



REPUBLIC OF KENYA



**Mwangi v Mudogo & 5 others (Environment and Land Miscellaneous Application E139 of 2021) [2022] KEELC 13303 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13303 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E139 OF 2021  
SO OKONG'O, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**JANE WAIRIMU MWANGI ..... APPLICANT**

**AND**

**JUMA LUANDE MUDOGO ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL NJENGA WAWERU ..... 2<sup>ND</sup> RESPONDENT**

**BERNARD SIKWEYA ..... 3<sup>RD</sup> RESPONDENT**

**COSMAS M. MUTAVA T/A MARCO SECURITY SERVICES . 4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. What I have before me is a notice of motion application dated July 27, 2021 by Jane Wairimu Mwangi (hereinafter referred to only as “the applicant”) seeking the following orders;
1. An order withdrawing and transferring to this court, Milimani CMC MISC Case No E455 OF 2021, *Juma Luande Mudogo v Benard Sikweya & 2 others* for further hearing and determination.
2. An order withdrawing and transferring to this court, Milimani CMCC No E8676 OF 2021, *Jane Wairimu Mwangi v Juma Luande Mudogo & Another* for further hearing and determination.
3. An order consolidating Milimani CMC MISC Case No E455 OF 2021, *Juma Luande Mudogo v Benard Sikweya & 2 others* and Milimani CMCC No E8676 OF 2021, *Jane Wairimu Mwangi v Juma Luande Mudogo & Another* with Nairobi ELC No E183 of 2021, *Jane Wairimu Mwangi v Michael Njenga Waweru & 4 Others*.



4. The costs of the application.
2. The application which is supported by the affidavit of the applicant is brought on the grounds that Milimani CMC MISC Case No E455 of 2021, *Juma Luande Mudogo v Benard Sikweya & 2 others* and Milimani CMCC No E8676 OF 2021, *Jane Wairimu Mwangi v Juma Luande Mudogo & Another* which are pending before the lower court and ELC No E183 of 2021, *Jane Wairimu Mwangi v Michael Njenga Waweru & 4 Others* which is pending before this court relate to the same subject matter namely, LR No 1870/VI/80 situated along David Osieli Road, Nairobi (hereinafter referred to as “the suit property”) and that similar issues have been raised in the three suits. The applicant has contended that the value of the suit property is over Kshs 200,000,000/- and as such exceeds the jurisdiction of the lower court. The applicant has contended that the lower court has no jurisdiction to hear and determine Milimani CMC MISC Case No E455 of 2021, *Juma Luande Mudogo v Benard Sikweya & 2 others* and Milimani CMCC No E8676 OF 2021, *Jane Wairimu Mwangi v Juma Luande Mudogo & Another* hence the need to have the two cases transferred to this court and consolidated with ELC No E183 of 2021, *Jane Wairimu Mwangi v Michael Njenga Waweru & 4 Others* to save on judicial time since similar issues have been raised in all the suits.
3. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through a replying affidavit sworn by the 1<sup>st</sup> respondent on October 8, 2021. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have contended that it is an abuse of the process of the court for the applicant to file multiple suits in respect of a matter that has been heard and determined. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have contended that such suits which are procedurally defective cannot be consolidated.
4. The 5<sup>th</sup> and 6<sup>th</sup> have opposed the application through grounds of opposition dated November 22, 2021. The 5<sup>th</sup> and 6<sup>th</sup> respondents have contended that since the value of the suit property is over Kshs 200,000,000/-, the lower court has no jurisdiction to hear the two suits pending before it. The 5<sup>th</sup> and 6<sup>th</sup> respondents have contended that since the suits have been filed in a court without jurisdiction, the same are null and void and as such cannot be withdrawn and transferred to this court. The 5<sup>th</sup> and 6<sup>th</sup> respondents have averred further that ELC No E183 of 2021 offends section 6 of the Civil Procedure Rules and as such bad in law since the same was filed during the pendency of Milimani CMC MISC. Case No E455 OF 2021, *Juma Luande Mudogo v Benard Sikweya & 2 others* and Milimani CMCC No E8676 OF 2021, *Jane Wairimu Mwangi v Juma Luande Mudogo & Another* which relate to the same subject matter. The 5<sup>th</sup> and 6<sup>th</sup> respondents have contended that the applicant’s application mischievous, misconceived and amounts to an abuse of the process of the court.
5. The applicant’s application was heard by way of written submissions. The applicant filed her submissions dated February 10, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their submissions dated February 21, 2022 while the 5<sup>th</sup> and 6<sup>th</sup> respondents filed their submissions dated February 16, 2022. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit and grounds of opposition filed by the respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the numerous authorities that were cited in support thereof.
6. The application before me has two limbs. The first limb seeks the withdrawal and transfer of the two suits pending before the lower court to this court. The second limb seeks an order that once the two suits have been transferred to this court, the same be consolidated with the suit pending before this court namely; ELC No E183 of 2021.

Section 18 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya 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.”

7. In *Kitbita Ngeana v Mwaniki Kisume* [2018] eKLR, the court cited the Ugandan case of *David Kabungu v Zikarenga & 4 others*, Kampala HCCS NO 36 of 1995 in which the court stated as follows on transfer of cases:

Section 18 (1) (b) 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 a 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. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is 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 expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application 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 would be refused...”

8. It is not contested that this court has jurisdiction to transfer cases that are pending before the lower court to this court for hearing and determination by the court. What is disputed is whether sufficient reasons warranting such transfer have been advanced by the applicant. As stated earlier, the only reason advanced by the applicant for the transfer of the two suits pending before the lower court to this court is that the lower court has no jurisdiction to determine the suits pending before it because the value of the property which is in dispute in the two suits and the suit before this court is in excess of Kshs 200,000,000/-. One of the suits in the lower court was filed by the applicant while the other was filed by the 1<sup>st</sup> respondent. It is not clear why the applicant filed a suit in the lower court which she claims to have no jurisdiction to hear the matter. It is also not clear why the applicant filed another suit before



this court while her other suit before the lower court was pending. I have noted that the applicant's suit before this court, ELC No E183 OF 2021 was filed through a plaint dated May 25, 2021 while the lower court suit was filed through a plaint dated May 27, 2021. The two suits were therefore filed at the same time. I suspect that the applicant was shopping for a forum where she could obtain an ex parte order otherwise there is no explanation why the applicant would file two suits at the same time in different courts, the lower court and superior court seeking similar reliefs. This suspicion is based on the fact that in both before the lower court and this court, the applicant filed an application for interlocutory injunction. I believe that when she failed to get the order ex parte before this court, she moved to the lower court and obtained the same. Such conduct must be frowned upon by this court. It is a clear case of abuse of the process of the court. Unashamedly, the applicant now wants her lower court suit in which she had obtained an ex parte order to be consolidated with the suit pending before this court in which the court had refused to grant her an ex parte injunction so that she can continue enjoying that irregular order from the lower court! This I believe explains why she does not wish to withdraw the lower court suit even after filing a suit before this court. This court will not lend its aid to such sharp practice.

9. I have also noted that the lower court suit that was filed by the 1<sup>st</sup> respondent was brought by way of a miscellaneous application and the same was heard and determined. The applicant has challenged the orders issued in that application before the lower court. I wonder why the applicant would wish to transfer an application that has been heard and determined by the lower court to this court. Is it not the lower court that is best suited to consider whether or not its orders made in that application should be set aside? Why should this court be called upon in its original jurisdiction to consider an application to set aside an order issued by the lower court? The lower court has jurisdiction to determine its own jurisdiction. The issue of jurisdiction having been raised before the lower court, it is best suited to determine it.
10. The foregoing alone should have been sufficient to dispose of the application before me which is clearly an abuse of the court process. I wish to add however that I am in agreement with the respondents that where a suit has been filed in a court with no jurisdiction, the same is a nullity and as such void. By her own admission that she filed a suit in a court without jurisdiction, the applicant's suit in the lower court namely; CMCC No E8676 of 2021 is null and void and as such the same cannot be transferred to this court.
11. In *Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper Service* [2019] eKLR which is the latest from that court on this subject, the Court of Appeal stated as follows:
  19. We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied.

Without jurisdiction, the court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989):

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise



jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this court have held that it would be illegal for the High Court in exercise of its powers under S 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred.

Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even article 159 of the Constitution to remedy the same.

..In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”(Emphasis ours) decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively.

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. Civil Appeal No 6 Of 2018 *Phoenix East Africa Assurance Co Ltd v Sm Thiga T/a Newspaper Services* therefore a nullity as it was based on a nullity.”
12. Since the only ground put forward in support of the applicant’s application for the transfer of the two lower court suits is want of jurisdiction of the lower court, the application must fail since a suit filed in a court without jurisdiction cannot be transferred.  
  
Having held that this court cannot transfer the two suits pending in the lower court to this court, it is not necessary for me to consider whether the two suits should be consolidated with the suit pending before this court. It follows therefore that the applicant’s application fails in its entirety.
13. In conclusion, I find no merit in the notice of motion dated July 27, 2021. The application is dismissed with costs to the respondents. In order to stop the abuse of the process of the court that the applicant is engaged in, the applicant shall withdraw either Mccc(cmcc) No E8676 of 2021 or ELC No E183 of 2021 within 7 days from the date hereof in default of which either or the two suits that was filed last shall stand dismissed with costs to the defendants in that suit without any further reference to the court.

**DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2022**



**S. OKONG'O**

**JUDGE**

**Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Wambua for the Applicant

Ms. Kyenze h/b for Mr. Agonga for the 1st and 2nd Respondents

Ms. Kerubo for the 5th and 6th Respondents

Ms. C.Nyokabi-Court Assistant

