



REPUBLIC OF KENYA



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**Kihara v Kanganya (Miscellaneous Application 22 of 2021)
[2022] KEELC 13422 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 22 OF 2021**

JG KEMEI, J

OCTOBER 6, 2022

BETWEEN

LUCY WARUIRU KIHARA APPLICANT

AND

SAMUEL WANJEMA KANGANYA RESPONDENT

RULING

1. The Application before me seeks orders to transfer suit No ELC 25 of 2019 – Samuel Wanjema Kanganya v Lucy Waruiru Kihara to this Court for purposes of hearing and determination together with ELC 84 of 2020 Thika - Mary Wairimu Kangethe –Vs- Samuel Wanjema Kanganya.
2. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of Ms. Elizabeth Kamuyu, learned counsel for the Applicant where she deponed that the two suits relate to each other since the subject matter is parcel No. Githunguri/Ikinu/503 and its resultant subdivisions. In addition, that the parties are related. The Applicant in this Application is the sister in law of the Respondent being the widow of his late brother. On the other hand, Mary Wairimu Kangethe is also the widow of the Respondent’s brother and the two widows are claiming land held under trust for their late husbands from their brother in law, the Respondent. It is the view of the deponent that if the two suits are tried separately there will be duplication of evidence and the risk of conflicting findings by the two Courts. Further that the value of the subject matter may exceed the pecuniary jurisdiction of the Principal Magistrate Court in Githunguri. Finally, that no prejudice will be occasioned on the parties and the Application is made in good faith and to serve the interest of justice.
3. The Application is opposed by the Respondent vide his Replying Affidavit deponed on the 15/7/2021. He decried the delay fomented by the Applicant in the hearing of the suit in Githunguri which according to him has been postponed severally at the instance of the Applicant. That the Applicant’s counsel on record failed to raise any objection with respect to jurisdiction throughout the pretrial and preliminaries in the lower Court. That he has incurred numerous expenses due to the delay in the



conclusion of the matter, which expense is causing him hardship occasioned by the Applicant's pure indolence. He averred that the Applicant is disinterested in prosecuting the suit given that he is enjoying possession of the land seeing that her advocate lodged a caution on the register further restricting his right to enjoy the property.

4. In addition, he pointed out that the Applicant has sought similar prayers in both suits and is therefore ridiculous for the Applicant to claim lack of jurisdiction on the part of the lower Court. Furthermore he deponed that the Plaintiff in ELC 84 of 2020 is alien to him and the subject matter is parcel 4170, therefore different from parcel 503 in the lower Court.
5. He urged the Court to consider factors interalia; that both parties reside in Githunguri where the cause of action arose therefore Githunguri Court is best placed to hear the matter; expenses likely to be incurred by the parties; nature of the relief being sought; balance of convenience interest of justice and the possibility of undue hardship.
6. Maintaining that the lower Court has jurisdiction to entertain the matter, he urged the Court to dismiss the Application noting that the Applicant failed to annex a valuation in support of the pecuniary jurisdiction.
7. On the 24/5/2022 parties elected to file written submissions. The Applicant failed to file written submissions while the Respondent's submissions were filed by the firm of Karanja Kagiri & Co. Advocates.
8. As to whether the Application has met the threshold to transfer the suit, the Respondent submitted and rehashed the grounds cited in the Replying Affidavit (supra). In the main the Respondent submitted that the Applicant has failed to annex a valuation to show the value of the property to support the averment that the pecuniary jurisdiction may be beyond that of the PMCC Court. That the Applicant has therefore failed to proof the allegations as to pecuniary jurisdiction of the subject matter; the Application is an afterthought, whose only probative value is to delay the hearing of the case;
9. He submitted that the cause of action arose in Githunguri and both parties reside in Githunguri and for that reason the case should be heard at the nearest Court which in this instance is the PMCC, Githunguri. That the transfer is based on speculation and should not be countenanced.
10. Relying on the case of *Mutia Muindi T/A Mutibra Auctioneers v CFC Stanbic Bank Limited Garnishee & Anor* [2015], the Respondent submitted that it was in the best interest of justice that the Application be dismissed. It was further submitted that the power to transfer a suit by the Superior Court served an important purpose, which is to attain the ends justice and facilitate access to justice. The Respondent urged the Court to dismiss the Application as being unmerited.
11. The key issue for determination is whether the Application has merit.
12. Section 11 of the *Civil Procedure Act* stipulates where suits should be filed. It states as follows;

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such Subordinate Courts:

Provided that-



- (i) If a suit is instituted in a Court other than a Court of the lowest grade competent to try it, the Magistrate holding such Court shall return the Plaint for presentation in the Court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his Court; and
 - (ii) Nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one Subordinate Court in the same County.”
13. Section 18 of the *Civil Procedure Act* empowers the Court to transfer suits 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.”
14. The power to transfer a suit is within the discretion of the Court which discretion must be exercised and applied judiciously. In exercising discretion each case and circumstances must be looked into.
15. Factors that Courts consider before allowing transfer of suits are; motive and the character of the proceedings, the nature of the relief sought, the interests of the litigants, administration of justice and expenses incurred by the parties and the convenience of the parties to be heard at the nearest access to justice.
16. The allegation in this particular case is that the pecuniary value of the suit land may be higher than that of the PMCC Court. No evidence has been tendered to support this averment. I find that it is merely speculative and the onus to proof this rested with the Applicant. This could have been proved by tendering a valuation report of the property to serve as a guide to the Court noting that the Principal Magistrate Court has a pecuniary limit of Kshs 15 million. No evidence has been tabled before this Court to show that the value of the property is above the said pecuniary limitations for the magistrate Courts which is capped at Kshs 20 million.
17. The Court was not guided as to the nature of the case, the cause of action of the parties and reliefs and remedies sought so as to determine whether or not the Application is merited. The Applicant failed to



place the pleadings of the case in the lower Court before the Court. The Court is unable to make any finding whether the two suits can be compatibly tried together either upon consolidation or separately.

18. It is borne of the record that the subject matter of the land is related, parcel 503 is the mother title while parcel 4170 is the resultant subdivision and therefore the parties are suing under similar title.
19. Before I pen off I have noted that though the original Defendant/Respondent passed on, he is yet to be substituted and this in my view is a step that has turned out to be fatal for the Applicant. I have seen the Application dated the 5/5/2021 where the Court allowed prayer No 1 with respect to the reinstatement of the Application but there is no evidence that prayer No 2 with respect with the substitution of the Defendant has been prosecuted. I have perused the said Application together with its annexures and I find that the grant of Letters of Administration was not enclosed to denote that none has been obtained. Interestingly the Death Certificate of one Michael Kihara Kanganya was annexed while the Respondent is Samuel Wanjema Kanganya. The reason for tendering the Death Certificate for the former has not been explained to the Court.
20. For the reasons I find that this Application is unmerited and it is dismissed with no orders as to costs.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of

Waithanji HB Kamuyu for Applicant

Kingangi for Respondent

Court Assistant – Phyllis Mwangi

