



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

E.L.C. MISC NO. 1 OF 2020

JACINTA WANGUI MWANGI.....1ST APPLICANT

JOSEPH NJOROGI MBURU.....2ND APPLICANT

(Suing as the administrators of the estate of KUNGU KAMWERE)

VERSUS

LUCY WANJIRU NJENGA.....1ST RESPONDENT

JOHN KIGWA NJENGA.....2ND RESPONDENT

GEORGE MUHIA.....3RD RESPONDENT

JACINTA NDUTA.....4TH RESPONDENT

PAUL KIMANI KANYI.....5TH RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 25th January, 2020 expressed to be grounded upon **Order 51 rule 1 of the Civil Procedure Rules 2010, (the Rules), Sections 1A, 1B, 3A and Section 18 (1) (b) (i) of the Civil**

Procedure Act (Cap. 21 Laws of Kenya), Section 4 (b) of the Environment and Land Court No. 19 of 2011, Article 162 (2) (b), Article 165 (3) (b) & (6) of the Constitution of Kenya, 2010 and all other enabling provisions of the law, the Applicants sought transfer of Nyahururu CM L&E No. 112 of 2019 from the Chief Magistrate's court to this court and for stay of proceedings pending the hearing and determination of the application.

2. The application was based on the ground that the Chief Magistrate's Court had no jurisdiction to entertain the suit because the Respondents had filed a defence and counter claim in which they alleged violation of their constitutional rights under the **Constitution of Kenya, 2010**. It was contended that this court is the only one vested with jurisdiction to determine the allegation of alleged violation of fundamental rights under **Article 162 (2) (b) of the Constitution of Kenya, 2010**.

B. THE APPLICANTS' INSTANT APPLICATION

3. During the pendency of the said application, the Applicants filed a notice of motion dated 21st January, 2021 under the provisions of **Order 8 rule 3 (5) of the Rules, Sections 1A,1B and 3A of the Civil Procedure Act (Cap. 21), Section 7 (1) of the Magistrates' Court Act 2015 and all enabling provisions of the law** seeking leave to amend their notice of motion dated 25th January, 2020 to incorporate an additional ground for seeking transfer of suit. They also sought an order that the draft amended notice of motion attached to the application be deemed as duly filed.

4. The only ground upon which the said application was based was that there was an oversight in including the ground that the Chief Magistrates' Court had no pecuniary jurisdiction to entertain the suit. It was contended that the value of the subject matter of litigation was ksh 25 million whereas the pecuniary limit of the trial court was ksh20 million. The application was supported by an affidavit sworn by Joseph Njoroge Mburu on 21st January, 2021.

C. THE RESPONDENTS' RESPONSE

5. The Respondents filed a replying affidavit sworn on 4th February 2021 by John Kigwa Njenga in opposition to the said application. It was contended that there was no evidence on record to demonstrate that the value of the subject matter of litigation was over Kshs 20 million. It was further contended that the reliefs sought in the plaint did not relate to the value of the land in issue and that the Respondents had not indicated the value of the land either in their defence or counterclaim. It was further disputed that the suit and counterclaim were about alleged violation of constitutional rights. The court was consequently urged to dismiss the application with costs.

D. DIRECTIONS ON SUBMISSIONS

6. When the application dated 21st January, 2021 was listed for hearing on 18th February, 2021 it was directed that it shall be canvassed through written submissions. The parties were granted 14 days to file and exchange their written submissions. The record shows that the Applicants filed their submissions on 2nd March, 2021 whereas the Respondents filed theirs on 7th March, 2021.

E. THE ISSUE FOR DETERMINATION

7. The court has perused the Applicants' notice of motion dated 21st January 2021, the Respondents' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether or not the Applicants are entitled to be granted leave to amend their earlier notice of motion dated 25th January, 2020.

F. ANALYSIS AND DETERMINATION

8. The court has considered the submissions of the parties as well as the material on record. It would appear to the court that the Applicants are merely seeking leave of court to add one more ground to the grounds already set out in their notice of motion dated 25th January, 2020. The Applicants contended that there was an oversight in stating that the Magistrates' Court had no pecuniary jurisdiction to try the suit as an additional ground for seeking transfer of suit.

9. The Respondents responded to the application as though they were dealing with the application for transfer dated 25th January, 2020. They disputed the value of the suit property or the value of the subject matter of litigation before the Chief Magistrate's Court. They also disputed that the suit or counterclaim raised allegations of violation of constitutional rights.

9. The court is of the opinion that the general principles which apply to amendment of pleadings equally apply to amendment of applications. There would be no logical or legal basis of applying different principles and considerations in relation to amendment of applications.

10. The guiding principles for amendment of pleadings were summarized in the case of **Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR** as follows:

“...the overriding consideration in applications for such leave is whether the amendments are unnecessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

11. The court finds no good reason why the Applicants' notice of motion dated 21st January, 2021 for leave to amend to enable them properly articulate their application for transfer should not be allowed. The additional ground they are seeking to introduce is a ground which they have freely included in the first instance without any leave of court. They are seeking leave now because of their oversight to include it earlier. The Respondents have not demonstrated what prejudice, if any, they shall suffer if the application was granted. The court notes that the application for transfer is yet to be heard and the Respondents shall have every opportunity to contest it. Accordingly, the court is inclined to allow the application for leave to amend.

G. CONCLUSION AND DISPOSAL ORDER

13. The upshot of the foregoing is that the court finds merit in the Applicants' notice of motion dated 21st January, 2021. Accordingly, the same is hereby allowed as prayed. Costs of the application shall be in the cause.

14. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 24TH DAY OF JUNE 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

in the presence of the

Applicants in person and

In absence of the Respondent

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Y. M. ANGIMA

JUDGE