



Tolksdorf v Mwangi & 2 others (Environment & Land Miscellaneous Case 007 of 2022) [2022] KEELC 14587 (KLR) (17 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND MISCELLANEOUS CASE 007 OF 2022**

AE DENA, J

OCTOBER 17, 2022

BETWEEN

CAROLA TOLKSDORF PLAINTIFF

AND

LENNY MURAYA MWANGI 1ST DEFENDANT

FRANCIS MAINA NJONJO 2ND DEFENDANT

**LAND REGISTRAR-KWALE DISTRICT LAND REGISTRY THRU THE
ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. On April 8, 2022 the applicant Carola Tolksdorf filed a suit Msambweni ELC case No E5 of 2022 in the Senior Residents Magistrates Court, Msambweni Land Court together with an application for interim orders of injunction. To be sure of its pecuniary jurisdiction the court ordered for a valuation of LR No Kwale/Galu Kinondo/1203 the suit property. A value of Kshs 12, 450,000/= was returned and the court found that it lacked jurisdiction.
2. Based on the above, the applicant then filed this Miscellaneous cause vide a Notice of Motion dated April 8, 2022 seeking for orders that the suit Msambweni ELC case No E5 of 2022 be transferred to this court for hearing and determination.
3. The application was placed before this court on June 15, 2022 under certificate of urgency when I directed that the same be served upon the other parties as required by Section 18 of the *Civil Procedure Act*. The 2nd respondent upon service filed a notice of preliminary objection dated June 27, 2022 on grounds that this court lacks jurisdiction to transfer ELC Case No E05 of 2022 Msambweni, the same having been filed in a court lacking jurisdiction.



4. On July 7, 2022 this court ordered that both the Notice of Motion and the preliminary objection be heard and determined together. In response to the preliminary objection, the plaintiff filed a replying affidavit sworn on July 18, 2022. In the affidavit she discloses the filing of the suit in the lower court, the order by the senior resident magistrate that a valuation be undertaken to determine if she had pecuniary jurisdiction, the outcome of the same and the courts finding on jurisdiction. That in the circumstances the suit ought to be transferred to the High Court for hearing and final determination. It is averred that the transfer will be in the interests of justice and facilitate just, expeditious, proportionate and affordable resolution of the dispute between the parties. It is submitted that the respondent will suffer no prejudice were the orders to be granted.

Submissions

5. The parties agreed to have the application and preliminary objection canvassed by way of written submissions.

Applicants Submissions

6. The applicant identified four issues.
 1. Whether the application is rightly founded before this court,
 2. Whether the preliminary objection is merited,
 3. Whether the applicant is entitled to the reliefs sought
 4. Who should bear the costs.
7. It is the applicant's submissions that the lower court suo moto issued orders to have the suit property valued, upon valuation rightly found it did not have jurisdiction and thereafter gave directions to the plaintiff to either withdraw the lower court suit or transfer the same. That the lower court was well aware that anything done without jurisdiction would be a nullity including its judgement. It is submitted that superior courts are vested with inherent jurisdiction which includes supervisory powers over subordinate courts and tribunals. That this basis the instant application has been brought before court. It is submitted that this court has the discretion to issue the orders sought as it is the court with jurisdiction to determine the dispute over the suit property. Reliance was placed on [*Southern Star Sacco Ltd Vs Vanancio Ntwiga \(2021\) eKLR*](#) and [*Samuel Kamau Macharia & Ano Vs Kenya Commercial Bank \(2012\) eKLR*](#)
8. On whether the preliminary objection is merited it is submitted that as a cardinal principle of law, a preliminary objection can only be raised on pure points of law as stated in *Mukisa Biscuits Manufacturing Co Ltd Versus West End Distributors Ltd [1969] EA 696*. It is submitted that this court has the authority to transfer a suit to itself upon an application being made. The same is under the ambit of its supervisory powers as enshrined under Article 165[6] of the [*Constitution*](#). Further that under the provisions of Section 4 of the [*Environment and Land Court Act*](#) No 19 of 2011 the court is vested with the jurisdiction to hear disputes relating to environment and land. It is contended that the applicant had an arguable case, sufficient cause and this court should lean towards the substratum of the dispute which is the revocation of the title believed to be fraudulent, by granting the applicant her date in court.
9. Further it is submitted on behalf of the applicant states that she is entitled to the reliefs sought and thus the application should be allowed with costs as prayed while the preliminary objection should be dismissed as the issues raised therein are not substantiated and were meant to convolute issues to deny



the applicant a chance to impeach the title in her favor. Counsel cited *Hon Attorney General Vs The Law Society of Kenya & Ano Civil Appeal (Application) No 133 of 2011*, and *Issa Masudi Mwabumba Vs Alice Kavenya Mutunga & 4 Others (2012) eKLR* on the ‘oxygen principle’.

The 2nd Respondents Submissions

10. The 2nd respondent’s submissions were filed on June 12, 2022 and whose main argument is that this court has no jurisdiction to transfer a matter from a court of no jurisdiction to a court of competent jurisdiction. It is submitted that the lower court did not have pecuniary jurisdiction to preside over the suit and therefore the suit filed before it was null and void ab initio thus incapable of being transferred. Counsel cites *Owners of Motor Vessel Lilian Vs Caltex Kenya Limited (1989) eKLR*, *Kagenyi Musiramo & Ano (1968) EA 43*, *Braham Mwangi Wamigwi Vs Simon Mbiriri Wanjiku & Ano (2012) eKLR* and *Boniface Waweru Mbiyu Vs Mary Njeri Vs & Another (2005) eKLR*. It is lastly submitted that the preliminary objection is merited and the same should be allowed.

Analysis And Determination

11. I have taken into consideration the pleadings and submissions filed by the parties together with the authorities relied upon.
12. Section 9 of the *Magistrates Court Act* No 26 of 2015 confers jurisdiction to the Magistrates Courts to hear and determine land disputes in exercise of jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* and is subject to the pecuniary limits under section 7 of the same. This pecuniary jurisdiction is between a minimum of Kshs 5 million and a maximum of Kshs 20 million.
13. From the above it is clear that the Senior Resident Magistrates Court at Msambweni does not have the pecuniary jurisdiction to determine the suit filed before it. In my view it was therefore proper for the court to down its tools and gave the two options herein, withdrawal or transfer to Kwale Environment and Land Court. The lower court also did not have the powers to transfer the suit to ELC Kwale as aptly stated by Nyamweya, J in *Aberdare Investments –v- Bernard Wachira & 5 Others (2015) eKLR* which held as follows:

‘ It is clear from those provisions (sections 17 and 18 of the *Civil Procedure Act*) that the court with jurisdiction to transfer a suit from or to a subordinate court is the High Court, or courts of similar status.’

14. Counsel for the applicant chose the option of making the present application which is brought under the provision’s sections 3A,17,18 of the *Civil Procedure Act*. Section 18 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 proceedings pending in any court subordinate to it, and therefore –
 - 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.
15. It is clear from the above provisions that the application is properly before this court and the issues that call for determination are whether the preliminary objection is merited and if it is not whether the applicant is entitled to the reliefs sought in the Notice of Motion application.
16. I will first address the preliminary objection which calls into question the jurisdiction of this court on the basis that the court has no jurisdiction to transfer a matter from a court of no jurisdiction to a court of competent jurisdiction. It is stated that suit filed in the Chief Magistrates Court is void ab initio therefore incapable of being transferred. That while this court has powers under section 17 and 18 of the *Civil Procedure Act* to either transfer suits or distribute them the exercise of this power is discretionary and the party desiring the same to be exercised in their favor must give sufficient reasons. Authorities were cited to emphasize that power to transfer cases is only exercised if the court before which the case is filed has jurisdiction.
17. I have read Justice Odunga's ruling where he was faced with a similar preliminary objection in *Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another supra* and which relied largely on the decision in *Kagenyi Musiramo & Ano (1968) EA 43* which set out the principles of law regarding transfer of cases under section 18 herein both relied upon by the 2nd respondent. I have also come across several decisions where the trends have been to focus on substantive justice and in view of the overriding objective in sections 1A and 1B of the *Civil Procedure Act*.
18. In the case of *John Mwangi Karanja -v- Alfred Ndiangui (2011) eKLR*, Hatari Waweru J delivered himself as follows:
- ' With the enactment of Section 1A and 1B of the *Civil Procedure Act*, the time has perhaps now come for this matter of transfer of suits to be looked at afresh....It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction. If a suit finds itself in the wrong court, surely it is in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (Section 1A (1). The court itself is enjoined by subsection (2) of that Section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.'
19. Justice Joel Ngugi had this to say in *Esther Mugure Karegi v Penta Tancom Limited [2016] eKLR*
- 'I have noted a number of cases which even prior to the enactment of the Magistrates Court Act sought to depart from the Kagenyi rule through the application of the Oxygen Principles in the *Civil Procedure Act*. Exemplifying this trend is the following paragraphs from *Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited [2014] eKLR*, a decision by Justice Mary Kasango: I agree with the approach adopted by Waweru, J. in the cited cases. It is my considered view that the holding in the Kagenyi Case has perhaps been overtaken by the development in law. The overriding objectives of the *Civil Procedure Act* contained in Sections 1A and 1B of the Act as well as the principles of exercising judicial authority enshrined in Article 159 (2) of the *Constitution* of Kenya now enjoin this court to



perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities. In my view, the High Court can now transfer a suit to another competent court even where that suit had been, in the first instance, brought to a court which had no jurisdiction to try it. However, such transfer must follow Section 18 of the Civil Procedure Act and the Constitution of Kenya.’

20. In John Kilonzo Ndivo v Everton Coal Enterprises Limited & 3 Others [2020] eKLR Justice CK Yano taking the cue from Hatari Waweru J (supra) pointed that; -

‘The overriding objective provided for under Sections 1A and 1B and the inherent power of the court under Section 3A are meant for the attainment of justice to the parties who come to court. The court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of proceedings at a cost affordable by the respective parties.’

21. The respondents have opposed the application and in addition to the objection raised, I also hear them as substantively saying that the correct procedure would have been to withdraw the suit filed in the magistrate’s court and file a fresh suit before the ELC court Kwale or even the Chief Magistrates Court which has a pecuniary jurisdiction of Kshs 20 million. The overriding objective of the Environment and Land Court Act 2011 is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act. Indeed, the option would be and is still available to file a fresh case appropriately. But will this achieve the objective of the Act and to me the answer is in the negative. This court is enjoined in the discharge of its functions under the Act to give effect to the principal objective herein. The overriding objective of the Civil Procedure Act also come into play in this regard.

22. The upshot of the foregoing is that;

1. The preliminary objection is hereby dismissed.
2. The Notice of Motion dated June 10, 2022 is merited and it is hereby ordered that Msambweni ELC case No E5 of 2022 be and is hereby withdrawn and transferred to this court for hearing and determination.
3. Costs shall follow the event.

DELIVERED AND DATED AT KWALE THIS 17TH DAY OF OCTOBER, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Wanjiku H/B for Mr. Obonyo for the Applicant

Mr. Njonjo for the Respondent .

Mr. Denis Mwakina- Court Assistant.

