

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

MISC CIV CASE 30 OF 2005

JOSEPH KARISA KATSOMA & 3 OTHERS.....PLAINTIFF

VERSUS

SAMUEL CHARO MARABU.....DEFENDANT

RULING

The applicants herein have a suit against the respondent in the lower court wherein the former claims vacant possession of various sub-plots, permanent injunction against the respondent restraining him from trespassing, selling or dealing with the said sub-plots, among other reliefs. That suit is pending. By Notice of Motion filed on 8th July, 2005, the applicants are seeking that the suit in the lower Court, SRM CC No. 310 of 2004 be withdrawn and transferred to the High Court at Malindi for trial and disposal. The application is premised on the fact the suit premises are valued at Kshs. 13.5m. That the same was not stated in the plaint at the time of instituting the suit. That value clearly is in excess of the pecuniary jurisdiction of the magistrate's Court now seized of the suit, whose jurisdiction is Kshs. 1M.

In his replying affidavit the respondent averred that the value of the plots is Kshs. 13.5 m and that he raises no objection to the application.

When the application came up for hearing the Court was informed that the parties wished to record a consent to the effect that the application be allowed.

I have state in **Kaingu Kombe and 2 others V Joseph Karisa Katsoma and 3 others** Misc. Civil Application No. 31/05 that where a suit is filed in a Court without jurisdiction, there is no suit capable of being withdrawn and transferred. See also **Kagenyi V Musiramo and Another (1968)** EA 43. Jurisdiction cannot be conferred by consent of the parties, as the parties in this application sought to do.

See also **Adero & Another V Ulinzi Sacco Society Ltd** (2002) 1 KLR 577.

The valuation report of the plots, the subject matter in SRM Civil Suit No. 310 of 2004 is annexed to the application and is shown as Kshs.13.5m. This is clearly in excess of the pecuniary jurisdiction of the lower Court jurisdiction. It is the duty of the parties or their counsel to ascertain, before instituting a suit, the value of the subject matter, where the cause of action arose and where the defendant resides or carries on business. Failure to do this and proceeding to file a suit and thereafter carry out valuation can only result in the situation the parties in this application find themselves. Such an application is incompetent and cannot be maintained. The applicants' application date 7th July, 2005 is dismissed with costs.

Dated and delivered at Malindi this 17th day of October, 2005.

W.OUKO

JUDGE

17.10.2005

Ruling delivered in the presence of Mr.Shuja for Mr.Lughanje.

Mr.Kupalia for the respondent.

W.OUKO

JUDGE