



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC MISC. APPLICATION NO. E002 OF 2021**

**ERASTUS CHIURIITHIRU.....APPLICANT**

**VERSUS**

**JANET WANGECHIGITONGA and**

**DANIEL NDIRITUWAMUTU (as administrators of the estate of the late**

**JOSPHAT GITONGA KING'ORI and HANNAH GACUGU WAMUTU).....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, LAIKIPIA .....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. The material on record shows that the suit the subject of the instant application for transfer was initially filed before the Environment and Land Court at Nyeri as *Nyeri ELC No. 225 of 2013 – Josphat G. King'ori and Another v Erastus ChiuriI thiru and Another*. The said suit was on 3<sup>rd</sup> May, 2018 transferred to the Chief Magistrate's Court at Nanyuki for trial and disposal. It was assigned Nanyuki CMCC No. 81 of 2018. It would appear that despite the suit having been listed for hearing in that forum on more than one occasion the suit has never been heard and disposed of to date.

**B. THE APPLICANT'S APPLICATION**

2. Vide a notice of motion dated 28<sup>th</sup> January, 2021 brought under **Sections 1A, 1B, 3A and 18(1) and (2) of the Civil Procedure Act (Cap. 21), Order 51 rule 1 of the Civil Procedure Rules**, and all **enabling provisions of the law**, the Applicant sought transfer of the said suit (*the pending suit*) from the Chief Magistrate's Court at Nanyuki to the Chief Magistrate's Court at Nyahururu for trial and disposal.

3. The application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by the Applicant, Erastus Chiuri Ithiru, on 27<sup>th</sup> January, 2021. It was contended that the subject matter of the pending suit was located in Marmamet in Laikipia West which was only 12 km from Nyahururu town and about 200 km away from Nanyuki Town. That was the only ground upon which the application was based.

**C. THE RESPONDENTS' RESPONSE**

4. The Respondents filed a response to the application vide a replying affidavit sworn by their advocate on record, Mr. Mwangi Kariuki on 25<sup>th</sup> February, 2021. They opposed the application on several grounds. First, it was contended that when the suit was transferred to the Chief Magistrate's court at Nanyuki on 3<sup>rd</sup> May, 2018, the Applicant did not raise any objection before the Environment and Land Court at Nyeri. Second, it was contended that when the pending suit was adjourned on 19<sup>th</sup> June, 2019 the same was adjourned to enable the Applicant file an application for transfer within 14 days which opportunity the Applicant did not utilize. Third, it was contended that the suit property was geographically located within Laikipia County hence the Chief Magistrate's court at Nanyuki was competent to entertain it in accordance with the provisions of **Sections 12 and 13 of the Civil Procedure Act (Cap. 21)**. Finally, it was contended that the administration and registration of the suit property was based in Nanyuki where the relevant land registry was based. Consequently, the court was urged to dismiss the application with costs.

**D. THE SUBMISSIONS OF THE PARTIES**

5. When the application was listed for *inter partes* hearing on 25<sup>th</sup> May, 2021 the Applicant's advocate prosecuted it on the basis of the grounds set out in the notice of motion and the contents of the supporting affidavit. It was contended that the suit property falls within the local limits of the Chief Magistrate's at Nyahururu hence the application for transfer should be allowed.

6. The Respondents, on the other hand, opposed the application on the basis of the contents of the replying affidavit filed on their behalf by their advocate on record. They submitted that the suit property falls within Laikipia County hence the Chief Magistrate's Court at Nanyuki had jurisdiction to entertain the suit. It was further submitted that the suit had been pending since 2013 and that the instant application was merely an afterthought which was intended to delay expeditious trial and disposal of the suit. The court was consequently urged to dismiss it with costs.

#### **E. THE ISSUE FOR DETERMINATION**

7. The court has perused the Applicant's notice of motion dated 28<sup>th</sup> January, 2021, the Respondents' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the primary issue for consideration is whether or not the Applicant has made out a case for transfer of the pending suit from Nanyuki Law Court to Nyahururu Law Courts.

#### **F. ANALYSIS AND DETERMINATION**

8. The court has considered the material and submissions on record on the issue of transfer of the pending suit. The application was essentially based upon **Section 18** of the **Civil Procedure Act (Cap. 21)** even though the Applicant also cited the general provisions of **Sections 1A, 1B and 3A** of the Act in support thereof. **Section 18** of the said Act stipulates as follows:

**“(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.”**

9. The Respondents were of the view that the pending suit was properly before the Chief Magistrate's court at Nanyuki since the suit property was located within Laikipia County. It was further contended that the pending suit was fully compliant with the provisions of **Section 12 and 13 of the Civil Procedure Act** on the place of suing. **Section 12** stipulates as follows:

**“Subject to the pecuniary or other limitations prescribed by any law, suits—**

**(a) for the recovery of immovable property, with or without rent or profits;**

**(b) for the partition of immovable property;**

**(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;**

**(d) for the determination of any other right to or interest in immovable property;**

**(e) for compensation for wrong to immovable property;**

**(f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:**

**Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be tirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”**

10. On the other hand **Section 13** of the **Act** stipulates that:

**“Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.”**

11. It is apparent from the material on record that the Applicant does not deny the jurisdiction of the Chief Magistrate’s Court at Nanyuki to entertain the suit. It is common ground that the suit property falls within Marmanet within Laikipia County and that the jurisdiction of the Chief Magistrate’s Court at Nanyuki extends to Marmanet. The Applicant’s Application was based merely on convenience since he was a resident of Nyahururu.

12. The court has considered the fact that the suit sought to be transferred has been pending for about 8 years now. The court has further considered the fact that the suit property is registered at the Land Registry at Nanyuki and that some of the orders sought in the plaint require certain actions to be undertaken by the Land Registrar, Laikipia County who is based at Nanyuki. The court is further of the opinion that any useful documentary evidence in the hand of government officials is likely to be found at Nanyuki and not Nyahururu.

13. The court has also noted that the Applicant did not object to the transfer of the pending suit to Nanyuki Law courts in 2018 and that he did not expeditiously file the application for transfer in 2019 when he was accorded a chance to do so by the trial court. Considering the age of the suit, there is a real risk of the hearing of the suit being delayed further as a result of a transfer.

14. Although the Chief Magistrate’s Court at Nyahururu is also competent to entertain the pending suit in accordance with the provisions of **Sections 12 and 13** of the **Civil Procedure Act** the court is, nevertheless, disinclined to order a transfer for the reasons already given. The court has further noted that the Applicant filed the instant application whilst the pending suit was already scheduled for hearing on 28<sup>th</sup> April, 2021. That could be an indication of the Applicant’s intention to needlessly delay or frustrate expeditious hearing and conclusion of the suit.

**G. CONCLUSION AND DISPOSAL**

15. The upshot of the foregoing is that the court finds no merit in the application for transfer of suit. Accordingly, the Applicant’s notice of motion dated 28<sup>th</sup> January, 2021 is hereby dismissed with costs to the Respondents. It is so ordered.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 8<sup>TH</sup> DAY OF JULY 2021.**

In the presence of:

Ms Njoki holding brief for Mr. Mwangi Kariuki for the Respondents

No appearance for the Applicant

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**Y. M. ANGIMA**

**ELC JUDGE**