



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISC ELC APPLICATION NO. E 8 OF 2020

JAMES MURAGURI KABONO..... APPLICANT

VERSUS

EQUITY BANK (K) LIMITED.....RESPONDENT

RULING

What is before Court for determination is the Applicant's Notice of Motion application dated the 27th October, 2020 brought pursuant to section 18 (1) of the Civil Procedure Act. The Applicant seeks to transfer Kajiado Chief Magistrate's Court ELC Case No. 04 of 2020 to this Court for hearing and final determination. The application is premised on the grounds on the face of it and the supporting affidavit of MARGARET KIMANI the Advocate in conduct of the matter on behalf of the applicant. She confirms filing the Kajiado Chief Magistrate's Court ELC Case No. 04 of 2020 online on 12th October, 2020. She explains that the Honourable Court on duty pronounced itself as without jurisdiction in the matter. She avers that there are no orders to preserve the suit property which was to be auctioned on 14th October, 2020.

The application was opposed by the Respondent who filed a Notice of Preliminary Objection dated the 28th January, 2021 where it contended that under section 18 of the Civil Procedure Act, the court has no jurisdiction to entertain this application that seeks to transfer the Kajiado Chief Magistrate's Court ELC Case No. 04 of 2020 to the ELC High Court at Kajiado for trial and determination. Further, the Applicant's Application and suit should be struck out with cost to the Respondent.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Applicant's Notice of Motion application dated the 27th October, 2020 and the Respondent's Notice of Preliminary Objection dated the 28th January, 2021 including the rivaling submissions, the only issue for determination is whether the Kajiado Chief Magistrate's Court ELC Case No. 04 of 2020 can be transferred to this Court for hearing and determination.

The Applicant in his submissions reiterated his claim and contended that this court has power to transfer a suit under section 18 of the Civil Procedure Act. To support his arguments, he relied on the following decisions: **Aberdare Investments V Bernard Wachira & 5 Others (2014) eKLR**; **Wycliffe Mwangaza Kihugwa V Grainbulk Handlers Limited (2014) eKLR**; and **Grace Thogori Komo V Dan Njagi Ndwiga (2013) eKLR**.

The Respondent in its submissions insist this court does not have power under section 18 of the Civil Procedure Act to transfer the aforementioned suit. Further, that a suit instituted in a court without jurisdiction cannot be transferred under section 18 of the Civil Procedure Act but remains a nullity. To buttress its averments, it relied on the following decisions: **Abraham Mwangi Wamigwi Vs Simon Mbiri Wanjiku & Another (2012) eKLR** and **Misc Application No. 308 of 2002 Charles Omwata Omwoyo Vs African Highlands & Produce Co. Ltd (2002) eKLR**.

On the issue of transfer of suit from one court to another, Section 18 of the Civil Procedure Act provides that:

'(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.’

Nyarangi JA in *The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1*, while dealing with the issue of jurisdiction held that:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

In the Ugandan case of *David Kabungu Vs Zikarenga HCCC NO. 36 OF 1995* it was observed that

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...”

See the case of *Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another [2012] eKLR*.

In the current scenario, the Applicant seeks to transfer a suit where the Magistrate had already downed her tools stating that she did not have jurisdiction to determine it. The Applicant in the said application apart of indicating that no interim orders were granted in the lower court has not made out a strong case for transfer of the said suit. I opine that since the magistrate had already downed her tools, citing lack of jurisdiction, there is hence no suit to be transferred to this court for hearing and final determination. In applying the legal provisions cited above as well as associating myself with the aforementioned cases, I find that this court is devoid of jurisdiction to transfer the Kajiado Chief Magistrate’s Court ELC Case No. 04 of 2020 to this court for hearing and final determination.

In the circumstance, I find the application dated the 27th October, 2020 unmerited and will dismiss it with costs.

Dated Signed and Delivered Virtually at Kajiado this 27th Day of July, 2021.

CHRISTINE OCHIENG

JUDGE