



Ntururu & another v Omweri & 2 others ((Sued as Legal Administrator of the Estate of Enock Omweri Mabwage)) (Miscellaneous Application E006 of 2022) [2023] KEELC 671 (KLR) (7 February 2023) (Ruling)

Neutral citation: [2023] KEELC 671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
MISCELLANEOUS APPLICATION E006 OF 2022
EM WASHE, J
FEBRUARY 7, 2023**

BETWEEN

PETER PEPERUA OLE NTURURU 1ST APPLICANT

STEPHEN LETAYA OLOOMPALA 2ND APPLICANT

AND

JOSHUA MWEBI OMWERI 1ST RESPONDENT

SYLVESTER RAKUBI CHIBA 2ND RESPONDENT

CHARLES ONGINA RWONA 3RD RESPONDENT

(SUED AS LEGAL ADMINISTRATOR OF THE ESTATE OF ENOCK OMWERI MABWAGE)

RULING

1. The applicants herein filed an ex-parte notice of motion dated October 26, 2022 (hereinafter referred to as “the present application”) seeking for the following orders; -
 - a. The honourable court be pleased to withdraw and transfer Kilgoris spm elc case no. e036 of 2021, kilgoris spm ELC Case No. E030 of 2021, kilgoris SPM Elc Case No. E034 Of 2021 and Kilgoris SPM ELC Case No. E033 of 2021 touching on L.r.no. Narok/nkararo/157,160,264 & 158 respectively to this honourable court for hearing and final disposal.
 - b. Costs of this application do abide the cause.
2. The grounds in support of the above prayers have been outlined in the body of the present application and further collaborated by the supporting affidavit of the 1st Applicant sworn on the October 26, 2022.



3. In a nutshell, the grounds in support of the prayers above are as follows; -
 - i. The proceedings outlined in the prayers relate to land disputes and therefore should be handled by this Court.
 - ii. The present Application does not prejudice any of the parties therein.
 - iii. It is therefore in the interest of justice that the said proceedings outlined in the prayers hereinabove are transferred from the lower court to this Honourable Court for hearing and determination thereof.
4. The Applicants thereafter attached the various pleadings outlined in the prayers for the Court's perusal.
5. The present Application has also invoked the provisions of Section 51 Rules 1, 2 & 3 of the Civil Procedure Rules, Section 7 & 13 of the *Environment and Land Court Act*, No. 19 of 2011 as well as Articles 48, 159(2)(d) & 162 (2) of the 2010 Kenyan Constitution.
6. The issue for determination is the present Application is whether or not this Court has the powers and/or mandate to withdraw proceedings from the lower and thereafter take over the same for purposes of hearing and determination thereof.
7. The Statutory powers for transfer of suits of a Civil nature is provided for under Section 18 of the *Civil Procedure Act*, Cap 21 laws of Kenya which 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”.
8. The issue of withdrawal of suits from the sub-ordinate Court to the High Court (and/or Specialised Courts) was discussed in the case of Abraham Mwangi Wamigwi -versus- Simon Mbiriri Wanjiku & Another (2012) Eklr where the Court stated as follows: -

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi vs. Musiramo* (supra), Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one court to another cannot be



made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.

In *Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others* (supra), Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited vs. National Bank of Kenya* (supra).

9. In a similar case known as *Boniface Waweru Mbiyu-versus- Mary Njeri & Another*, J.b Ojwang J (as he was then) opined as follows; -

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore, it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

10. Indeed, referring to the provisions of Section 18 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and the authorities captured hereinabove, this Court takes note that before it exercises its discretion of withdrawing a suit from a lower Court and transferring it to itself, the issue of jurisdiction must be considered.
11. Where the Lower Court in which the proceedings were first filed does not have jurisdiction to entertain the said suit, then the High Court or Specialised Court can not order a transfer of the same to itself as the suit to be withdrawn and transferred is annulity from the very beginning.
12. On the other hand, if the suit is filed in a sub-ordinate Court which has jurisdiction to hear and determine the said dispute, then the High Court has jurisdiction to withdraw the same from the lower court and have the same transferred to the High Court and/or Specialised Court.
13. Turning to the present Application, the Court has indeed perused the Complaint filed in Kilgoris Elc Spm Case No. 30 Of 2021 Between Charles Ongina Rwona-versus- Peter Pereru Ntururu & 2 Others dated 11th of June 2021.
14. This suit was filed by the firm of Okemwa Elijah & Company, Advocates.
15. The second suit was instituted through the Complaint filed in Kilgoris Elc Spm Case No. 33 Of 2021 Between Joshua Mwembi Omweri (suing As The Legal Representative Of The Estate Of Enock Omweri Mabwage)-versus- Stephen Letiya Olombala dated 28th of June 2021.
16. This suit was filed by the firm of Ombachi & Company, Advocates.
17. The next suit was filed Kilgoris Elc Spm Case No. 34 Of 2021 Between Joshua Mwembi Omweri (suing As Legal Administrator Of The Estate Of Enock Omweri Mabwage)-versus- Peter Tureko & Another.
18. This suit was filed by the firm of Ombachi & Company, Advocates.
19. The last suit was filed by the Complaint known Kilgoris Elc Spm Case No. 36 Of 2021 Between Sylvester Rakubi Chiba-versus- Peter Pereru Ntururu & Another.



20. This suit was again filed by the firm of OKEMWA ELIJAH & COMPANY, ADVOCATES.
21. The Applicants despite fully being aware of the participation of the two firms of OMBACHI & COMPANY, ADVOCATES & OKEMWA ELIJAH & COMPANY, ADVOCATES elected to approach this Court by way of an Ex-parte application.
22. However, the provisions of Section 18 (1) of the Civil Procedure Act, Cap 21 Laws of Kenya expressly require that an application for transfer of civil suits must be notified to the other parties who are also required to be heard and/or participate in its hearing.
23. Consequently therefore, before this Court can exercise its discretion under Section 18 of the Civil Procedure Act, Cap 21 Laws of Kenya, it is a statutory requirement that this Application be served on the Plaintiffs and/or their Counsel.
24. In conclusion, the Court hereby makes the following Orders as appertains the Application dated 26th October 2022; -
 - A. THAT APPLICATION DATED 26TH OCTOBER 2022 BE SERVED ON THE PLAINTIFFS AND/OR THEIR COUNSEL WITHIN FOURTEEN (14) DAYS FROM THE DATE OF THIS RULING.
 - B. THE PLAINTIFFS BE AND ARE HEREBY GRANTED FOURTEEN (14) DAYS FROM THE DATE OF SERVICE OF THIS APPLICATION TO FILE ANY RESPONSES THEREOF.
 - C. THE MATTER BE MENTION IN THIRTY (30) DAYS FOR FURTHER DIRECTIONS AND/OR ORDERS OF THE COURT.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 7TH FEBRUARY 2023.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: NGENO

ADVOCATES FOR THE APPLICANT: NO APPEARANCE

ADVOCATES FOR THE RESPONDENT: NO APPEARANCE

