



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC MISC APPL. NO. 1 OF 2020

PETERSON WANJAU WERU.....1ST APPLICANT

EPHANTUS MUKOMA MACHARIA.....2ND APPLICANT

VERSUS

PETER MACHARIA MURIUKI.....1ST RESPONDENT

PAUL MUTHEE MURIUKI.....2ND RESPONDENT

JOSEPH MATHENGE MURIUKI.....3RD RESPONDENT

RULING

A. INTRODUCTION

1. The material on record shows that vide a plaint dated 14th July, 2015 filed before the High Court at Nyeri the Applicants sued the Respondents seeking an order for Title No. Iriaini/Kairia/253 (parcel 253) and Iriaini/Kairia/232 (parcel 232) to be consolidated and shared equally amongst all the dependants of the late Weru s/o Murega.

2. The said suit was later on transferred to the Principal Magistrates' Court at Karatina for trial and disposal. However, during the pendency of the said suit, the Respondents filed a notice of preliminary objection on two grounds. First, that the suit properties were registered in the names of deceased persons and none of the parties were administrators of the estates of the deceased persons. Second, the nature of the claim was essentially a succession dispute hence the court sitting as an Environment and Land Court had no jurisdiction to entertain the suit.

3. The said preliminary objection was fully canvassed and the Principal Magistrates' court at Karatina upheld the preliminary objection in certain respects and consequently struck out the suit on a date which is not clear from the copy of the ruling which was exhibited by the parties. In its ruling, the court found that the claim relating to parcel 253 was not tenable since the Respondents were not the legal representatives of the registered owner who was deceased. The court further held that the claim relating to parcel 232 was essentially a succession dispute which could only be entertained by a succession court.

B. THE APPLICANTS' APPLICATION

4. By a notice of motion dated 20th February, 2020 presumably under **Section 18 of the Civil Procedure Act (Cap. 21)** the Applicants sought transfer of Karatina PMCC No. 60 of 2018 to this court for full hearing and determination. It was contended that the Principal Magistrates' court at Karatina had no jurisdiction to hear and determine the suit.

5. The said application was supported by the affidavit of the 2nd Applicant, Ephantus Mukoma Macharia, sworn on 20th February, 2020 and the annexure thereto. The Applicants contended that they had a good case with chances of success hence the application for transfer should be allowed.

C. THE RESPONDENTS' RESPONSE

6. The Respondents filed a replying affidavit sworn by the 2nd Respondent on 9th March, 2020 in opposition to the application. They contended that the Applicants' suit before the Principal Magistrates' court at Karatina was struck out hence there was no pending suit capable of being transferred to this court. It was further contended that the court lacked jurisdiction to transfer a concluded suit hence the only option the Applicants had was either to appeal against the striking out order or to file an appropriate suit. Consequently, the court was urged to dismiss the application with costs.

D. DIRECTIONS ON SUBMISSIONS

7. When the application was listed for hearing on 22nd February, 2021 it was directed that the application shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their submissions. The Respondents indicated that they wished to rely solely upon their replying affidavit and they did not intend to file any submissions. On the other hand, the Applicants' submissions were not on record by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

8. The court has considered the Applicants' notice of motion dated 20th February, 2020 and the affidavit in support thereof, the Respondents' replying affidavit in opposition thereto and the material on record. The court is of the opinion that the following two issues arise for determination herein:

- (a) *Whether the Applicants have made out a case for transfer of suit.*
- (b) *Who shall bear costs of the application*

F. ANALYSIS AND DETERMINATION

a) Whether the Applicants have made out a case for transfer of suit

9. The Applicants have sought transfer of Karatina PMCC No 60 of 2018- **Peterson Wanjau Weru and Another v Peter Macharia Muriuki & 2 Others** to this court for trial and disposal of the basis that the said court has no jurisdiction to entertain the same. The Applicants annexed an incomplete copy of the ruling of the Principal Magistrates' court to their supporting affidavit. In particular, they omitted the last page of the ruling by which the Respondents' preliminary objection was determined.

10. On the other hand, the Respondents opposed the application on the basis that there was no suit pending at the Principal Magistrates' court at Karatina since the Applicants' suit was struck off. It was, therefore, contended that the Applicants could only appeal against the dismissal order or file a fresh suit in the circumstances.

11. Although the Applicants did not cite any provisions of the law in support of their application, an application for transfer of suit or other proceedings can only be based upon **Section 18 of the Civil Procedure Act (Cap. 21)**. The said Section stipulates as follows:

“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 proceedings 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 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 proceedings has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn”.**

12. The court is of the opinion that in order for a court to transfer a suit or other proceedings from one court to another, there must be something pending to be tried and disposed of. A suit cannot be transferred merely for cosmetic purposes. Thus, where it is shown that a suit has been struck off or concluded, a transfer order would not serve any useful purpose. It has been said that a court of law ought not to issue orders in vain.

13. The court has noted that, unlike the Applicants, the Respondents exhibited a complete copy of the ruling upholding their preliminary objection. The Applicants did not file a further or supplementary affidavit disputing the genuineness of the copy of the ruling annexed to the replying affidavit. The Applicants did not contend that the effect of the ruling of the Principal Magistrates' court was different from what the Respondents contended it was.

14. The court is thus satisfied that the Applicants' suit having been struck out by the Principal Magistrates' court at Karatina there is no pending suit which can be the subject of transfer. Accordingly, the court agrees with the Respondents that there is no suit capable of being transferred. In the premises, the court is not inclined to make a transfer order in futility.

(b) Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. It would appear that the parties herein are relatives hence the court is of the opinion that the appropriate order to make is that each party shall bear his own costs.

G. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds no merit in the Applicants' application for transfer of suit. Accordingly, the notice of motion dated 20th February 2020 is hereby dismissed. Each party shall bear his own costs.

It is so ordered.

RULING DATED and **SIGNED** at **NYERI** and **DELIVERED** via Microsoft Teams Platform this 24th Day of March, 2021.

In the presence of:

The Applicants in person

No appearance for the Respondents

Court assistant – Wario

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HON. Y. M. ANGIMA

JUDGE

24.03.2021