



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISCELLANEOUS APPLICATION NO. 165 OF 2019**

**PETER GITAU KARIUKI &**

**BENSON NGIGE NDUNGU.....APPLICANTS**

**VERSUS**

**NELSON GITAHI WANUNA.....RESPONDENT**

**RULING**

The application dated 24/09/2019 sought to have the suit registered as **Milimani ELC CMCCC Case No. 10524 of 2018- Peter Gitau Kariuki and Benson Ngige Ndungu v Nelson Gitahi Wanuna** withdrawn from the Chief Magistrate's Court at Nairobi and transferred to this court for trial and disposal.

The application was based on the ground that the land known as Dagoretti/Ruthimitu/6 ("the Suit Property") had been valued at Kshs. 68,000,000/=, which amount surpasses the monetary jurisdiction of the Chief Magistrate's Court. The application was supported by the affidavit of Peter Gitau Kariuki sworn on 24/09/2019 who deponed that together with his co-applicant, he filed **Milimani ELC CMCCC Case No. 10524 of 2018** which suit is still pending before that court. He annexed a copy of the plaint. He deponed that he had since had the Suit Property valued and that based on the valuation report prepared by Touchstone Valuers Limited dated 12/09/2019, the value of the Suit Property is Kshs. 68,000,000/=. He added that at the time when he instructed his lawyers to file the suit at the Chief Magistrate's court, he had not valued the property professionally and did not indicate to his lawyers the value of the Suit Property. His lawyers advised him that the value of the property surpassed the monetary jurisdiction of the Chief Magistrate of Kshs. 20 Million, and that it was therefore necessary to transfer the case to the Environment and Land Court in the interest of justice and for the expeditious disposal of the dispute.

The Applicants filed submissions which the court has considered. They submitted that in **Kagenyi v Msiramo & Another (1968) EA 48**, the court found that an order for the transfer of a suit from one court to another cannot be made unless the suit had been brought in the first place to a court which had jurisdiction to try it. The Applicants further submitted that even though most courts in Kenya have followed the said pronouncement from Uganda on the issue, some courts have departed from that holding, a case in point being **Mwangaza Kihugwa v Grainbulk Handlers Limited [2004] eKLR**, where the court departed from the holding in the **Kagenyi case** and found that even if a case were filed in a court without jurisdiction to hear and determine it, it was in the interest of justice to take it to the right court so that the issues could be properly and finally adjudicated. The court further stated that the holding in the **Kagenyi case** perhaps had been overtaken by the developments in law because the overriding objectives of the Civil Procedure Act and Article 159(2) of the Constitution of Kenya now enjoin the court to perform its duties without undue regard to procedural technicalities.

Initially the Respondent did not oppose the application but in the course of the proceedings he changed his position and opposed the application. The Respondent submitted that this court could not exercise its discretion to transfer a suit from one court to another, if the suit was filed in a court which did not have jurisdiction because such a suit was incompetent and could not be sanctified through transfer. The Respondent relied on the Court of Appeal decision in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tours Travel [2016] eKLR** where the court held that it would be illegal to transfer a suit filed without jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit since jurisdiction was so fundamental that where it was lacking, parties could not even seek refuge in the oxygen principle or the overriding objective or even Article 159 of the Constitution to remedy the issue.

The issue for determination in this application is whether the Chief Magistrate Court has jurisdiction to hear the matter and whether the Applicants have established a case for this court to order the transfer of that suit to the ELC for determination. Section 7 (1)(a) of the Magistrates Court Act, 2015 provides that a magistrate's court has jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed 20 Million Shillings where the court is presided over by a Chief Magistrate. According to the valuation report prepared by Touchstone Valuers Limited dated 12/09/2019, the value of the Suit Property is Kshs. 68,000,000/= which would be three times over the pecuniary jurisdiction of a Chief Magistrate.

In order to determine whether or not the Chief Magistrates Court has jurisdiction to determine the dispute in **Milimani ELC CMCCC Case No. 10524 of 2018**, it is necessary to ascertain what the subject matter of that suit is.

Looking at the plaint dated 27/11/2018, the Applicants' seek to forcefully evict the Defendant from one room constructed within the Suit Property with the Plaintiffs averring that the Defendant resided in that room with the consent of the Plaintiffs until 22/6/2018 when he was given notice to vacate the premises and but failed to move out.

The Tenth Edition of Black's Law Dictionary defines subject matter as the issue presented for consideration; or the thing in which a right or duty has been asserted or the thing in dispute. That Dictionary describes subject matter jurisdiction as the jurisdiction over the nature of the case and the type of relief sought; or the extent to which a court can rule on the conduct of persons or the status of things. Subject matter is also known as jurisdiction of the cause or jurisdiction over the action or jurisdiction *ratione materiae*.

In the court's view, the value of the room that the Respondent has refused to vacate cannot possibly be Kshs. 68 Million as the Applicants have attempted to demonstrate in their application as they seek to transfer the suit to the ELC. The valuation report lends credence to this fact as it indicates that the portion of the property fronting the main road was leased to New Highlight School which had constructed semi-permanent structures that include classes, offices and ablution blocks and that the other portion of the land is under naturally growing vegetation. There is no averment in the suit to support the possibility that the Defendant is laying claim to the Suit Property or that there is an ownership dispute over the entire Suit Property. The Applicants did not attach the defence filed by the Respondent to their application. Had they done so then it would have given the court an idea about the nature of defence the Respondent is putting up and whether he lays claim to the Suit Property whose value is given by the Applicants as Kshs. 68 Million.

The subject matter of the dispute being a room constructed on the Suit Property whose value has not been shown to exceed Kshs. 20 Million falls well within the jurisdiction of the Magistrates Court.

The application dated 24/09/2019 lacks merit and is dismissed with costs to the Respondent.

**DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF MARCH 2021.**

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. Rosemary Chege for the Applicants

Ms. C. Kiarie holding brief for Mr. J.P. Machira for the Respondent

Mr.

V.

Owuor-

Court

Assistant