Gikonyo for the 1st to 4th Defendants

Mr. Wanjohi for the Applicant

Court assistant - Kendi**

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J. O. Olola

JUDGE

