



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ongwae v Gitenya & 4 others (Miscellaneous Application E007 of 2022)  
[2022] KEELC 15323 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
MISCELLANEOUS APPLICATION E007 OF 2022**

**JM KAMAU, J**

**DECEMBER 8, 2022**

**BETWEEN**

**STEPHEN MAMBOLEO ONGWAE ..... APPLICANT**

**AND**

**SUSAN MANOTI GITENYA ..... 1<sup>ST</sup> RESPONDENT**

**JOHNSON MACHORA ONGWAE ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE MOGAMBI ONGWAE ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR NYAMIRA COUNTY .. 4<sup>TH</sup> RESPONDENT**

**AND**

**JAMES MAMBOLEO ..... PROPOSED RESPONDENT**

**RULING**

1. By a notice of motion dated 18/11/2022, the Applicant herein sought for the following orders:
  1. That the Application herein be certified as urgent.
  2. That upon granting prayer 1 hereinabove this Honourable Court be pleased to order that case No. MCELC 057 of 2021 be moved from the Chief Magistrate's Court, at Nyamira Law Courts and be placed before this Honourable Court for Hearing and determination.
  3. The Court Executive Officer, Nyamira Law Courts do ensure compliance with the order hereof.
  4. That the costs of and incidentals to the application be costs in the cause.
2. The Application is premised on the ground, inter alia, that the Plaintiff/1<sup>st</sup> Respondent filed a Civil Suit in CMCC NO. ELC 057 of 2021 in the Chief Magistrate's Court, Nyamira on the 25<sup>th</sup> day of



October 2021, citing intermeddling in the Estate of Ongwae Moenga (Deceased), as well as having beneficial and registrable interest in the two land parcels forming the bulk of the Estate of Ongwae Moenga (Deceased). On 30<sup>th</sup> March, 2022, the Applicant in a Notice of Motion titled Preliminary Objection, sought to have the case removed from the Chief Magistrate's Court on the grounds that the latter lacked Pecuniary Jurisdiction to hear and determine the case in accordance with the Magistrate's Court Act, Chapter 10 of the Laws of Kenya, which states that the Chief Magistrates can hear and determine Civil Suits in which the subject matter in dispute does not exceed Kshs. 20 Million. The Application has not been heard. On 3<sup>rd</sup> of August 2022, the Applicant sought and obtained expert valuation of West Mugirango/siamani/3427, which valuation placed the value of part of the said Estate at Kenya Shillings Forty-five Million (Kshs. 45,000,000/=). The other 2 grounds the Application is anchored on are that the Respondents stand to suffer no prejudice if the orders sought are granted and lastly that the ends of justice will be served best by granting the orders sought.

3. Although the Applicant has explained that the notice of motion dated 30/3/2022 is yet to be heard by the subordinate court, such an Application for Transfer cannot be granted by the lower court. He is therefore properly before this court.
4. The Applicant is of the view that this court is the proper forum to resolve the dispute and that it is in the interest of justice that the orders sought are granted.
5. Section 18 of the [Civil Procedure Act](#) 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.”
6. Section 18 (1) (b) of the [Civil Procedure Act](#) gives the High Court the general power to transfer suits from one subordinate Court to another or to itself 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. But for the court to grant an order of transfer the Applicant must satisfy the court as to the reasons for such orders. By use of the term High Court I believe the same should be read mutatis mutandis with Courts of Equal Status since the High Court is deprived of jurisdiction to deal with matters Environment and Land under article 165 (5) of [the Constitution](#) of Kenya, 2010 which provides:
  - (5) The High Court shall not have jurisdiction in respect of matters—



- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. falling within the jurisdiction of the courts contemplated in article 162 (2).

Which are the Courts contemplated in Article 162(2) of *the Constitution*?

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
  2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
    - a. employment and labour relations; and
    - b. the environment and the use and occupation of, and title to, land.
  3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
7. Under section 4 of the *Environment and Land Court Act*, No. 19 of 2011:
1. There is established the Environment and Land Court.
  2. The Court shall be a superior court of record with the status of the High Court.
  3. The Court shall have and exercise jurisdiction throughout Kenya.
8. Consequently, the transfer of cases where the subject matter is either Environment and/or Land from one subordinate Court to another or to the Environment and Land Court is the preserve of the Environment and Land Court of Kenya.
9. I note that the Applicant is relying on section 4 of the *Civil Procedure Act* in challenging the jurisdiction of Nyamira Chief Magistrate Court where CMCC NO. ELC 057 of 2021 was filed.
10. The Applicant has presented other grounds for transfer of the case. But the same are not relevant in this Application. Being a discretionary power, the decision whether or not to transfer a suit from one court to another depends largely on the facts and circumstances of a particular case.
11. In the case of in the matter of the Interim Independent Electoral Commission Constitutional Application No 2/2011 the court had this to say;
- Assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, by statute law and by principles laid out in judicial precedent”
12. The Applicant’s focal point is pecuniary jurisdiction of the Chief Magistrate’s court. Indeed, the issue of jurisdiction is a key consideration by any court before deciding on whether or not to try a matter placed before it. If the court lacks jurisdiction, then it must down its tools. That position was clearly established by Nyarangi JA in the case of the *Owners of Motor vessel “Lillians” –vs- Caltex Oil Kenya Limited* [1989] KLR 1 where he held as follows: -
- 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”.



13. There is thus need to find out whether the lower court has jurisdiction to try the matter now being sought to be transferred to this court. It is noted that the Applicant has annexed a valuation report so as to establish that indeed the suit property is valued at well over Kshs.45 million as contended by the Applicant.
14. The lower court did not have jurisdiction in the first place to entertain the suit since under the Magistrate's Courts Act the highest court presided over by a Chief Magistrate has pecuniary jurisdiction not exceeding Kshs. 20 million.
15. Kshs. 45,000,000/= is way beyond the pecuniary jurisdiction of the Chief Magistrate's court as vested under Section 7(1) of the Magistrate's Court Act, capped not to exceed KShs.20 Million hence the need to transfer the suit. That puts it beyond doubt that the suit whose subject matter is over Kshs. 45,000,000/= filed before the Chief Magistrate's court is before a court without jurisdiction.
16. In the case of *Crest Security Services Ltd v Multiple ICD Kenya Limited* [2020] e KLR the court had the following to say:

...This court takes the view that the concern that would militate against an order for withdrawal of a suit filed in a court without jurisdiction for trial before a court vested with jurisdiction is where a prejudice would be visited on the respondent. In the matter before me no prejudice has been alleged and I consider it in the interests of justice that an order be made for withdrawal of the matter from the magistrate's court and transfer to this court for purposes of it being heard and determined..."
17. This court is not convinced that any prejudice would be visited on the Respondents in the event that the present matter is transferred to the ELC Court. Having established that the Chief Magistrate's court lacks jurisdiction to determine the present matter, I find that justice will only be served if the matter is transferred to the ELC Court, Nyamira for efficient disposal. The Court therefore orders that Nyamira Chief Magistrate's Court Civil Case No. MCELC 057 of 2021 be forthwith moved from the Chief Magistrate's Court, Nyamira and be transferred to Nyamira Environment and Land Court for Hearing and determination. Costs in the course.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF DECEMBER 2022.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant: Sibota**

**Applicant: Present in person**

**Defendants: N/A**

