



Family Bank Limited v Cheruiyot (As the Administraatrix of the Estate of Philip Chelule Cheruiyot) (Environment & Land Case E018 of 2021) [2022] KEELC 13827 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13827 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E018 OF 2021
MC OUNDO, J
OCTOBER 27, 2022

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

NANCY CHEPKEMOI CHERUIYOT RESPONDENT

AS THE ADMINISTRAATRIX OF THE ESTATE OF PHILIP CHELULE CHERUIYOT

RULING

1. For determination is an Application under a certificate of urgency dated the 29th November 2021 and brought pursuant to the provisions of Article 159(2)(d) of the *Constitution*, Section 1A, 1B, 3A and 18 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law, where the Applicant seeks for stay of proceedings before the Kericho Chief Magistrate's Court in Civil suit No. 398 of 2019 and thereafter a transfer of the same to this court for consolidation with the present suit. The Application is supported by the grounds on the face of it as well as by a supporting Affidavit sworn on the 29th November 2021 by Peter Wangaki Wena, Counsel for the Applicant herein.
2. The Respondent filed her Grounds of Opposition dated 16th December 2021 and a Replying Affidavit dated 14th January 2022 on the basis that the Applicant's Application was incurably defective, bad in law and in contravention of the enabling laws, the precedent and procedure for reasons that the High Court having allowed their preliminary objection dated 21st October 2020, the matter could not be transferred to this court for consolidation.
3. The Application was disposed of by way of written submissions wherein the Applicant submitted that pursuant to the provisions of Order 11 Rule 3(1)(h) of the Civil Procedure Rules, and the decision



in the case of *Stumberg & Another vs Potgeiter* 1970 EA, the law permitted the consolidation of cases based on the principles therein under:

- i. Whether a question of law or fact arises in both cases.
 - ii. Whether the rights or reliefs claimed in the two cases or more arise out of the same transaction or a series of transactions.
 - iii. Whether any party will be disadvantaged or prejudiced or will the consolidation confer undue advantage to the other party.
4. That the application had met the threshold to warrant an order of consolidation of the suit because the issues for determination in both suits involved the right and obligation of the same parties in a tenancy agreement over the same premises consisting of 3000 square feet in Land Reference No. 8839/53 Litein Trading Center. That further the parties and their witnesses were all the same.
 5. That the consolidation of the suit would be in the interest of proper and efficient administration of justice and in tandem with the provisions of Article 159 of *the Constitution*. That it would further be expedient, less costly and would save the court precious time.
 6. That by the matter being part heard, it could not be a bar to an order for consolidation. That further, the Defendant in Kericho CMCC No. 398 of 2019 had filed an Application seeking to set aside the ex-parte hearing conducted on 23rd November 2021 as it had proceeded in the absence of the Defendant and the said Application was awaiting determination.
 7. That the consolidation would avoid entry of conflicting verdicts and no party would suffer any prejudice. That the court was bound to exercise its discretion in favour of an order for consolidation as the cases as presented revolved around the same subject matter and therefore raised substantially common issues of law and fact. Reference was made to a decision by the Supreme Court in *Law Society of Kenya vs Center for Human Rights and Democracy & 12 Others* [2014].
 8. The Applicant's submission further was to the effect that contrary to the Respondent's response that the suit herein was struck out, their understanding of the ruling delivered by the High Court on 9th April 2021 was to the effect that this suit be transferred to the Environment and Land Court. That the Application had merit and the same ought to be allowed with costs.
 9. In opposition to the Application, the Respondent herein submitted that the Applicant herein had filed the current suit in Kericho High Court, Commercial Division as HCC Suit No. 4 of 2020 wherein it had sought orders relating to the use and occupation of land in reference to the Respondent's property consisting of 3000 square feet in land reference No. 8839/53 Litein Trading Center within Kericho.
 10. That the Respondent had raised a preliminary objection on the jurisdiction of the commercial court to hear the Plaintiff/Applicant's suit which Application was allowed vide a ruling delivered on 9th April 2021. Thereafter the Respondent sought for transfer of the matter from the commercial division of the High Court to the Environment and Land Court wherein after they sought for stay of proceedings in the subordinate court in Kericho CMCC No. 398 of 2019.
 11. The Respondent framed their issues for determination as to whether the suit herein was competently and/or properly before this court to which it submitted that via the ruling of 9th April 2021, which had struck out the suit, there existed no suit before the High Court that was capable of being transferred to the Environment and Land Court for any directions to be issued. The present suit was therefore incompetent. Reliance was placed on the cases of *Owners of the Motor Vessel 'Lillian S' vs Caltex Oil*



(Kenya) Limited [1989] KLR 1 and *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour and Travel* [2016] eKLR.

12. The Respondent further took issue with the Applicant's Supporting Affidavit to the Application stating that the same was defective and inadmissible having been sworn by Counsel who was in conduct of the matter. They relied on the decided case in *International Community of Women Living with HIV Registered Trustees vs Non-governmental Organizations Co-ordination Board & 2 Others; Teresia Otieno (Proposed Interested Party)* [2019] eKLR to submit that at paragraph 8 of the said Affidavit, Counsel had delved into contentious matters thereby giving evidence despite not being a party to the suit, to the effect that both the subject matter and issues for determination in the suit before the subordinate court and the present suit were similar. There was however no Complaint attached as filed in the subordinate court. Their submission was that this was a ploy to mislead the court. That whereas the Respondent in Kericho CMCC No. 398 of 2019 was claiming vacant possession from her property and mesne profits from the Applicant herein, the Applicant's claim in the suit was the claim for construction costs that they had allegedly incurred and therefore Counsel could not testify on these issues without evidence as the issues therein were highly contested.
13. The Respondent further submitted on whether the prayers for transfer and consolidation of the suit herein was justified and/or could be granted to the effect that the Applicant had not demonstrated that it would suffer any irreparable harm, loss or damage, that could not be compensated by way of damages, should the orders for stay and/or consolidation of the suit pending before the subordinate court not be granted.
14. That the Plaintiff/Respondent herein had already closed its case in Kericho CMCC No. 398 of 2019 wherein the suit before the court had not been certified ready for hearing. That this Application was intended to delay the suit before the subordinate court which had been filed three (3) years ago seeking to evict a tenant who has refused to vacate from the Respondent's premises, and had continued to occupy the same illegally, without basis and rent free. That the transfer of the suit for the purpose of consolidation would therefore be in contravention of the provisions of Section 18 of the *Civil Procedure Act*. That the Defendant/Applicant had only filed his defence, and had neither a counterclaim nor any documents filed therein was not a reason why the Applicant could not file an appropriate suit before a court of competent jurisdiction. The Respondent sought for the Application dated 29th November 2021 to be dismissed, and the suit herein filed to be struck out as the same was founded on a nullity which was incurably incompetent. They sought for costs.

Determination.

15. I have considered the Application, the grounds of objection and submissions thereto, I find the issues for determination which arises therefrom as being twofold to wit; whether there should be issued an order to transfer the proceedings in the Kericho Chief Magistrate's Court in Civil suit No. 398 of 2019 to this court for consolidation with the present suit.
16. The law that deals with consolidation of suits is found under Order 11 Rule 3 (I) (h) of the Civil Procedure Rules which states as follows:-
"3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—
(a)-----
(h) Consider consolidation of suits;"



17. In *Prem Lala Nabata & Anor vs Chandi Prasad Sikaria* [2007] 2 Supreme Court Cases 551, the India Supreme Court held:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

18. In *Law Society of Kenya* (supra) the Supreme Court of Kenya held: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”

19. From the above, it can be discerned that the purpose for consolidation of suits is to save on costs, time, for expeditious disposal of matters, to eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice, and to promote judicial economy. It is further trite that consolidation should not be prejudicial to either of the Parties.

20. The principles that arise there from the authorities herein above stated are that;

- (i) that the suits should have common questions of law and facts;
- (ii) the reliefs sought in both cases in respect of or arise from the same transactions or a series of transactions; and
- (iii) any other reason desirable to make the order.

21. It is not in dispute that the Respondent herein filed suit against the Applicant in the Kericho Chief Magistrate’s Court being Civil suit No. 398 of 2019 seeking for mesne profits and vacant possession from her premises consisting of 3000 square feet in land reference No. 8839/53 Litein Trading Center from the Applicant herein. That the matter was heard wherein Plaintiff/Respondent herein had closed her case.

22. It has also not been contested that while there was a suit pending in the subordinate court, the Applicant herein filed another suit against the Respondent in the Kericho High Court being Civil Suit No. 4 of 2020 via a plaint dated the 7th February 2020 wherein it sought for judgment against the Respondent in the sum of Ksh. 28,492,757/= being the sum of money incurred for construction of a banking premises on the suit property.

23. There is therefore no doubt that both the suits herein were between the same parties, over the same subject matter which had raised common questions of law and fact. The reliefs sought in both cases were in respect of or arose from a transaction or a series of transactions that were inter-related and therefore it would be convenient to try the suits together to make an order. Up to this point, and in consideration of the precedents herein above cited, the court is in agreement with the Applicant that it would be in the best interest of justice to consolidate the matters so as to avoid multiplicity of suits, for the expedition of the suit and in order to meet the overriding objective set out in the *Civil Procedure Act*.



24. The Respondent has however raised an objection that the matters cannot be consolidated for reasons that the Plaintiff had closed its case in the matter before the subordinate court in Kericho CMCC No. 398 of 2019 whereas the matter pending in this court had not been certified ready for hearing. That the suits were at different levels of trial.
25. In *Benson G. Mutahi & Raphael Gichove Munene Kabutu & 4 Others* [2014] eKLR, the court held: -
- “It is also clear from a reading of the Court of Appeal’s decision in *Ngumbao vs Mwatate & 2 Others*[1988] KLR 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore submissions of Mr Muyodi that this case cannot be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition.”
26. I would reiterate the foregoing here and add that there would be no prejudice to be suffered by any of the parties herein if there were to be consolidation of the suits.
27. However on the second issue for determination as to whether Kericho CMCC No. 398 of 2019 could be transferred to this court for consolidation with the present suit; the power to transfer a suit is discretionary and therefore a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons as to why the transfer is merited. In this case, the Applicant herein seeks to have the matter transferred for reasons that their counterclaim in the sum of Ksh. 28,492,757/= exceeds the pecuniary jurisdiction of the Chief Magistrates’ Court. That they had subsequently filed the instant suit in the High Court in HCCC No. 4 of 2020 which suit had been transferred to the Environment and Land Court and therefore the transfer of the Kericho CMCC No. 398 of 2019 to this court was to have it consolidated with the present suit.
28. The Respondents have objected to the transfer of the suit for reasons that pursuant to them filing a Notice of preliminary objection touching on the jurisdiction of the commercial court to hear the Plaintiff/Applicant’s suit No HCCC No. 4 of 2020, their Application had been allowed vide a ruling delivered on 9th April 2021. That by confirming that that High Court had no jurisdiction, it could not turn around again to transfer the matter to the Environment and Land Court. This would be in contravention of the provisions of Section 18 of the *Civil Procedure Act*.
29. Section 18 of the *Civil Procedure Act* bestows upon the High Court (read ELC) the powers to transfer suits of a civil nature. The said provisions of the law 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”.
30. However it is now trite that if a matter is filed in a Court that has no jurisdiction when the claim was filed, it would mean that the said suit is incompetent and the Court does not have jurisdiction to transfer the matter.
31. In the case of *Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another* [2012] eKLR, the Court held as follows:-
- “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 vs. 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 vs. 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. 500,000.00 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. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited vs. National Bank of Kenya* (supra).
32. Further in *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR the court had held that:
- “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”.
33. And lastly in *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR the Court held that:-
- “Furthermore, according to *Kagenyi v Musiramo and Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”
34. It is therefore clear that since this suit was instituted before the High Court which had no jurisdiction, such a suit, it is trite cannot be transferred, pursuant to the provisions of Section 18, to the Environment and Land Court, where it ought to have been instituted in the first instance, as the same was a nullity in law. There can therefore not be a consolidation on a non-existent suit as the court can only transfer a cause whose existence is recognized by law.
35. I uphold the Grounds of Objection raised by the Respondent herein, the suit herein filed is struck out. The Notice of Motion dated 29th November 2021 is not merited and I proceed to dismiss the same with costs to the Respondent.



It is ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27TH DAY OF
OCTOBER 2022.**

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

