



**Lund-Henriksen & another v Kabara (Environment & Land Case
E320 of 2021) [2022] KEELC 14694 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E320 OF 2021
OA ANGOTE, J
NOVEMBER 3, 2022**

BETWEEN

BIRGITHE LUND-HENRIKSEN 1ST PLAINTIFF

**ELI PAASCHE DREYER AS ADMINISTRATORS OF THE ESTATE OF PHILIP
DENNIS NAGENDA WILSON 2ND PLAINTIFF**

AND

ALICE WAIRIMU KABARA DEFENDANT

RULING

1. Through the notice of motion application dated November 23, 2021, the plaintiff/applicant sought for the following orders:
 - a. That this honourable court be pleased to transfer MC ELC Number E287 of 2021 Alice Wairimu Kabaria v John Mureithi Clement Ngugi, Birgithe Lund Henriksen and Eli Paasche Dreyer as Administrators of the Estate of Philip Wilson to this Honourable Court for hearing and final determination.
 - b. That MC ELC Number E287 of 2021 Alice Wairimu Kabaria v John Mureithi Clement Ngugi, Birgithe Lund Henriksen and Eli Paasche Dreyer as Administrators of the Estate of Philip Wilson be heard together with the suit herein.
 - c. That all consequential orders in Civil Suit Number E287 of 2021 Alice Wairimu Kabaria v John Mureithi Clement Ngugi & Birgithe Lund Henriksen and Eli Paasche Dreyer as Administrators of the Estate of Philip Wilson be set aside and/or quashed.
 - d. That costs of this application be provided for.
2. This application is based on the grounds on the face of it and the supporting affidavit of the plaintiff's advocate who deponed that this matter and MC ELC No E287 of 2021 relate to the same property, LR



No 1/414 (original number LR No 1/23/3) and that there was a ruling pending delivery on November 26, 2021 on the plaintiff's application seeking temporary injunction and challenging the jurisdiction of that court to hear and determine the matter.

3. Counsel deponed that the issue of injunction has already been determined and an order for temporary injunction against the defendant issued by this court on November 18, 2021.
4. The plaintiff's counsel deponed that the value of the suit land exceeds the Chief Magistrate's court pecuniary jurisdiction as it is over Kshs 250,000,000 and that the hearing of these two matters before the same judge will prevent the prospect of having two conflicting decisions on the same subject matter being rendered, leading to judicial embarrassment.
5. The defendant did not file a response to the application and no submissions were filed by either party.

Analysis and Determination

6. It is the plaintiff's contention that this suit relates to the same subject matter land as in MC ELC No E287 of 2021. The plaintiff's counsel has urged that the Chief Magistrate's Court lacks the requisite pecuniary jurisdiction to hear and determine MC ELC No E287 of 2021 as the value of the subject matter exceeds Kenya Shillings Two Hundred Million.
7. Section 18 of the *Civil Procedure Act* bestows upon the High Court and courts of equal status to withdraw and transfer a case instituted in a subordinate court:-

“(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. It is trite that the power to transfer a case to the High Court can only be exercised if the court before which it is filed is vested with competent jurisdiction to try and dispose of the matter. (*Kagenyi v Musiramo & Another* (1968) EA 43; *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR; *Ali Abdi Sheikh v Edward Nderitu Wainaina & 3 Others HCCC No 556 of 2009*; *Rainbow Manufacturers Limited v National Bank of Kenya* [2010] eKLR). The underlying rationale in these decisions is that if a suit filed is incompetent, then the court lacks jurisdiction to effect a transfer.



9. The Ugandan case of *David Kabungu v Zikarenga HCCC NO 36 of 1995* considered the identical provision of the power of the High Court to transfer a suit and expansively set out the considerations of a High Court and courts of equal status in exercising this power:-

“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. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. 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...”

10. If indeed the matter in the lower exceeds the pecuniary jurisdiction of the lower court, the parties herein should move the lower court to have the suit struck out. Indeed, the lower court on its own motion can strike out the suit for want of jurisdiction. Alternatively, the plaintiff should withdraw the suit in the lower court. These are the only remedies that are available in a situation where a party files a matter in a court which did not have jurisdiction in the first place.
11. For those reasons, this court dismisses the notice of motion dated November 23, 2021 with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2022.

O. A. Angote

Judge

In the presence of;

Ms Olemba holding brief for Nyiha for Plaintiff/Applicant

No appearing for Defendant

Court Assistant – June

