



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 62 OF 2019**

**ESTHER WANGUI WANJOHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**KELLEN MUTHONI KIBARA.....DEFENDANT / RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application**, dated **19<sup>th</sup> November 2019**, by the Plaintiff/ Applicant seeking for orders that;

***1. Suit No. ELC Case No. 9 of 2019, being Esther Wangui Wanjohi ...Vs... Kellen Muthoni Kibara, be and is hereby transferred from the Senior Principal Magistrate's Court, Ruiru to Environment & Land Court at Thika for final determination.***

***2. Costs be in the cause.***

The Application is premised on the grounds that on **4<sup>th</sup> April 2019**, the Plaintiff/ Applicant filed **Case No. 61** at the Environment & Land Court in Thika and the Court on its own motion transferred the matter from Thika Environment and Land Court to the Senior Principal Magistrates Court at Ruiru as **ELC Case No. 9 of 2019**, for hearing and determination. That the matter came up for hearing where the Defendant/Respondent produced a valuation report putting the value of the suit property at more than **Kshs. 20,000,000/=**.

Further that the Plaintiff/ Applicant carried out a Revaluation of the suit property on **13<sup>th</sup> November 2019**, to which it was determined that each individual plot of the 12 plots in the suit property has a market value of **Kshs.2,000,000/=** which total value exceeds the pecuniary jurisdiction of Senior Principal Magistrate's Court at Ruiru and thus it is in the interest of Justice that the suit is transferred to the **Environment & Land Court**, Thika for determination.

In her Supporting Affidavit, **Esther Wangui Wanjohi** averred that on **8<sup>th</sup> November 2019**, she carried out a search of **Ruiru/Kiu/ Block 11001-11012**, formerly **Ruiru Kiu Block 2/2519**, and upon receiving the searches of the individual plots, she found out that the Defendant/Respondent transferred plots no. **11001, 11002, 11005, 11008, 11009 and 11010** to individuals on **6<sup>th</sup> June 2019**, two months after she instituted a suit against her. She averred that it is in the interest of Justice that the suit be transferred to this Court.

The Application is opposed and the Defendant/ Respondent swore a Replying Affidavit filed in Court on **9<sup>th</sup> December 2019**, and averred that the Plaintiff/ Applicant was served with the list of documents and Photostat copies of the same through her Advocates on **25<sup>th</sup> June 2019**, and therefore had ample time to verify whether the Valuation Report of the land was authentic or not. That the Plaintiff/ Applicant filed the suit on **4<sup>th</sup> April 2019**, and was aware of the subdivisions at the time of filing the suit. Further that at the time of sale of **plots No. Ruiru/Kiu Block 2/11001, 11002, 11005, 11008, 11009 and 11010**, there was no suit pending. That she has been advised by her Advocate's that if a matter is filed in a Court which has no jurisdiction, then there is no suit to be transferred. That the Plaintiff/ Applicant had closed her case and the Defendant's/ Respondent's last witness in **ELC No. 9 of 2019** at Ruiru SPM Court was the Valuer who was being cross examined by the Plaintiff's/ Applicant's Advocate when the Court found that it had no jurisdiction upon the value. That the issue of jurisdiction should have been ascertained by the Plaintiff/ Applicant before the hearing of any witnesses by the Court. The Court as urged to dismiss the Application.

The Plaintiff/ Applicant **Esther Wangui Wanjohi** swore a Supplementary Affidavit on **2<sup>nd</sup> March 2020** and averred that the Defendant/ Respondent is in possession of the suit land and was in the best position to raise the issue of jurisdiction before the matter went for hearing. She averred that she has been advised by her Advocates on record, advise which she believes to be true that the Defendant/ Respondent does not stand to suffer any harm should the Plaintiff's/ Applicant Application be allowed. That she was aware that the value of the suit land was **Kshs. 1,500,000/=**, the amount which her late father illegally sold the suit land to the Defendant at in **2013** and had she been aware of the appreciation, she would have promptly informed the Court when the matter was transferred. That dismissing the suit instead of transferring it will cause irreparable harm and that it is in the interest of Justice and expeditious disposal of cases that the suit is

transferred.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the Application and the Affidavits in support of and in opposition of the same and finds that the issue for determination is ***whether the Application is merited.***

The Applicant has sought for the transfer of the suit from subordinate Court based on the fact that the Lower Court has no jurisdiction to hear and determine the matter based on the value of the land. Though the Defendant/ Respondent has argued that the objection to the jurisdiction of the lower Court to hear and determine the matter came too late in the day, it is not in doubt that jurisdiction is everything and without it a Court has no option but to down its tools. Further it is not in doubt that the issue of jurisdiction can be brought at any time even at the appeal stage.

The power bestowed upon the High Court to transfer suits of a Civil nature is provided for in **Section 18** of the **Civil Procedure Act** that stipulate thus:-

***“(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.”***

In the case of ***Hangzhou Agrochemicals Industries ltd ...Vs... Panda Flowers Ltd (2012) eKLR***, the court addressed conditions to be considered in determining whether or not to grant an order of transferring a suit, thus:

***“...In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.***

The Plaintiff/ Applicant has sought for the transfer of the suit on the basis that the lower Court does not have jurisdiction to hear and determine the matter. It is not in doubt that the powers to order transfer by the High Court which has an equal status to the Environment and Land Court are discretionary. However, a matter can only be transferred if the Court from which the Applicant is seeking to have the matter transferred from had jurisdiction over the said matter and the Applicant has satisfied the Court that the transfer is necessary. See the case of ***Kithita Ngeana ...Vs... Mwaniki Kisume [2018] eKLR*** where the Court stated:-

***“Circumstances that would move a court to grant the order sought were considered in the David Kabungu Case (Supra) where Okello J stated that;.....***

***“What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is 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 expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application 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 would be refused...”***

However, in this instant case the Court acknowledges the special circumstances that occurred and caused the suit to be filed in Ruiru SPM's Court. It is not in doubt that the suit that the Applicant seeks to transfer was initially filed before the Environment and Land Court Thika which was vested with the requisite jurisdiction. The Court on its own motion transferred the suit to Ruiru SPM's Court based on the documents that were filed in Court that suggested that the Senior Principal Magistrate's Court in Ruiru was clothed with the requisite jurisdiction as the value of the suit property is higher than the said Court's pecuniary jurisdiction. However it turns out that the said Court

did not have jurisdiction. Can this Court then transfer the matter back to this Court?

Jurisdiction is everything and without it a Court has no option but to down its tools. It is also not in doubt that jurisdiction is conferred by the law and no party can confer jurisdiction on any Court even parties can not consent to a Court having jurisdiction. The law requires that a Court transfers a matter if the Court in which the matter was filed in had jurisdiction, it is not in doubt that the matter was filed before this Court, and therefore, it follows that the matter was filed in a Court that was clothed with the requisite jurisdiction. When the Court inadvertently based on insufficient documents transferred the matter, it vested the SPM Court in Ruiru with jurisdiction that it did not have. Considering the circumstances of this case, there is no doubt that the transfer to the Ruiru SPM Court was null and void ab initio as this Court could not confer the said Court with jurisdiction neither could the parties.

Having held that the matter ought not to have been transferred and the fact that the matter was filed in the Court that had jurisdiction, the Court finds and holds that the instant Application is merited and the file ought to be transferred back to this Court for hearing and determination. It is in the best interest of Justice and expeditious disposal of the suit that the said matter is transferred to a Court with requisite pecuniary jurisdiction.

The Upshot of the foregoing is that the Notice of Motion Application dated **19<sup>th</sup> November 2019**, is found **merited** and the same is allowed entirely with costs being the cause.

It is so ordered

**Dated, signed and Delivered at Thika this 8<sup>th</sup> day of April 2021.**

**L. GACHERU**

**JUDGE**

**8/4/2021**

**Court Assistant - Phyllis**

### **ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

### **With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**No appearance for the Plaintiff/Applicant**

**M/s Wangare for the Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**8/4/2021**