



Kunah v Ever Green Tea Factory Ltd (Environment and Land Miscellaneous Application E017 of 2024) [2025] KEELC 1100 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E017 OF 2024
LA OMOLLO, J
MARCH 6, 2025**

**BETWEEN
RAPHAEL KIPYEGON NG'ETICH KUNAH APPLICANT
AND
EVER GREEN TEA FACTORY LTD RESPONDENT**

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 7th June, 2024. The application is expressed to be brought under Article 162(2)(b) of *the Constitution* of Kenya and Sections 1A, 1B & 18 of the *Civil Procedure Act*.
2. The Applicant seeks the following orders;
 - a. Spent
 - b. That this Honourable Court be and is hereby pleased to transfer Sotik Magistrate's Court ELC No. E001 of 2021 between Raphael Kipyegon Ng'etich Kunah and Evergreen Tea Factory Ltd to this Court for hearing and determination.
 - c. That the costs of this application be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of Raphael Kipyegon Ng'etich Kunah sworn on 7th June, 2024.

Factual Background.

4. The application under consideration first came up for hearing on 19th June, 2024 when the Court directed that it be served upon the Respondent and hearing deferred to 16th July, 2024.



5. On 16th July, 2024, the application was not heard for reasons that an error had been made on the directions issued. It was again deferred to 16th September, 2024. On the said date the Court gave directions that the application be canvassed by way of written submissions.
6. On 17th October, 2024 the matter was mentioned to confirm filing of submissions and reserved for ruling.

The Applicant's contention.

7. The Applicant contends that his advocates instituted a suit against the Respondent to wit Sotik CM ELC Case No. E001 of 2021 vide a plaint dated 7th January, 2021. He explains that in the plaint he sought damages for trespass upon his land, an order compelling the Respondent to return the suit property to its previous state prior to the trespass, compensation for degradation of the environment including natural water resources and in the alternative the Respondent to pay the equivalent value of the suit property.
8. He also contends that at the time the suit was filed he pleaded under paragraph 9(i), (ii) and (iii) of the plaint that he had suffered loss to the tune of Kshs. 18,000,000/=.
9. He further contends that he is advised by his Advocates on record that Section 9 of the Magistrate's Court Act provides for the jurisdiction of the Magistrates Court and that the Magistrates Courts have jurisdiction to hear and determine land disputes as provided for under Section 26 of the *Environment and Land Court Act*. He goes on to state that the said jurisdiction is subject to the pecuniary limits under Section 7 of the Magistrates Court Act which is between five and twenty million.
10. It is his contention that his claim as filed was within the pecuniary jurisdiction of the Magistrate's Court at Sotik.
11. It is also his contention that he was granted leave to file further documents by the trial Court and upon re-assessment of damages by Keriasek & Co. Ltd Valuation Surveyors and Real Estate Agents, the damages he intends to claim are a sum of Kshs. 21,387,500/=.
12. It is further his contention that he intends to apply for leave to amend his plaint to plead the assessed damages and adds that his advocates have already drafted a draft amended plaint.
13. He contends that even though the Magistrate's Court has powers to grant leave to a party to amend pleadings, in this matter if the plaint was to be amended, the Court will not have the jurisdiction to determine the matter and an application for transfer would not be proper in the circumstances.
14. He also contends that he has been advised by his advocates on record that if the plaint is amended and the damages prayed for are in excess of the Magistrate's Court jurisdiction, then an application for transfer to this Court will not be proper as the suit would be incompetent for lack of jurisdiction.
15. He further contends that currently, the Magistrate's Court at Sotik has jurisdiction to hear the matter as the pleadings have not been amended and therefore the suit is competent.
16. It is his contention that this Court being a Court of equal status as the High Court has original unlimited jurisdiction in matters concerning land disputes.
17. It is also his contention that the amount he intends to plead as damages will be above the pecuniary jurisdiction of the Magistrate's Court and it would be in the interest of justice that the matter be transferred to a Court with original and unlimited jurisdiction to hear and determine the suit.



18. He ends his deposition by stating that the Respondent does not stand to suffer any prejudice if the said orders sought are granted as it will have an opportunity to defend itself.

The Respondent's Response.

19. The Respondent filed an Affidavit in Reply sworn by one Amit Shah its director on 5th July, 2024.
20. He deposes that it was not true that the subordinate Court has the jurisdiction to hear and determine the suit. He adds that the only judicial officer with jurisdiction to hear and determine a claim for a sum of Kshs. 18,000,000/= is the Chief Magistrate and that there has never been a Chief Magistrate in Sotik Law Courts.
21. He also deposes that he has been advised by his advocates on record that the highest-ranking judicial officer in Sotik Law Courts is Senior Principal Magistrate Hon. B.M Kimtai to whom the suit sought to be transferred had been allocated for hearing and disposal.
22. He further deposes that the parties herein have appeared before the said judicial officer but the Applicant has never been ready to proceed with the hearing only for him to show up with the present application before this Court.
23. It is his deposition that by dint of Section 7(1)(b) of the Magistrate's Court Act, 2015, the pecuniary jurisdiction of a Senior Principal Magistrate is Kshs. 15,000,000/=.
24. It is also his deposition that the original suit was filed in a Court without jurisdiction. At the time of the filing of the suit, the Applicant was represented by M/s Ochieng Teddy & Company Advocates who appreciated the essence of filing a suit in a Court clothed with jurisdiction.
25. It is further his deposition that he is advised by his Advocates on record that a suit filed in a Court without jurisdiction is a nullity and cannot be transferred.
26. He deposes that the Applicant is mischievously seeking to cure the lack of jurisdiction by leaning on a valuation report he should have obtained before filing his suit.
27. He also deposes that the valuation report puts the value of the purported loss at over Kshs. 20,000,000/= which further serves to highlight the fact that Sotik CMELC No. E001 of 2020 was filed in a Court that lacked jurisdiction.
28. He further deposes that even without the valuation report being lodged, the purportedly damaged suit premises had a value. He adds that the valuation report only gives a formal expression to the intrinsic value of the suit property.
29. He ends his deposition by stating that the issue of jurisdiction is a cardinal one and that jurisdiction should have existed prior to the filing of the primary suit. He adds that transfer of the suit should not be used to cure the illegality in the filing of the suit before the Magistrate's Court.

Issues for determination.

30. The Applicant filed his submissions on 30th September, 2024 while the Respondent filed its submissions on 16th October, 2024.
31. The Applicant submits on whether his application has merit. The Applicant while reiterating the averments in his supporting affidavit relies on Section 18 of the *Civil Procedure Act*, Sections 7 & 9 of the Magistrates Courts Act, the judicial decision of *Rapid Kate Services Limited v Freight Forwarders*



Kenya Limited & 2 Others [2005] 1KLR 292 as was cited in Said Abdikaarim Abdi v Shukri Jattani Sokore & Daudi Soran Sora [2021] eKLR.

32. The Applicant also reiterates that even though the Magistrate's Court has powers to grant leave to a party to amend his pleadings, if he is allowed to do so, the Magistrate's Court will not have the jurisdiction to determine the matter and the application for transfer will not be proper in the circumstances.
33. The Applicant further reiterates that he intends to claim damages of Kshs. 21,387,500/= which is in excess of the pecuniary jurisdiction of the Magistrate's Court.
34. The Applicant relies on the judicial decisions of Rebecca Chumo v Christina Cheptoo Chumo [2021] eKLR, Wamathu Gichoya v Mary Wainoi Magu [2015] eKLR and urges the Court transfer Sotik CM ELC Case No. E001 of 2021 to itself.
35. The Respondent in its submissions reiterates its averments in its replying affidavit, relies on the judicial decisions of Sukari Sugar Industries Ltd v Ochola Peter Ariyo [2021] eKLR, Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment), Family Bank Limited v Shemsa Nassro Hamdu [2021] eKLR, Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR and Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
36. The Respondent submits that a suit must first be filed in a Court with competent jurisdiction for the High Court to exercise its jurisdiction to transfer the suit.
37. The Respondent urges the Court to dismiss the Applicant's application with costs.

Analysis and determination.

38. I have considered the application, the response thereto and the rival submissions.
39. It is my view that the only issue that arises for determination is whether Sotik CM ELC Case No. E001 of 2021 should be transferred to this Court.
40. 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.”
- 41. Section 7 of the Magistrates’ court Act provides as follows;
 - 1. A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
 - a. twenty million shillings, where the court is presided over by a chief magistrate;
 - b. fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - c. ten million shillings, where the court is presided over by a principal magistrate;
 - d. seven million shillings, where the court is presided over by a senior resident magistrate; or
 - e. five million shillings, where the court is presided over by a resident magistrate.
 - 2. The Chief Justice may from time to time, by notice in the Gazette, revise the pecuniary limits of jurisdiction set out in subsection (1), taking into account inflation and change in prevailing economic conditions.
- 42. Section 9 (a) of the Magistrates’ court Act provides as follows:

“ Claims in employment, labour relations claims, land and environment cases A Magistrate’s Court shall—

 - a. in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to—
 - i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. compulsory acquisition of land;
 - iii. land administration and management;
 - iv. public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - v. environment and land generally; ...”
- 43. The Applicant filed Sotik CM ELC Case No. E001 of 2021 against the Respondent. The Applicant has annexed a copy of the Plaint dated 7th January, 2021 to his supporting affidavit.
- 44. The Orders sought in the said plaint are as follows;
 - a. Damages for trespass upon the Plaintiff’s property.



- b. A mandatory injunction be issued as against the Defendant compelling him to return the Plaintiff's property to the state it was prior to trespass and destruction thereof.
 - c. Compensation for the degradation of the environment. Including natural water resources.
 - d. In the alternative to prayers (b) hereinabove, the Defendant to pay the Plaintiff the equivalent value of the property herein.
 - e. Costs of the suit.
45. The Applicant has also annexed a copy of a valuation survey report drawn by Keriasek & Co. Ltd for damage compensation claim for land parcel No. Kericho/Manaret S.S/193 Bomet County. The said report puts the value of compensation at Kshs. 21,387,500/=.
 46. It is on the basis of the above report that the Applicant is seeking that this Court transfers Sotik CM ELC No. E001 of 2021 to the Environment and Land Court for hearing and determination for the reason that the Magistrate's Court does not have the jurisdiction to hear and determine matters where the value of the subject matter is more than 20,000,000/=.
 47. In response, the Respondent contends that the Applicant filed Sotik CM ELC Case No. E001 of 2021 before a Court that did not have the pecuniary jurisdiction to hear it.
 48. The Respondent also contends that the Applicant in his plaint sought to be awarded Kshs. 18,000,000/= . He further contends that the only magistrate who has the pecuniary jurisdiction to hear such a matter is a Chief Magistrate.
 49. The Respondent further contends that in Sotik Law Courts the highest-ranking judicial officer is a Senior Principal Magistrate who has a pecuniary jurisdiction of Kshs. 15,000,000/=.
 50. The Respondent therefore submits that the Applicant filed his suit before a Court that did not have the jurisdiction to hear and determine the matter and therefore this Court cannot transfer the said suit to the Environment and Land Court for hearing and determination.
 51. In the judicial decision of *Oceanic Towers Limited v Husseini Builders Limited* [2021] eKLR the Court cited with approval the judicial decision of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995 where the Court stated as follows;

“Section 18(1) of the *Civil Procedure Act* gives the Court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo motu by the Court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground though it is relevant consideration. As a general rule, the Court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular Court for the purposes of working injustice. What the Court has to consider is whether the Applicant has made a case to justify it in closing doors of the Court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want



of jurisdiction of the Court from which the transfer is sought is no ground for ordering transfer because where the Court from which transfer is sought has no jurisdiction to try the case, transfer could be refused..." (Emphasis mine)

52. As at the time of filing his suit, the Applicant's pleadings show that, among other prayers, loss was particularized at paragraph 9 of the plaint. This loss comes to a total of Kshs. 18,000,000.
53. Having established that the pecuniary jurisdiction for a Senior Principal Magistrates Court is 15,000,000, this court takes judicial notice of the fact that Sotik law courts is a Principal Magistrates' court and the highest-ranking judicial officer in that court is a Senior Principal Magistrate. The court takes judicial notice of this fact and also considering that this court exercises supervisory jurisdiction over it. There is no doubt that the Applicant filed a suit in a court without jurisdiction.
54. The Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR stated thus;

"In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the "O2" principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer. In *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another* [2012] eKLR, it was held as follows:-

"It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as "transfer". In other words, courts can only transfer a cause whose existence is recognised by law." [Emphasis Mine]

55. As was held in *Oceanic Towers Limited v Hussein Builders Limited* (supra) and *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* (supra) cited above, where a suit is filed in a Court lacking in jurisdiction, transfer shall be refused.

Disposition.

56. Taking the foregoing into consideration, I find that the application dated 7th June, 2024 lacks merit and is hereby dismissed with costs to the Respondent.
57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6TH DAY OF MARCH, 2025.



L. A. OMOLLO

JUDGE.

In the presence of: -

Miss Njogu for the Applicant.

Miss Kebungo for Nyamurongi for the Respondent.

Court Assistant; Mr. Joseph Makori.

