



REPUBLIC OF KENYA



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**Rimber v Unifresh Exotic (K) Limited (Environment & Land Case
427 of 2017) [2022] KEELC 2204 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 427 OF 2017**

LL NAIKUNI, J

JUNE 9, 2022

BETWEEN

CECILIA MUMBI RIMBER APPLICANT

AND

UNIFRESH EXOTIC (K) LIMITED RESPONDENT

RULING

I. Preliminaries

1. What is before this Honorable Court for its determination is a Notice of Motion application dated 14th February 2022. It was filed by the Defendant/Applicant herein. The application is brought under the provisions of Sections 3A, 11, 12 and 13 of the Civil Procedure Act Cap 21 Laws of Kenya and Rule 14 of the Environment and Land Court directions, 2014.

II. The Defendant's Case

2. The said application seeks for the following orders: -
 - a. That Kwale ELC Case No. CMCC No. 158 of 2021 (Formerly Mombasa ELC case No. 427 of 2017) be and is hereby transferred from the Chief Magistrate Court at Kwale for hearing and final determination.
 - b. That Costs of this application be provided for.

It is founded on the grounds, testimony and averments of the 7th Paragraphed Supporting Affidavit of Gibson Kabue, the legal officer of the Defendant's Company sworn on 14th February 2022. He deponed that the land parcel that is subject matter of the suit that is Land Reference Numbers Kwale/Mnasini/663 which is situated within County of Kwale. He averred that the Court presided by the Chief Magistrate at Kwale has pecuniary jurisdiction to hear and determine the said suit. He deponed that the transfer would save both the Court's



and the parties' to the suit time. He stated that the Plaintiff would not suffer any prejudice if the said orders sought are granted.

III. The Plaintiff's Case

3. The application was opposed by the Plaintiff through a 14th Paragraphed Replying Affidavit sworn by Cecilia Mumbi Rimber and dated 21st February 2022. It was filed in Court on 8th March 2022 and three (3) annexures marked as "CRM – 1 to 3" annexed thereto. It stated that on the 24th August, 2021, this suit was transferred to the High Court in Kwale for hearing and given a new number, to wit Kwale ELCC NO. 158 OF 2021.

She deponed that on 9th December, 2021, when both parties appeared before the only sitting ELC Judge at Kwale ELC Court (Honourable Addressa Dena), the Honourable Judge recused herself for the rightful reason that she knew the husband and the Plaintiff at a personal level and therefore to continue handling the matter would bring in conflict of interest.

4. The Plaintiff averred that in the given circumstances, the Judge at the ELC Kwale directed that the file be re – transferred back to Mombasa ELC for a mention on the 20th December, 2021 before the Presiding Judge to give further directions. On the 20th December, 2021 the suit was listed for mention before Hon Justice Sila Munyao, under its original number, that is, Mombasa ELC NO. 427 OF 2017 (formerly KWALE ELC 158 OF 2021), and the Judge directed that it be mentioned on 22nd February, 2022 before Hon. Justice Naikuni for directions on hearing. The Plaintiff deponed that the application by the Defendant was incompetent for the reason that this suit, having been transferred to Mombasa, it was no longer a subject to the jurisdiction of the ELC Kwale. She stated that the proper court to give any further directions herein is the Mombasa Environment and Land Court.
5. The Plaintiff further averred that the Defendant had neither stated the value of the land nor annexed any document thereof to justify their assertion that the suit property fell within the pecuniary jurisdiction of the Chief Magistrate's Court in Kwale. She averred that the Defendant had been in occupation and using the suit land since August 2014 to grow sugarcane for commercial purposes while deliberately refusing to pay the balance of the purchase price or vacate suit land. The Plaintiff posited that if the Defendant genuinely wished to have the suit heard and determined in Kwale, they would have filed this application immediately upon being served with summons to enter appearance on 1st December, 2017.
6. The Plaintiff concluded by stating that this was another ploy by the Defendant to continue delaying the hearing of the suit through brazen abuse of the court process. This was done as they continued making profit from her land through sale of sugarcane grown thereon since August 2014. That it was her humble prayer that the suit proceeds for hearing before Mombasa Environment and Land Court as scheduled, to avoid any further delays occasioned by the Defendant.

IV. The Plaintiff's Grounds of Opposition

7. In addition, on 8th March, 2022, the Plaintiff filed in Court a five (5) points Ground of Opposition application dated 21st February 2022 dated 21st February, 2022. The Plaintiff averred that the application filed in the Kwale Environment and Land Court (Kwale ELC No. 158 of 2021) was incompetent and fatally defective for the reason that the suit has already been transferred to the Mombasa Environment and Land Court.
8. The Plaintiff stated that the previous suit no longer existed and that the Defendant had neither stated, nor annexed any document to illustrate the value of the suit land. Hence failing to justify its transfer to Chief Magistrate's Court in Kwale. The Defendant having been served with summons to enter



appearance on 1st December, 2017 was guilty of inordinate delays thus not deserving of the orders sought.

9. The Plaintiff averred that the application by the Defendant was yet another ploy to delay the hearing of this suit. She held that that was being done while continuing to occupy the Plaintiff's land and unlawfully making profits from the suit land since August, without paying the agreed purchase price. She prayed for the application dated 14th February, 2022 by the Defendant to be dismissed with costs.

V. Submissions

10. On 24th April 2022 while all parties were present in Court, the Honorable Court directed that the Notice of Motion be canvassed by way of oral submissions. Pursuant to that, on the 24th May 2022, they all complied and the ruling date was reserved for the 7th June, 2022.

A. The Defendant's Written Submissions

11. The Learned Counsel, Mr. Njuru for the Law firm of Messrs. Lloyd & Partners Advocates for the Defendant submitted that they had filed in Court the Notice of Motion application dated 14th February 2022 and it's supporting affidavit by Gibson Kabue. He stated that they were seeking for the transfer of the suit to the Chief Magistrate Court Kwale under the provisions of Section 18(1) of the Civil Procedure Act, Cap. 21 which prescribed for a transfer of a suit to the lowest court of competence and jurisdiction.
12. The Learned Counsel submitted that a suit should be heard within the local limits of the courts where the land was situated. He made reference to the provisions of Section 13 Civil Procedure Act and Section 13 of the Environment and Land Court Act. He stated that the land is in Kwale and was valued at a sum of Kenya Shillings Ten Million, Seven Fourty Four Thousand Five Hundred (Kshs 10,744,500/-) in accordance with the averments set out under paragraph 3 of the Amended Plaintiff dated 8th December 2021 by the Plaintiff. Thus, he argued that parties were bound by their own pleadings under the provisions of Order 2 Rule 6 of the Civil Procedure Rules 2010 and Sections 7 and 9 of the Magistrates Act Cap. 10 Laws of Kenya. Therefore, for these reasons it meant that the appropriate court to hear and determine the matter should be the Chief magistrate Court based at Kwale.
13. The Learned Counsel submitted that in fact the matter, in the month of September, 2021 upon the establishment of the ELC Kwale, had administratively and as a matter of Judiciary policy along with other cases falling within that jurisdiction had been transferred to the ELC Kwale. Unfortunately, the only one ELC Judge there, recused herself on grounds that she was well known to the family of the Plaintiff and to continue handling it would likely cause conflict of interest in the long run. In the given circumstances, she re - transferred the case back to this court.
14. The Learned Counsel concluded his submission by refuting that this was a delaying tactic by themselves. On the contrary, he argued that they simply felt that the Magistrate Court would evenly and expeditiously hear and determine the case talking that they had less workload there in comparison to the ELC Court. He reiterated that the allegations on the delay of the matter had been largely contributed by the Plaintiff following the unfortunate demise of the Plaintiff. As regards to the delay of the Defence was due to the many applications filed by the Plaintiff. The Learned Counsel rebutted that he had noted the cited authorities and fully concurred with them. He concurred that indeed these were the fundamental principles to be considered when applying for the transfer of suits from to other Courts. He underscored the fact that the most important principle to guide the court was the statutory provisions of the law on the subject matter.



15. He emphasized that what should be followed and guide the court adequately would have been a land valuation report. This is what the Plaintiff should have filed as a guide but none was filed. With regards to the principle of convenience to the effect the Mombasa being more convenient than Kwale, he asserted that there was a full pledged Airport at Ukunda. Therefore, to hold that Mombasa would be cheaper than Kwale had not been demonstrated. The Learned Counsel submitted that in terms of the remedies of the Plaintiff, she wanted to claim a sum of Kenya Fourty Million (Kshs. 40, 000,000/=) she would have pleaded it in the Plaint. On the issue of appeal, the Counsel submitted that it was anticipatory as there had been no such outcome of the suit nor an appeal preferred as yet. In the likelihood event there was an appeal, then that court would know how to deal with the situation. He urged Court not to be presumptive.

He submitted that the Court had not been informed neither where the witnesses worked nor resided. The Counsel concluded by holding that they were ready to be heard at any time, though conditionally but before the Chief Magistrate Court.

B. The Plaintiff's Submission

16. The Learned Counsel for the Plaintiff/Respondent opposing the Notice of Motion application dated 14th February 2022 submitted that they relied on the grounds of opposition dated 21st February 2022. She held that the application was incompetent and fatally defective for the reason that it was brought under the non existent suit - ELC NO 427 OF 2017 that was already transferred from Mombasa to ELC Kwale. It was her contention that upon its transfer it was allocated a new suit number being ELC (KWALE) NO 158 OF 2021. Further, again upon the re - transfer here it acquired a new number altogether. She stressed that the ELC NO 158 OF 2021 no longer existed. By this as stand alone issue was sufficient to cause its dismissal, she argued.
17. The Learned Counsel submitted further that the Notice of Motion application had failed to annex any documents such as a land valuation report to illustrate the actual value of the suit property in order to justify the reason for its transfer to the Chief Magistrate Court in Kwale. Her assertion was that such transfers were envisaged under the provisions of Sections 18(1) of the Civil Procedure Act, Cap. 21 were not automatic. It is purely dependent on the discretion of the court.
18. The Learned Counsel emphasized that the operative word there was 'May' and not 'Shall' to ascertain the mandatory statutory connotation of the provisions. To buttress on this point on the court's discretion, she made reference to many case law including but not limited to the one of "*David Kabungu v Zikarenga & 4 others Kampala* HCCS No. 36 of 1995, and "*Hangzhou Agro – Chemicals Industries Limited v Panda Flowers*, [2021] eKLR" the Court exercising discretion on a request for transfer of suit in circumstances similar to the Civil Procedure Act Cap 12 Laws of Kenya. The considerations are:-
- a. the convenience of the parties;
 - b. the remedies sought; and
 - c. the appropriate form for the matter to be heard.
19. While applying the above legal principles to the instant case, the Learned Counsel submitted that firstly both the Plaintiff and the Defendant worked and resided in Nairobi. Therefore, it would be financially convenient for them to be travelling from Nairobi to Mombasa than from Nairobi to Kwale all the time the case was scheduled for hearing. Secondly on the issue of the relief sought, the Plaintiff has prayed for profits which if calculated at the rate of Kenya Shillings Six Million (Kshs 6,000,000/-) per year and talking the wholesome number of years the Defendant had continued to be in use and occupation



of the suit land, it will definitely exceed all that the Magistrate has with their pecuniary jurisdiction as provided to the law.

20. Thirdly, the forum to hear the case is ELC Mombasa. She additionally submitted that upon the matter being transferred to ELC Kwale and not the Chief Magistrate Court, this court sees it needful for it to be heard before a court of equal status and it was ELC Kwale, unfortunately the only ELC Judge there recused herself.

The Learned Counsel submitted that she foresaw the matter being brought back to Mombasa if the court was to transfer the case to ELC Kwale. Therefore, that was why it would be prudent to just let the parties be heard and the matter determined in Mombasa being the right forum. Her contention was that the Defendant was causing more delay towards the hearing and determination of the case. She informed court that it was evident that since the Defendant was served with summons to enter appearance on the 19th December 2017, he had never taken any action until it was two (2) years down the line when he filed a defence. In any case, it was at that time that they should have filed the application for the transfer of the case to the Chief Magistrate Court. Clearly, according to her, it was just an afterthought while they continued enjoying the profits for all this duration.

The Learned Counsel submitted that the balance of convenience was to dismiss the Notice of Motion application with Costs to the Plaintiff.

VI. Analysis And Determination

21. I have read and considered the application herein, the supporting affidavits, the grounds of opposition and the responses thereto and the oral submission of both parties and the relevant provisions of *the Constitution* of Kenya, 2010 and provisions of the Laws. There are three (3) issues for the determination by this Honorable Court. These are: -
- a. Whether or not the ELC court where the suit was initially filed has the requisite legal mandate to hear and determine the same?
 - b. Whether the Defendant/Applicant has presented sufficient reasons to warrant the transfer of suit from ELC Mombasa to Kwale Chief Magistrate's Court?
 - c. Who will bear the Costs of the application.

ISSUE No. a). Whether or not the ELC court where the suit was initially filed has the requisite legal mandate to hear and determine the same?

22. The jurisdiction of the High Court to transfer suit from one Subordinate Court to another is provided for under Section 18 of the *Civil Procedure Act*, Cap. 21. This Section is to be read in conjunction with Section 11 of the stated Act which states thus:

“Every suit shall be instituted of the lowest grade competent to try it, except that where there are more Subordinate Courts than one, with jurisdiction in the same district competence to try it, suit may, if the party instilling the suit or his advocate certifies that he believes that a point of Law is involved.” “That any other good and sufficient reason exists, be instituted in any one of such Subordinate Courts.”

23. Further, the provision of Section 15 of the *Civil Procedure Act*, Cap 21 provides that suit should be instituted at the place where the cause of action arose or where the Defendant resides or carries on businesses. The Honourable Court is persuaded to rely on the Ugandan decision cited by the Learned Counsel for the Plaintiff/Respondent in the case of “David Kabungu – Versus - Zikarenga (*Supra*) on



the well down fundamental principles upon which this court will exercise its discretion as regards the transfer of cases in which Okello J stated as follows:-

“Section 18 (1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused.....”

ISSUE No. b). Whether the Defendant/Applicant has presented sufficient reasons to warrant the transfer of suit from ELC Mombasa to Kwale Chief Magistrate’s Court?

24. Under this sub – heading, the Honourable Court holds that the Defendant/Applicant has failed to present any sufficient reasons to warrant the transfer of this suit from the ELC Mombasa to the Chief magistrate Court for the following reasons. Firstly, upon keenly assessing all the averments set out in the Plaintiff filed by the Plaintiff dated 21st November 2017 and the Defence by the Defendant dated 14th February, 2022 and filed in Court 21st February, 2022 it is undisputed fact that both parties reside and work in Nairobi while the suit property is in Kwale. Therefore, by dint of Sections 12 and 15 of the *Civil Procedure Act*, Cap. 21 the Plaintiff properly filed the suit within the local limits where the suit land was situated and that was at ELC Mombasa then from the cause of action or where the Defendants reside or carry on business. By then the ELC Kwale Courts had not yet been established. Upon the establishment of the ELC Kwale in the year 2021, the case along with many others of similar status were administratively transferred there in the month of September, 2021. Unfortunately, the only single ELC Judge there recused herself for the reasons that she knew the Plaintiff’s family and she had had a close familiarity with them. She caused it to re – transferred back to the ELC, Mombasa.

Secondly, under the contents of Paragraph 10 of the filed Defence, the Defendant admits this as the right Jurisdiction by stating that:- “the contents of Paragraphs 13 and 14 of the Plaintiff are hereby admitted” where these Paragraphs of the Plaintiff states “there is no other suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter or on the same cause of action.....the cause of action arose within the jurisdiction of this Honourable Court”. It is trite law that jurisdiction is everything. It goes to the root of any matter that a court of law is seized and therefore if a court lacks jurisdiction to hear and determine a matter then it is not possible for it to seek to transfer that which it does not have power to do so. It follows therefore that suit had been filed in a court with jurisdiction and thus the Defendant’s prayer before this court for transfer should hereby be refused.



25. Thirdly, from its submissions, the Defendant argued that it was the Plaintiff who had the burden of proving the value of the suit property. Indeed, the Learned Counsel cited the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010, whereby they strongly held that parties were bound by their pleadings. He relied on the contents of Paragraph 3 of the Amended Plaint whereby the Plaintiff provided the purchase price of the suit land to be Kenya Shillings Ten Million Seven Hundred and Fourty Four Thousand Five Hundred (Kshs. 10, 744, 500/=) by 14th May, 2015 as a justification for causing the suit to be transferred to the lower Court. On the contrary, pursuant to the provisions of Section 107 of the Evidence Act, Cap. 80 to wit:-

“He who alleges is the one to prove the existence of those facts” in my view being the party making the application to have the matter transferred to a Chief Magistrate’s court in Kwale who had the burden of proving the value of the land lied on them. From the Plaintiff’s submission it’s clear that the Defendant has been using the suit property for commercial purposes as they cultivated and harvested sugarcane which should be valued. This is a matter of a breached agreement of sale of property that occurred in 2017 and since then the suit has been stalled by one application to another. Interestingly, apart from the value of the land, this particular issue was never rebutted nor controverted by the Defendant/Applicant. Thus, it is taken as an admission.

26. Fourthly, in so far as the transfer of the suit is concerned, this Court feels that the Defendant/Applicant has been trying to transfer the suit to attain its own convenience and not that of the Plaintiff/Respondent. I would have expected that the claim of this magnitude where both parties worked for gain in Nairobi due regard would have been given to the nearest Court at a place that was more central to both of them and the suit property. In this case, Mombasa is a central place of access for both parties and the said suit property. It would be expected that sufficient notice for the hearing of the case once given should provide an opportunity for each of the parties to make arrangements to travel to Mombasa for the trial of the case and back at ease.

27. As regards the other remaining issues, I note that the Defendant filed a Notice of Motion application on 18th December 2017 whereby the Defendant never raised the issue of jurisdiction in terms of the pecuniary value of the said suit property. The Plaintiff filed an amended Plaint on 8th December 2021 stating the amount owed and the agreement that had been breach; the Defendant filed their defence on 21st February, 2022 in which defence they did not mention anything to do with the transfer of the suit to a lower court. Hence the Defendant’s claim that no prejudice would be occasioned to the Plaintiff was not convincing for it is obvious that the Plaintiff has already been prejudiced by having the suit run for all these years without any positive outcome for them. My considered view is that the Defendant has not made out a strong case for the transfer of the suit.

28. Finally, the Honourable Court do agree with the Plaintiff on the contention that land does appreciate and together with the addition to the mesne profits and Interests under the Law Society Conditions of Sale are applied from the year 2015 when they took possession of the land to date then the suit property may not be the amount that was stated in the Plaint and hence is likely to surpass the pecuniary jurisdiction of the Chief Magistrate Court.

Keeping in view the aforesaid facts and circumstances of the case, and also looking at the principles laid down by the Court in “David Kabungu (*supra*)” the Notice of Motion application dated 14th February 2022 is not maintainable.



ISSUE NO. C).Who will bear the Costs of the application.*

29. It is known law that issues pertaining to costs are discretionary. From the provision of Section 27 (1) of the Civil Procedure Act, Cap. 21, Costs follow the event. The event here means the results or an outcome of any litigation process.

In the instant case, the Notice of Motion application Dated 14th February, 2022 by the Defendant/Applicant has been found to be without merit. It follows therefore that the Plaintiff/Respondents are entitled to costs of the application.

VII. Conclusion & Disposition

30. In the long run, and based on the indepth analysis of the framed issues herein, this Court finds no merit in the filed application in terms of Section 18 (1) as read with Sections 11, 12 and 15 of the Civil Procedure Act. Hence, it proceeds to make the following orders.

- a. That the Notice of Motion application dated 14th February, 2022 be and is hereby dismissed while the Grounds of Opposition dated 21st February 2022 be and are hereby sustained.
- b. That for expediency sake, this suit be fixed for hearing and final determination within the next Ninety (90) days without fail. The matter be mentioned for Pre – Trial Conference Session pursuant to the provisions of Order 11 of the Civil Procedure Rules, 2010 on 26th July, 2022 and fixing of a hearing date as stated hereof.
- c. That in view of the fact that this Court just finalized hearing and delivered a Judgement on 24th May, 2022 in the ELC No. 428 of 2017 in “Kaoyeni Enterprises Limited v Unifresh Exotics (K) Limited” where the Directors in the said case are the same Plaintiffs and Defendants in this case, in the interest of justice, equity and Conscience and avoidance of any conflicts of interest, misconception and negative perception, this Court now wishes to recuse itself from this matter henceforth. Thus, the matter be placed before the ELC Presiding Judge sitting at the ELC No. 1 for further direction thereof.
- d. That the costs of the Application to be borne by the Defendant/Applicant.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE OF 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah Hassan

Non appearance for the Plaintiff/Respondent.

Mr. Njuru Advocate for the Defendant/Applicant.

HON. L. NAIKUNI (JUDGE)

