



**Mawando Limited & another v Thousand Palms Beach Hotel Limited & another;  
 SBM Bank (K) Ltd (Interested Party); Thousand Palms Beach Hotel Limited  
 (Plaintiff to the Counterclaim); Mawando Limited & 3 others (Defendant to the  
 Counterclaim) (Civil Suit 45 of 2012) [2024] KEELC 5504 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5504 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
 CIVIL SUIT 45 OF 2012**

**LL NAIKUNI, J  
 JULY 2, 2024**

**BETWEEN**

**MAWANDO LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ZAHID IQUBAL DEAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THOUSAND PALMS BEACH HOTEL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SBM BANK (K) LTD ..... INTERESTED PARTY**

**AND**

**THOUSAND PALMS BEACH HOTEL LIMITED .... PLAINTIFF TO THE  
 COUNTERCLAIM**

**AND**

**MAWANDO LIMITED ..... DEFENDANT TO THE COUNTERCLAIM**

**ZAHID IQUBAL DEAN ..... DEFENDANT TO THE COUNTERCLAIM**

**DIAMOND HOUSING LIMITED ..... DEFENDANT TO THE COUNTERCLAIM**

**JOHN MAGIYA PRACTICING AS NYAMETA, MOGAKA  
 & MAGIYA, ADVOCATES AND JOHN MAGIYA & CO.**

**ADVOCATES ..... DEFENDANT TO THE COUNTERCLAIM**



## RULING

### I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application dated 27<sup>th</sup> May, 2024. It was moved by Mawando Limited and Zahiqa Iqbal Dean, the Plaintiffs/ Applicants and brought under the provisions of Sections 3A, 15 & 63 (e) of the Civil Procedure Act, Cap. 21.
2. Upon service of the Notice of Motion application upon the Respondents, the 1<sup>st</sup> Defendant/ Respondent filed grounds of opposition dated 5<sup>th</sup> June, 2024 and further the Plaintiffs filed a further affidavit dated 17<sup>th</sup> June, 2024.

### II. The Plaintiff/Applicants' case

3. The Plaintiffs/Applicants sought for the following orders:
  - a. That this Honourable Court be pleased to transfer this suit and all proceedings herein to the Environment and Land Court at Malindi for trial and disposal.
  - b. That such other and/or further orders do issue in the interest of justice.
  - c. That the costs of this application be provided for
4. The application is supported by the grounds, testimonial facts and the averments found under the 13<sup>th</sup> paragraph supporting affidavit of Florence Achieng, an advocate of the high court of Kenya having the conduct of this matter on behalf of the Plaintiffs/Applicants who averred that:-
  - a. The Applicant herein was a resident of Kikambala, the County of Kilifi in the Republic of Kenya.
  - b. Upon perusal of the Court file, she discovered that the subject matter of this suit, the property known as L.R No. MN/III/736, situated north of Mtwapa Creek in Kikambala, Kilifi County, Kenya, is located in Kikambala, which falls within the local limits of the Environment and Land Court in Malindi. However, the suit was filed at the Environment and Land Court in Mombasa.
  - c. There was an Environment and Land Court in Malindi, which has jurisdiction to hear and determine the suit.
  - d. It was a statutory requirement that every suit for the determination of any other right to or interest in immovable property should be instituted in the court within the local limits of whose jurisdiction the property is situate or where the cause of action arises.
  - e. The cause of action arose in the County of Kilifi where the Malindi Environment & Land Court is stationed.
  - f. The suit was only instituted in the Environment and Land Court in at Mombasa because there was no such division at the Malindi Law Courts at that time.
  - g. An Environment and Land Court division had since been established in Malindi handling disputes relating to Environment and Land and it was the competent court in this case clothed with the requisite jurisdiction to determine the controversy between the parties.



- h. Unless this Honourable Court orders for the transfer, the real controversy will not be resolved.
- i. The parties to this suit would suffer no prejudice upon allowance of this application.
- j. The interest of the court was to do justice and this could only be achieved by the grant of the orders sought by the Applicant allowing the transfer of this suit to the Environment and Land Court in Malindi, where the subject matter of this suit is situated.
- k. It would indeed be in the interest of convenience and expedition of the matter for all the parties that the suit be heard and determined at the Environment and Land Court at Malindi.

### **III. The 1<sup>st</sup> Defendant/ Respondent's case**

5. The 1<sup>st</sup> Defendant opposed the application through a 4 paragraphed grounds of opposition dated 5<sup>th</sup> June, 2024 on the following grounds:-
  - a. The Plaintiffs filed this suit in the Environment & Land Court Mombasa. The matter was party heard and was heard long after the setting up of the Environment & Land Court in Malindi. The application was therefore an after thought intended only to buy time and derail the hearing of this suit.
  - b. There were two Plaintiffs. Only the 2<sup>nd</sup> Plaintiff sought to transfer the suit to the Environment & Land Court Malindi. That Plaintiff knows for a fact that the subject property is registered in Mombasa as the documents exhibited in Court between him and the 3<sup>rd</sup> Defendant reflect him as a holder of that property registered at the Lands Registry, Mombasa. The application was a deliberate delay tactic bordering on an abuse of the process of the Court, that Plaintiff having unreservedly testified in part before this Honourable Court prior to the filing of that application.
  - c. The Plaintiffs and/or the 2<sup>nd</sup> Plaintiff were/was guilty of laches, this suit having been filed way back in the year 2012 and no explanation was given why that application could not have been filed sooner than was done.
  - d. The application was frivolous and ought to be dismissed with costs to the 1<sup>st</sup> Defendant

### **IV. The Further Affidavit of the Plaintiffs**

6. In response to the Grounds of opposition the Plaintiffs filed an 18<sup>th</sup> paragraphed further affidavit sworn by FLORENCE ACHIENG, an Advocate of the High Court of Kenya having the conduct of this matter on behalf of the Plaintiffs on 17<sup>th</sup> June, 2024 where she averred that:-
  - i. The 1<sup>st</sup> Defendant in complete disregard of the Court's directions on timelines where they had been given 7 days to respond to their Application, proceeded to serve them with the said grounds of opposition on Friday, the 14<sup>th</sup> June, 2024 10 days late as they had until 4<sup>th</sup> June, 2024 to do so. (Annexed and marked in the affidavit as "FA - 1" was a true copy of the email thread).
  - ii. Prior to filing the Application dated 27<sup>th</sup> May, 2024 the board of directors, Mawando Limited, the 1<sup>st</sup> plaintiff herein had not sat to resolve to appoint their Law firm (Florence Achieng & Associates, Advocates) to represent them in this suit.
  - iii. The same had since been done and they had now been duly appointed to represent the 1<sup>st</sup> Plaintiff in this suit hence their Application dated 27<sup>th</sup> May, 2024 was Applicable to both



Plaintiffs whom we represent. (Annexed and marked in the affidavit as “FA - 2” was a true copy of the resolution).

- iv. Their Law firm was now properly on record for both Plaintiffs. (Annexed and marked in the affidavit as “FA - 3” a true copy of the notice of Appointment).
- v. It was therefore incorrect to assert that only the 2<sup>nd</sup> Plaintiff sought the transfer of this suit to Malindi. Both Plaintiffs prayed that this suit be tried in the Malindi Environment and Land Court. This prayer was grounded in the fact that the suit property is located in Kikambala, Kilifi County. Consequently, the Malindi Environment and Land Court was clothed with the requisite jurisdiction to hear and determine this suit.
- vi. It was not in dispute that the suit property was registered at the Lands registry in Mombasa but the said title was registered under the Registered Titles Act (Cap 281) (now repealed) hence the reason behind its registration in Mombasa and not Kilifi lands registry despite the suit property being physically located in Mtwapa, Kilifi County. All titles in the coastal region registered under the said scheme (Registered Titles Act) are registered in Mombasa irrespective of whether the property’s physical location was in Kilifi, Malindi or any other location in the coastal region outside Mombasa.
- vii. The only properties registered under the *Land Registration Act* were registered in Kilifi hence the reason why the suit property herein was registered in Mombasa and not Kilifi.
- viii. It was not in dispute that the matter had been set down for hearing but the Plaintiff was yet to conclude his testimony as he was stood down during his first hearing, hence no prejudice will be suffered by the parties as the Plaintiffs have not closed their case. In any event, the testimony that the Plaintiff is set to give was as good as starting off the matter as the Defendants still had a chance to cross examination the Plaintiffs and all their witnesses.
- ix. Their application was neither afterthought nor a deliberate delay tactic. Although the suit was filed in 2012, its first hearing only commenced in 2023. This delay was not the fault of the Plaintiffs, as all parties had not fulfilled their obligations necessary for the matter to proceed. Therefore, the Plaintiffs could not be blamed for the delays in prosecuting the case.
- x. It was therefore not the Plaintiffs’ fault that the matter had never proceeded since it was filed in in the year 2012.
- xi. Further, they were recently appointed to come on record for the Plaintiffs in this matter and upon perusal of the file, they discovered that the suit property was located in Mtwapa District which was within Kilifi County hence the Court best suited to try the matter was the Malindi Environment and Land Court.
- xii. Upon their of this fact they moved with speed to immediately file the Application of transfer of suit to Malindi. Had they been on record when the matter was filed, they would have filed the suit in Malindi or bring this fact to the attention of the Court at the earliest opportune time to ensure expeditious disposal of this suit.
- xiii. In any event, the circumstances that led to the delays in hearing of this suit since 2012 could not be solely attributed to the Plaintiffs. The Plaintiffs were keen on prosecuting the matter to its logical conclusion.
- xiv. In further support of the application dated 27<sup>th</sup> May, 2024 and urged the Honourable Court to allow the same transferring this suit to the Malindi Environment and Land Court.



## V. Submissions

7. On 3<sup>rd</sup> June, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 27<sup>th</sup> May, 2024 be disposed of by way of written submissions. By the time of penning down this Ruling, the Honourable Court was only able to access the Submissions by the Plaintiffs/Applicants. Pursuant to that on 19<sup>th</sup> June, 2024 a ruling date was reserved on 16<sup>th</sup> July, 2024 by Court accordingly on its own merit.

### A. The Written submissions by the Plaintiffs/Applicants

8. The Plaintiffs/Applicants through the Law firm of Messrs. Florence Achieng & Associates filed their written submissions dated 21<sup>st</sup> June, 2024. M/s. Achieng Advocate commenced the submissions by stating that the same had been filed to dispose of the Applicants' application dated 27<sup>th</sup> May, 2024 brought under Sections 3A, 15 & 63 (e) of the Civil Procedure Act, Cap. 21 and all other enabling provisions of the seeking the above sought reliefs.
9. The Learned Counsel submitted that in a joinder the 1<sup>st</sup> Respondent filed grounds of opposition dated 5<sup>th</sup> June, 2024 opposing the same. The Applicant on their part filed a further affidavit sworn on 17<sup>th</sup> June, 2024 in support of the Application and in response to the said grounds of opposition. They wished to entirely rely on the said affidavit. According to the Learned Counsel save for the 1<sup>st</sup> Respondent, all the other parties in this suit were not opposed to this application as no prejudice will be suffered by any party upon allowance of the same. It was their humble submission that the application before Court was merited as the suit property is located in Kikambala which was in Kilifi County hence the Malindi Environment and Land Court is best suited with the requisite territorial jurisdiction to hear and determine this case. The 1<sup>st</sup> Respondent had not tendered before this Court any proof to the Contrary that the property was not situated in Kilifi County. This fact on physical location of the suit property was therefore not in dispute and they urged the Honourable Court to allow their application in that regard transferring the suit and all proceedings herein to Malindi Environment and Land Court.
10. According to the Learned Counsel, the suit property in this case was located in Kikambala, Kilifi Couty. The same was however registered at the Lands registry in Mombasa as the said title was registered under the Registered Titles Act (Cap 281) (now repealed) hence the reason behind its registration in Mombasa and not Kilifi lands registry despite the suit property being physically located in Kikambala, Kilifi County. All titles in the coastal region registered under the said scheme (Registered Titles Act) are registered in Mombasa irrespective of whether the property's physical location is in Kilifi, Malindi or any other location in the coastal region outside Mombasa. Only properties registered under the Land Registration Act, 2012 are registered in Kilifi hence the reason why the suit property herein was registered in Mombasa and not Kilifi.
11. The Learned Counsel averred that the registration of the property in Mombasa Lands Office and the physical location of the said property were two different things that should not be confused as the rules of procedure were clear that every suit for determination of any right to or interest in immovable property should be instituted in the Court within the local limits of whose jurisdiction the property is situate or where the cause of action arose which in this case was the Malindi Environment and Land Court.
12. It was the Learned Counsel's humble submission that the transfer of the suit to Malindi Environment and Land Court was a procedural issue which was statutorily provided and also considering that in this suit the issue as the geographical location of the suit property is settled. They place their reliance



in the case of “John Mwangi Karanja – Versus - Alfred Ndiangui [2011] eKLR” where the Court had this to say;

“It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).

That being the case, it is really a matter of procedure, not jurisdiction, to transfer a case from one Resident Magistrate's Court to another in order to satisfy local geographical limitations, as that court otherwise has jurisdiction throughout Kenya.

The present application seeks to transfer a suit from one Resident Magistrate's Court to another. The Resident Magistrate's Court otherwise has jurisdiction throughout Kenya notwithstanding local geographical limitations set out in the *Civil Procedure Act*. It should be a simple matter of procedure to transfer the suit to the appropriate Resident Magistrate's Court, appropriate in terms of local geographical limitations. I will in the circumstances allow the application by notice of motion dated 21<sup>st</sup> July, 2010. Milimani CMCC No. 1992 of 2005 is hereby withdrawn from that court and transferred to the Chief Magistrate's Court, Thika for hearing and disposal. Costs of this application shall be in the main suit. It is so ordered.”

13. According to the Learned Counsel as was in the above cited case where the suit was being transferred from one Magistrate Court to the other, they urged the Honourable Court to consider that their scenario was no different; they humbly beseeched the Court to transfer the suit to Malindi as it was an Environment and Land Court just like Mombasa Environment and Land Court save that the suit property was situated in Kilifi County.

14. In the case of “Kabungu – Versus - Zikarenga HCCC No 36 OF 1995” it was held that-

“Section 18(1) (b) 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 moto by the court without application by any party...”

15. Further, in the case of “Zacharia Ongera Mongare – Versus - National Bank of Kenya Ltd & Another (2022) eKLR” where the suit had been filed in Environment and Land Court, Nairobi over property located in Ruiru being LR. Number Ruiru/Ruiru East Bloc 3/929, Mogeni J. had this to say:-

“I have carefully considered the pleadings of the parties and have fully considered their submissions and arguments. I feel that striking out the suit for filing the same in the wrong court is a harsh and draconian measure. This will not finally resolve the issues between the parties; it merely prolongs the dispute since the plaintiff is not prevented from filing a fresh suit subject to limitation of time.

I therefore order that this suit be transferred to the Thika Environment and Land Court Registry. The same shall be placed before the Presiding Judge there for further directions,



orders and final determination. The costs of this transfer and other incidentals shall be in the suit.

It is so ordered.”

16. Further, the Learned Counsel relied on the case of “Kipkemboi Kiptim Mariani – Versus - Pauline Awoi [2018] eKLR” the Court held that:

“The guiding considerations are firstly where the suit property is located and secondly whether the court to which it is to be transferred has a magistrate who is gazetted to handle environment and land matters.

Section 12 (a) and (d) of the *Civil Procedure Act* specifies where suits for determination of rights or interests in immovable property ought to be filed. It provides:

Subject to the pecuniary or other limitations prescribed by any law, suits

- (a) for the recovery of immovable property, with or without rent or profits;-.....
- (d) for the determination of any other right to or interest in immovable property;- where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

The suit property herein is Nakuru/Ngongongeri/812 and this suit seeks determination of rights or interests concerning its ownership and possession. The defendant has eloquently explained in her affidavit that the property is located in Molo Sub County. The plaintiff has not tendered any contrary evidence in that regard. I therefore accept as correct that the property is located in Molo Sub County. Needless to state, the property is therefore located within the local limits of the jurisdiction of the Chief Magistrate's Court at Molo.

Regarding the question of whether there is any magistrate at Chief Magistrate's Court at Molo who is gazetted to handle environment and land matters, suffice it to state that this court exercises supervisory jurisdiction over the Chief Magistrate's Court at Molo. The court is aware that there are magistrates in that court who are duly gazetted to handle environment and land matters.

In view of the foregoing, this suit is hereby transferred to Chief Magistrate's Court at Molo for hearing and determination.”

17. The Learned Counsel asserted that it was not in dispute that the matter had been set down for hearing but the Plaintiff was yet to conclude his testimony as he was stood down during his first hearing, hence no prejudice will be suffered by the parties as the Plaintiffs had not closed their case. In any event, the testimony that the Plaintiff is set to give is as good as starting off the matter as the Defendants still had a chance to cross examination the Plaintiffs and all their witnesses.



18. The Learned Counsel submitted in furtherance to paragraphs 14 and 15 of their Affidavit sworn on the 17<sup>th</sup> June, 2024 that since coming on record, they had taken proactive steps to advance this case towards resolution. The Plaintiffs were keen to prosecute this matter diligently and without further unnecessary delay. Their application was made in good faith and with the intention of ensuring a fair hearing for all parties. Transferring this case to the Malindi Environment and Land Court will not prejudice the defendants. The case remained at a stage where the defendants will have full opportunity to cross-examine the plaintiffs and present their own evidence. The Plaintiffs were yet to conclude their testimony, thus, all parties will benefit from a fair opportunity to address the matters at hand. The Learned Counsel submitted that the Application before Court was neither an afterthought nor in any way a deliberate delay tactic as the matter only commenced its first ever hearing in October 2023, despite the same having been filed in the year 2012. There are no intentions whatsoever on the part of the Plaintiffs to delay the matter but they were keen on prosecuting the matter to its logical conclusion within the appropriate jurisdiction.
19. In conclusion, the Learned Counsel submitted that in view of the foregoing, and as demonstrated by the above cited cases and statutory provisions, this Honourable Court do find that the Application herein was merited and proceed to grant the same as prayed.

## VI. Analysis and Determination

20. The Honourable Court has carefully read and considered the pleadings herein and the relevant provisions made by the Learned Counsel. In order to arrive at an informed, fair, Equitable and reasonable decision, the Honorable Court has two (2) framed the following issues for determination.
- a. Whether this Honourable Court has the requisite jurisdiction to over the suit property herein located at Mtwapa and whether the Honourable Court should transfer the suit to Environment and Land Court – Malindi?
  - b. Who will bear the Costs of Notice of Motion application

### **Issue No. a). Whether this Honourable Court has the requisite jurisdiction to over the suit property herein located at Mtwapa and whether the Honourable Court should transfer the suit to Environment and Land Court – Malindi**

21. Under this sub – stratum we shall discuss the jurisdiction and whether or not it is necessary for this Honourable Court to transfer the suit to another territory. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as:

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

22. Under Sections 4 and 13 (1) of the Environment Land court *Act, No. 19 of 2011* this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the ELC (Malindi) in the “Kharisa Kyango – Versus - Law Society of Kenya (2014) eKLR”.



23. Further, in the now famous case of “Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR” dealt with a court, jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

16. Additionally, still on the same point, in the case of “County Government of Migori – Versus - I N B Management IT Consultant Limited ( 2019) eKLR” whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

SUBPARA “10-

The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady ) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

24. Jurisdiction is a weighty fundamental matter and to allow a 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 Oxygen principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even the provision of Article 159 of the Constitution to remedy the same. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.
25. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the case of:- “Matter of Interim Independent Electoral Commission [2011] eKLR” held as follows:

“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. The classic decision in this



regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

26. From the above case and using the Predominant Purpose Test, it will be paramount for me to determine the gravamen of the dispute between the parties herein and determine whether the same is rooted in contests about ownership, deficiency in title, occupation or use of the land or something else.
27. In the case of “Phoenix of East Africa Assurance Co. Ltd – Versus - S M Thiga T/A Newspaper Service (2019) eKLR” the Court of Appeal while dealing with transfer of a matter from one court to another over question of jurisdiction, held as follows:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”

28. Further the Court of Appeal in “Equity Bank Limited – Versus - Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR” stated as follows;

‘In numerous decided cases, courts, including this Court has 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.....’

29. This position was reinforced by the Supreme Court in the case of “Albert Chaurembo Mumba & 7 Others – Versus - Maurice Munyao & 148 Others (2019)eKLR” where the Court restated the position in in the case of “Kagenyi – Versus - Musirambo & Another (1968) EALR 43”, that an order for transfer



of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it.

30. It is imperative to state that this matter filed awhile ago in the year 2012 – close to 12 years ago and its now part heard almost at its tail end. It is after that period that the Plaintiffs now to seek to withdraw it and file it in Malindi. The Property as per the Plaintiffs known as L.R No. MN/III/736, situated north of Mtwapa Creek in Kikambala, Kilifi County, Kenya, is located in Kikambala, which falls within the local limits of the Environment and Land Court in Malindi. However, the suit was filed at the Environment and Land Court in Mombasa.
31. According to the amended – Amended Plaint dated 2<sup>nd</sup> December, 2021, the 1<sup>st</sup> Plaintiff is a limited Liability Company incorporated in Kenya under the Companies Act and the 2<sup>nd</sup> Plaintiff is an adult of sound mind residing and working for gains within Mombasa. Whereas the 1<sup>st</sup> Defendant is described as a limited liability company incorporated in Kenya, the 2<sup>nd</sup> Defendant was described as a Government employee working at the Registrar of Titles Mombasa and responsible for registration of all dealings to do with land including this suit.
32. According to the Amended – Amended Plaint, the cause of action arose in the office of the 2<sup>nd</sup> Defendant’s office where titles were fraudulently registered in the name of the 1<sup>st</sup> Defendant who continuously charged the suit property through loan facilities from the Interested Party.
33. The provision of Section 15 of the Civil Procedure Act, Cap. 21 provides that every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant or each of the Defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain. The Law hence requires that parties (Plaintiffs and Defendants) do file the suit at the closest court where the cause of action arose and/or where the suit property is located or where the parties reside. It is therefore a territorial jurisdiction issue where a party opts to remove a matter from where the cause of action arose and file it away from where the property is situated. The orders being sought in the amended plaint and the amended counter claim dated 15<sup>th</sup> January, 2024 are against the 2<sup>nd</sup> Defendant where the Plaintiffs aver that the fraud occurred.
34. According to the Learned Counsel to the Plaintiffs/Applicants, the suit property in this case was located in Kikambala, Kilifi County. The same was however registered at the Lands registry in Mombasa as the said title was registered under the Registered Titles Act (Cap 281) (now repealed) hence the reason behind its registration in Mombasa and not Kilifi lands registry despite the suit property being physically located in Kikambala, Kilifi County. All titles in the coastal region registered under the said scheme (Registered Titles Act) are registered in Mombasa irrespective of whether the property’s physical location is in Kilifi, Malindi or any other location in the coastal region outside Mombasa. Only properties registered under the Land Registration Act, 2012 are registered in Kilifi hence the reason why the suit property herein was registered in Mombasa and not Kilifi.
35. The Counsel further states that the registration of the property in Mombasa Lands Office and the physical location of the said property were two different things that should not be confused as the rules of procedure were clear that every suit for determination of any right to or interest in immovable property should be instituted in the Court within the local limits of whose jurisdiction the property is situate or where the cause of action arose which in this case was the Malindi Environment and Land Court. The transfer of the suit to Malindi Environment and Land Court was a procedural issue which was statutorily provided and also considering that in this suit the issue as the geographical location of the suit property is settled.



36. The Plaintiffs are bringing the issue of local limits. From Mombasa Law Courts to Kikambala it is 36.4 kilometers by road it is 1 hour and 33 minutes' drive while from Malindi Law Courts to Kikambala is a distance of 85.5 kilometers sure even the Plaintiffs can see that this Court is in the local limits of the suit property. Further and without belabouring the point, this Court has been informed time without number that one of the Plaintiff is a senior citizen and who ordinarily encounters difficulties in access Court due to ill health condition. Thus, in such a circumstance, which Court would be convenient for him – this Court or ELC Malindi?. With all due respect to the Applicant, its my real hope and belief that this is not an art of forum shopping!! Be that as it may, I am therefore inclined to dismiss the said application seeking to transfer the suit to Malindi in its entirety as this Court is competent enough to deal with the trial and disposition of this suit.

**Issue No. b). Who will bear the Costs of Notice of Motion application 27<sup>th</sup> May, 2024**

37. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR” and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court is of the opinion that the 1<sup>st</sup> Defendant has the costs.

**VII. Conclusion and disposition**

38. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. Thatthe Notice of Motion application dated 27<sup>th</sup> May, 2024 by the Plaintiffs be and is hereby found to lack merit hence dismissed with costs.
- b. Thatan order made that this Honourable Court is clothed with the requisite territorial and geographical jurisdiction to hear and determine this suit to its conclusion without any further delay.
- c. Thatfor expediency sake, the part - matter to be heard and thus finalized as scheduled on 30<sup>th</sup> July, 2024 and 27<sup>th</sup> November, 2024 respectively.
- d. Thatcosts of the Notice of Motion application dated 27<sup>th</sup> May, 2024 to be awarded to the 1<sup>st</sup> Defendant and which shall paid by the Plaintiffs.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MISCROFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 22<sup>ND</sup> DAY OF JULY 2024.**

.....  
**HON. MR. JUSTICE L.L NAIKUNI**



**ENVIRONMENT AND LAND COURT AT,  
MOMBASA**

**Ruling delivered in the presence of:-**

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s, Achieng Advocates for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants.
- c. No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants/Respondents.
- d. Mr. Kimathi Advocate for the 3<sup>rd</sup> Defendant/Respondent.
- e. M/s. Abighael Advocates holding brief for Mr. Metto Advocate for the 4<sup>th</sup> Defendant/Respondent.

