



REPUBLIC OF KENYA



Waititu & another v Waititu & 2 others (Environment and Land Miscellaneous Application E011 of 2021) [2022] KEELC 3978 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3978 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2021

JO OLOLA, J

JULY 28, 2022

BETWEEN

JOHN MBUTHIA WAITITU 1ST APPLICANT

ELIZABETH NJERI WAITITU 2ND APPLICANT

AND

JUSTUS THUKU WAITITU 1ST RESPONDENT

EVANSON RWARA KAHORO 2ND RESPONDENT

THE LAND REGISTRAR, NYERI 3RD RESPONDENT

RULING

1. By the notice of motion dated August 13, 2021 as filed herein on August 16, 2021 John Mbuthia Waititu and Elizabeth Njeri Waititu (the applicants) pray for an order that this court be pleased to transfer Othaya SRMCC No 14 of 2018; John Mbuthia Waititu and Another v Justus Thuku Waititu and 2 Others from the Othaya Senior Resident Magistrates Court to the Chief Magistrates Court at Nyeri for hearing and determination.
2. The application which is supported by an Affidavit sworn by the applicant's advocate on record Grace Nyambura Maina is based on the grounds:
 - (i) That though the matter was previously before this court, the court on its own motion transferred the same for hearing and determination to the court at Othaya;
 - (ii) That subsequent to the transfer, a valuation report on the subject parcel of land was filed in court on June 25, 2020 giving the value of the land as Kshs 7,200,000/-. The said value is beyond the pecuniary jurisdiction of the Othaya court; and



- (iii) That in the circumstances it is only mete and just that the matter be re-transferred to the Chief Magistrates Court at Nyeri which is vested with jurisdiction.
3. Evanson Rwara Kahoro (the 2nd defendant) is opposed to the application. In a replying affidavit sworn on November 16, 2021 as filed herein on November 17, 2021, the 2nd defendant avers that the said case in Othaya is a nullity as the court has held it has no jurisdiction and this court cannot transfer what is a nullity.
 4. The 2nd defendant avers that the application is an abuse of the court process as the applicants have failed to disclose to the court that the 1st defendant is deceased and that this court cannot entertain the application and/or give any orders until the deceased defendant is substituted.
 5. The 2nd defendant avers that the applicants have not come to court with clean hands and that there was undue delay in filing the application. The 2nd defendant asserts that the applicants have decided to wait for the 1st defendant whom they had a complaint about to die and that the application has been filed more than one year since the Othaya court held that it had no jurisdiction on July 15, 2020.
 6. The 2nd defendant further avers that he resides in Nairobi and has spent a lot of money travelling to court in Othaya. He accuses the applicants of seeking to transfer the case to Nyeri without considering the distances he will have to cover and the associated expenses to attend court and urges the court to dismiss the application.
 7. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the rival submissions placed before me by the learned advocates representing the parties herein.
 8. The applicants have urged this court to transfer Othaya SRMCC No 14 of 2018 to the Chief Magistrates Court at Nyeri for hearing and disposal after the said court did on July 15, 2020 determine that it had no jurisdiction to entertain the same. The 2nd defendant is however opposed to the application stating as it were that the said matter being in a court without jurisdiction is a nullity and that the same cannot therefore be transferred by this court to any other court.
 9. From the material placed before me, it was apparent that the suit herein was initially commenced before this court as Nyeri ELC 195 of 2017 by the applicants herein against the three defendants herein. It was not disputed that this court on its own motion did transfer the matter on February 21, 2018 to the Othaya court for hearing and determination.
 10. As it turned out, as the matter proceeded for hearing before the court to which it was transferred, a valuation report was filed which placed the value of the suit property beyond the pecuniary jurisdiction of the Othaya Senior Resident Magistrates Court. That being the case the Othaya court downed its tools citing the absence of jurisdiction to hear and determine the matter.
 11. It is on that account that the applicants have urged this court to have the matter re-transferred to the Chief Magistrates Court at Nyeri for hearing and disposal. While I am in agreement with the 2nd defendant that a suit filed before a court lacking jurisdiction is a nullity and that the same cannot be transferred, it was clear to me that that was not the case obtaining herein.
 12. The applicants before the court had initially instituted the suit in this court which is clearly clothed with jurisdiction to determine the dispute. As at the time the court on its own motion transferred the matter to the Othaya Senior Resident Magistrates Court, the new valuation had not been done and the court did assume that the matter could be heard and disposed of by that court.



13. Now that the valuation places the value of the land beyond the jurisdiction of the court to which this court had sent it, I was unable to find any reason why the applicants should be blamed for the resulting situation. It would in my view be absurd if the court having itself in error transferred the matter to a wrong forum would then turn around and punish the applicants for the same.
14. As concerns the death of the 1st defendant, I did not think the same was fatal to the entire suit and that the same would warrant a striking out of the suit in its entirety as against the 2nd and 3rd defendants. That is clearly an issue which can be raised and dealt with once the suit is before the right forum.
15. It follows that I am persuaded that there is merit in the motion dated August 13, 2021. I allow the same with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF JULY, 2022.

In the presence of:

Mr Wahome Gikonyo holding brief for Ms. G. Maina for the Applicant

No appearance for the Respondent

Court assistant - Kendi

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JO OLOLA

JUDGE

