



REPUBLIC OF KENYA



Obuyu v Mbukoni Holdings Limited & another; Mbithi (Interested Party) (Environment and Land Miscellaneous Application E017 of 2024) [2024] KEELC 6370 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6370 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E017 OF 2024
CA OCHIENG, J
OCTOBER 2, 2024

BETWEEN

JACKTONE NYENDE OBUYU APPLICANT

AND

MBUKONI HOLDINGS LIMITED 1ST RESPONDENT

THOMAS WAMBUA 2ND RESPONDENT

AND

PENINAH MBITHE MBITHI INTERESTED PARTY

RULING

1. What is before for Court for determination is the Applicant's Notice of Motion Application dated the 26th February, 2024 brought pursuant to Sections 1A, 1B, 3A and 18 (1) (a), (b), (2) of the *Civil Procedure Act*; Section 3, 13 and 19 of the *Environment and Land Court Act* including Order 4 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following Orders:-
 - a. That this Honourable Court be pleased to transfer ELC No. E041 of 2023 at the Principal Magistrate's Court at Kangundo to Machakos Chief Magistrate's Court for hearing and determination.
 - b. That the costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Applicant JACKTONE NYENDE OBUYU where he confirms that he is also the Plaintiff in Kangundo Principal Magistrate's Court ELC No. E041 of 2023. He explains that on or about February, 2024 after a valuation report, it came to his knowledge that the cause of action in ELC No. E041 of 2023 at the Kangundo Principal Magistrate's Court wholly arises in Machakos County. He contends that the prevailing commercial rates of the value of the suit land may exceed the pecuniary



jurisdiction of the Principal Magistrate's Court at Kangundo. He avers that in the interests of justice, this suit should be heard at the Chief Magistrate's Court in Machakos as it is fully clothed with the necessary and proper jurisdiction to handle land disputes as the suit land herein. He reiterates that there will be no prejudice to the Respondents should the order sought be granted since the matter has never proceeded for interpartes hearing. Further, the matter may be conducted in Machakos Law Courts without unnecessary expense and inconveniences.

3. The Application was opposed by the 3rd Respondent PENINAH MBITHE MBITHI who filed a Relying Affidavit where she confirms residing in Joska and Nairobi. She contends that the suit lands are based in Mavoko Municipality within the jurisdiction of Mavoko Chief Magistrate's Court. Further, that the Applicant was aware of this fact when he filed his suit in Kangundo. She argues that the matter is before the Chief Magistrate Hon. Ole Keiwua who has the same jurisdiction as the Chief Magistrate in Machakos. She claims the Applicant has previously litigated in four (4) other suits in the Machakos and Nairobi respectively. She reiterates that the suit should be filed where the subject matter is situated or Defendant resides.

Analysis and Determination

4. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and Applicant's submissions, the only issue for determination is whether ELC No. E041 of 2023 at the Principal Magistrate's Court at Kangundo should be transferred to the Machakos Chief Magistrate's Court for hearing and determination.
5. The Applicant has sought for transfer of the ELC No. E041 of 2023 at the Principal Magistrate's Court at Kangundo to Machakos Chief Magistrate's Court for hearing and determination, which has been opposed by the Respondents. The Applicant claims the commercial value of the suit land is higher than the pecuniary jurisdiction of the said court. Further, that since the cause of action arose within Machakos County, the Chief Magistrate's Court at Machakos can hear and determine it.
6. On jurisdiction, Section 15 of the *Civil Procedure Act* provides as follows: -
 - “Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—
 - a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or (c) the cause of action, wholly or in part, arises.”
7. On transfer of a suit from one court to another, Section 18 of the *Civil Procedure Act* stipulates that:-
 - “(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) ...
 - (ii) ...
 - (iii) ...
- (2) try or dispose of the same; or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or retransfer the same for trial or disposal to the court from which it was withdrawn. 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.”

8. I note the Applicant seeks to transfer a suit from one subordinate court to another subordinate court. This court takes judicial notice of the fact the Kangundo Chief Magistrate’s Court has equal jurisdiction with the Machakos Chief Magistrate’s Court. From the valuation report, I note the value of the suit land is only Kshs. 6,000,000 and yet pecuniary jurisdiction of Chief Magistrate’s Court is Kshs. 20,000,000.

9. In the case of *Sammy Kipserem Chepsiror v John Machira Okombo* [2022] eKLR, the Learned Judge while dealing with transfer of a case from one subordinate court to another, held that:-

“This governing factor as pleaded in the notice of motion limits the court’s jurisdiction to exercise the discretion of transfer in which proceedings are stated to have been commenced without jurisdiction. It has also been suggested that the cause of action arose in Kamukunji police station which potentially brings the dispute within the ambit of criminal law. That is not the subject matter before the chief magistrate’s court at Eldoret. Therefore the totality of the circumstances are far from convincing that the cause of action of the claim would be better be heard and determined at Milimani Commercial Court. A mere convenience of the plaintiff is not enough for transfer of the case to be effected from one session magistrate to another with concurrent jurisdiction. There is no evidence that the key witnesses for both parties are residents of Nairobi. Notwithstanding that even if witnesses were found to reside in Nairobi for the last two years covid-19 pandemic has brought about phenomenal changes in adjudication of cases by adopting information technology. ... Indeed, there are serious anomalies in the approach taken by the applicant on the application to seek leave of the court to transfer the suit to a more suitable forum of conveniences. Unfortunately, that other forum is not appropriate to say the least in terms of the cause of action and it is also dogged by enormous delays due to high volume of caseloads. In the court’s view to transfer the litigation to Nairobi from the current forum at the plaintiff’s request would be yet another example of an abuse of the court process. The Chief Magistrate’s Court Eldoret has personal and subject matter jurisdiction to mete out fair and equal justice to the parties. It also rather curious that in this very case the applicant has discovered without a legitimate factor that Eldoret Court is a forum non-conveniens to adjudicate over the dispute. As pointed out by



the defendant in the affidavit filed in the court below it appears, mistakenly so that National Police Service had been roped in without any sufficient good cause in a matter I consider purely commercial. Given the history of the matter having been reported to Kamukunji police station by the applicant the roots of good faith for contracting parties to the suit are at risk. It is in this context tremendous effort should be made to lay before the trial court the primary evidence in support of the claim against the defendant instead of engaging in a series of interlocutory applications. There is prima facie evidence that such applications have occasioned unnecessary delays.”

10. See also the case of Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another [2012] eKLR.
11. Based on the facts as presented, while relying on the legal provisions I have cited and associating myself with the decisions quoted, I find that the instant Application amounts to an abuse of the court process as the Kangundo Chief Magistrate’s Court is indeed fully clothed with jurisdiction to hear and determine this matter. It seems to me that the Applicant was seeking a convenient court but this cannot do, as this amounts to forum shopping.
12. In the foregoing, I find the instant Notice of Motion Application unmerited and will dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Nzioka for 1st and 2nd Respondents

Morgan Muinde for Applicant

Mutune for Interested Party

Court Assistant – Simon/Ashley

