



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC MISC. APPLICATION NO. 9 OF 2020

GRACE NDUNGE KILONZI.....1ST APPLICANT

KENNEDY NJAGI MWANIKI.....2ND APPLICANT

BENSON KILONZI MWANIKI.....3RD APPLICANT

JANE WAIRIMU MWANIKI.....4TH APPLICANT

VERSUS

NICHOLAS MUNENE WAMIRANGI.....RESPONDENT

RULING

Pursuant to the provisions of Sections 18(1) b (ii) and 2, 1A & 1B, 3 and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and Article 159 (2) of the Constitution of Kenya the Applicant approached this Court under certificate of urgency for a motion dated 7th February, 2020 seeking the following orders:

a. Spent

b. That the Honourable Court be pleased to transfer the suit filed by the respondent being Kerugoya CMCC ELC NO. 45 OF 2019 Nicholas Munene Wamirangi Vs John Mwaniki Njagi & 5 others in the Senior Resident Magistrate Court at Kerugoya to the Senior Resident Magistrate Court at Gichugu for trial and determination.

c. That cost of the application be provided for.

The application is founded upon the following grounds:

- a. That the subject matter which is land is in Gichugu.
- b. That the parties reside in Gichugu.
- c. That the applicants have financial constraints and are unable to attend court regularly due to the distance.
- d. That if the matter is transferred it will reduce the costs the 1st applicant is incurring in transport since she is a widow and the sole bread winner to her children who are co-applicants.

In addition to the grounds, the applicant has deposed to a 11 paragraphs supporting affidavit, of which the following are the major averments:-

- a. That the respondent filed CMCC ELC NO 45 OF 2019 at Kerugoya.
- b. That the subject matter which is land parcel number NGARIAMA/MERICHI/2885 is in Gichugu and the parties reside here.
- c. That the applicant has financial constraints and would prefer the said case transferred to Kianyaga for trial and determination.
- d. That the co-applicants are her children and rely on her for transport to attend court.

e. That she is a widow and does casual jobs after being chased away by the respondent from her home and thus unable to attend court.

The Respondent opposed the application vide his Grounds of Opposition dated 30th October, 2020. The major Grounds of Opposition, reproduced verbatim, are as follows:

a. That the application is incompetent and bad in law.

b. That this court does not have jurisdiction to entertain this application by dint of *Section 13 of The Environment and Land Court Act, 2011 and Article 162(2) (b) of The Constitution of Kenya, 2010* since the question involves land.

c. The application is incurably defective and does not lie since some parties namely John Mwaniki Njagi and Jane Wairimu Njagi who were defendants in Kerugoya **CMCC ELC NO. 45 OF 2019** are involved in this application thus prejudicing their right to be heard.

d. That this matter was determined by Hon E.O. Wambo, Senior Resident Magistrate and a decree issued to that effect thus there is no matter left for transfer to any other court for hearing and determination.

e. That what is pending in Kerugoya **CMCC ELC NO. 45 OF 2019** is an application by the applicants herein to review and/or set aside the decree issued thereon and is best suited to be heard by the court that issued the decree.

f. That the reason fronted by the applicants that they want the suit transferred to Gichugu Senior Resident Magistrate due to transport constrains is farfetched and cannot be ground enough to transfer the said suit.

Applicants Submissions

The Applicants filed submissions dated 3rd March, 2021 where they largely reiterated the averments in the supporting affidavit of their motion dated 7th February, 2020. They submitted that *Section 18 of the Civil Procedure Act* bestows upon the High Court power to transfer suits. They relied on *David Kabungu Case* that decided on the circumstances that would move a court to transfer a suit.

The applicants contend that though the decree was issued the same was issued fraudulently. The trial court at Kerugoya was never informed that the applicant's husband was selling land. Spousal consent was not obtained. The applicants live at the subject land and were never given an opportunity to be heard. They had placed a caution and restriction on the subject land, never were they called to remove the restriction. That is in itself a ground to set aside the consent order. They submit that the court at Gichugu has jurisdiction to determine the case. They urge the court not to deny them access to justice due to financial constraints.

They relied in the decision in:

Meeli Ole Naisewa Vs Benson Gachoki Kinyanjui (2016) e K.L.R.

They pray for the application to be allowed.

Respondent's Submissions

The respondent filed submissions on 2nd November and based them on his Grounds of Opposition dated 30th October, 2020.

The respondent framed three issues for determination.

a) Is there a suit eligible for Determination?

That this matter was determined by Hon E.O. Wambo, Senior Resident Magistrate and a decree issued to that effect thus there is no matter left for transfer to any other court for hearing and determination. The respondent submitted that what is pending for determination is an application by the applicants herein to have the decree stated above reviewed, varied and or set aside.

b) Which Court is best placed to review, set aside or vary the decree issued by Hon. E.O. Wambo on 20th June, 2019?

The respondent rely on *Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010* to submit that the best suited magistrate to hear and determine the application for review is Hon E.O Wambo, Senior Resident Magistrate at Kerugoya.

The respondent relies on the case of :

David Kabunga Vs Zikarega & 4 others (Kampala HCC No. 36 of 1995) which was cited with approval in the case of *Meeli Ole Naisewa Vs Benson Gachoki Kinyanjui (2016) e K.L.R.* where the Court stated as follows:

“The burden lies on the applicant to make a strong case for the transfer. A mere balance of convenience in favor of the proceedings in another court is not sufficient ground for transfer.”

c) Who should bear the costs of this application?

The respondent submits that the application herein is devoid of merit and should be dismissed with costs.

Issues for Determination

1. Whether this matter should be transferred from Kerugoya Senior Magistrate's Court to Gichugu Senior Magistrate Court for trial and determination.

Analysis

Section 18 of the Civil Procedure Act bestows upon the High Court and Courts of equal status power to transfer suits:-

(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;

The applicants in their notice of motion and submission seek the transfer of the suit **CMCC ELC No. 45/2019** (Kerugoya) to the Senior Resident Magistrate Court at Gichugu. They claim that the subject of matter of the suit, land, is situated in Gichugu as well as the applicants who reside there. They submitted that the court at Gichugu has jurisdiction to determine the case. Further they urged the court not to deny them access to justice due to financial constraints.

On the part of the respondents, they relied on *Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010* to submit that the best suited magistrate to hear and determine the application for review is Hon E.O Wambo, Senior Resident Magistrate at Kerugoya.

They contend that what is pending in Kerugoya **CMCC ELC NO. 45 of 2019** is an application by the applicants herein to review and/or set aside the decree issued thereon and is best suited to be heard by the court that issued the decree.

Section 80 of the Civil Procedure Act provides that:

Any person who considers himself aggrieved —

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 2 of the Civil Procedure Rules, 2010 provides that:

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed”.

The applicants main ground for transfer of the suit is that they are facing financial constraints in prosecuting the matter at Kerugoya Senior Resident Magistrates Court.

They cite the decision in:

David Kabunga Vs Zikarega & 4 others (Kampala HCC No. 36 of 1995) which was cited with approval in the case of **Meeli Ole Naisewa Vs Benson Gachoki Kinyanjui (2016) e K.L.R.** The Court stated as follows:

“The burden lies on the applicant to make a strong case for the transfer. A mere balance of convenience in favor of the proceedings in another court is not sufficient ground for transfer.”

Further in **Meeli Ole Naisewa Case**, the court ruled that the provisions of **Section 18 of the Civil Procedure Act** are fortified by **Sections 1A, 3A and 1B** to achieve the overriding objectives of the Court.

Moreover, the threshold for transfer of cases was set out in the case of **Kithita Ngeana Vs Mwaniki Kisume [2018] e KLR**, the Court held as follows:-

“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..."

I agree with the decision above save to add that if the suit before the Magistrate Court here in Kerugoya has been heard and determined, then there is really nothing to be transferred to Gichugu except the decree for execution. The respondent has averred that what is pending in the case before the Magistrate Court herein in Kerugoya is an application for review under **Section 80 CPA** as read with **Order 45 CPR**. Those averments have not been denied. If that be the case, then the most suitable person to hear the application is the Judge who passed the decree. In that case therefore, the trial magistrate in Kerugoya is better placed to hear the application as stipulated under **Order 45 CPR**.

The applicant cannot use financial constraints at this stage when the case has been concluded. In any case, the application for review which is now pending can be handled by the applicants advocate as their personal attendance in such an application is not required. The issue whether the applicants will be denied justice if the application is not granted is a non-starter. The suit before the magistrate in Kerugoya has gone a full circle and judgment delivered. The applicants cannot be heard to say that they were denied access to justice.

For all the reasons stated herein, I find the applicants had not made a case to warrant this Court exercise its discretion in transfer of **CMCC, ELC 45/2019 (Kerugoya)** to Gichugu Resident Magistrate Court. In the upshot, the Notice of Motion dated 7th February 2020 is dismissed with costs to the respondent.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18TH DAY OF JUNE, 2021.

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E.C CHERONO

ELC JUDGE

In the presence of:-

1. Ms Githaiga holding brief for Barasa for the 2nd Respondent
2. Applicant/Advocate – absent
3. Kabuta – Court clerk.