



**Kariuki v Mwirabua & 2 others (Miscellaneous Civil Cause
E001 of 2024) [2024] KEHC 4699 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CAUSE E001 OF 2024**

FN MUCHEMI, J

MAY 2, 2024

BETWEEN

JAMES KIBE KARIUKI PLAINTIFF

AND

JOSPHAT GICHUNGE MWIRABUA 1ST RESPONDENT

MWANANCHI CREDIT LTD 2ND RESPONDENT

MISTAN AUCTIONEERS 3RD RESPONDENT

RULING

Brief Facts

1. The applications coming up for determination are dated 2nd January 2024 and 4th January 2024. The first application dated 2nd January 2024 seeks for orders of transfer of Thika MCL & E No. E119 of 2023 from Thika Chief Magistrate’s court to Ruiru Magistrate’s courts for disposal. The second application dated 4th January 2024 seeks for orders of setting aside, vacating or discharging the orders issued on 2nd January 2024 in the instant case.
2. For ease of reference the applicant in the second application shall be treated as “the applicant” while the applicants in the second application shall be referred to as the respondents.”
3. The application dated 4th January 2024 was opposed by the applicant through a Replying Affidavit sworn on 11th March 2024.

The First application dated 2nd January 2024.

4. The application was supported by the affidavit sworn of Mr. Richard Kimani Charagu, the applicant’s Advocate. He deposed that in the year 2004, the applicant entered into a sale agreement with the 1st respondent for the sale of three plots namely Plots Nos. 1, 2 and 28 out of LR No. Ruiru East/Juja East



Block 2/795. The deponent states that the applicant paid the full purchase price and took possession of the said plots. He then developed one of the plots where he has a permanent residential house, a permanent perimeter wall in addition to other developments.

5. It was further deposed that the applicant later realized that the 1st respondent had taken a loan with the 2nd respondent and used the suit property as a collateral and that the 3rd respondent had placed an advert in the newspaper for sale of the suit property by public auction in recovery of the outstanding loan.
6. Consequently, the applicant states through his counsel that he filed an application under certificate of urgency at Thika CM Court MCL & E No. 119 of 2023 seeking for orders of an injunction restraining the respondents or their agents from dealing and intermeddling with the suit property.
7. Upon service of the documents, applicant states that the 2nd respondent filed a preliminary objection on the basis of territorial jurisdiction which led his counsel to realize that he had made an error in filing the matter in the wrong court.
8. Mr. Charagu urges this court not to visit his mistakes on his client, the applicant for that would impair the delivery of justice. Consequently, counsel for the applicant urges the court to transfer the suit he filed in Thika law courts to Ruiru law courts and he further avers that the respondents will not suffer any prejudice if the suit is transferred.

The second application dated 4th January 2024.

9. The 2nd respondent states that the applicant filed his application dated 2nd January 2024 seeking to have a matter filed before the Chief Magistrate's Environment and Land Court at Thika, MCL & E No. E119 of 2023 transferred to the Ruiru Law courts. The 2nd respondent further states that the court in conduct of the application granted the orders sought ex parte and closed the file.
10. The 2nd respondent contends that the applicant served its advocates with the application dated 2nd January 2024 but failed or neglected to serve the order that was issued by the court until the morning of 4th January 2024 when MCL & E No. E119 of 2023 was slated for mention effectively preventing it from applying to set aside the said court orders before the matter came up in the lower court.
11. The 2nd respondent contends that the orders granted by the instant court ought to be set aside as a matter of law as the court had no jurisdiction to issue the orders as the subject matter of the application and the suit in the lower court is LR No. RUIRU EAST/JUJA EAST/BLOCK 2/795 and the court empowered to hear and determine the application is the Environment and Land Court. Further, the said application was filed during the High Court vacation without an application under Rule 3(1) and (2) of the High Court (Practice and Procedure Rules). The 2nd respondent further argues that the order issued by the court was final in nature and none of the respondents were allowed to participate nor file responses, contrary to the mandatory provisions of *the Constitution* guaranteeing a fair trial and further that the court failed to acknowledge that the applicant did not even seek that the application under the vacation rules be heard and determined the application ex parte which the 2nd respondent argues is not only irregular but should warrant investigation.
12. The 2nd respondent contends that the applicant is guilty of material non-disclosure and misrepresentation as he failed to disclose that there is a pending ruling in Thika MCL & E No. 119 of 2023 on a preliminary objection filed by the 2nd respondent which among other grounds raised the issue of territorial jurisdiction clearly showing that his approach to the instant court was mischievous. Furthermore, the applicant had previously filed a case before Ruiru Law Courts which was heard and determined being Miscellaneous Application No. E30 of 2023 involving the same parties and the same



subject property LR No. Ruiru East/Juja East/Block 2/795 and that is the reason why the applicant filed Thika MCL & E No. E119 of 2023 at Thika Law Courts.

13. The 2nd respondent contends that by closing the file suo moto, the court ensured that it would not be able to respond and or participate in an application where only the 2nd respondent company would suffer detriment.
14. The 2nd respondent states that the court issued an order against an application that was irregularly placed before it and one that had no supporting documents to justify the orders sought, which act by the applicant was calculated as the supporting documents would have clearly shown that the instant court lacked jurisdiction and exposed the material non-disclosure.
15. The 2nd respondent contends that it is trite law and practice that if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer and thus the court ought to set aside the orders issued on 2nd January 2024. Moreover, the 2nd respondent urges the court in the wider interest of justice to allow the motion ex debito justitiae.

The Applicants response to the 2nd application

16. The plaintiff states that his application was brought under the vacation rules and on the face of the motion the application clearly indicated so. The plaintiff further states that his advocate on record is not guilty of material non-disclosure as he disclosed the facts relating to Thika MCL & E No. 119 of 2023 and in particular he stated that the 2nd respondent had filed a preliminary objection on the basis of territorial jurisdiction, that the matter was slated for 4th January 2024 and thus it ought to be transferred to Ruiru before determination of the preliminary objection.
17. The plaintiff contends that the 2nd respondent is misleading the court by giving false information on who initiated Ruiru Miscellaneous Application No. E30 of 2023 when in fact the 2nd respondent is the one who filed the case and sued the 1st respondent. The plaintiff states that since he was not a party to the Ruiru Miscellaneous Application, he is not bound by the said ruling.
18. The plaintiff argues that his application is brought in good faith as there is need for the substantive issues in dispute concerning the subject suit property to be heard and determined before a court which has jurisdiction. The plaintiff further argues that the substantive issues in question are about selling of land to claim the amount due for the loan thus making the instant court have the jurisdiction to hear and determine his application.
19. The plaintiff states that the instant court has incidental concurrent jurisdiction which includes the ability of the High Court and equal status courts to deal with certain procedural issues such as the transfer of suits and Article 159(2) of *the Constitution* gives authority to the instant court to perform its duties in a just, expeditious, proportionate and affordable was without undue regard to technicalities.
20. The plaintiff states that the orders sought are not tenable as the same is brought under the wrong provisions of the law and further that if the orders sought are granted, the plaintiff states that he will suffer great prejudice and irreparable harm since the suit property in dispute will be auctioned and sold yet he is a rightful owner of the suit property. Moreover, the plaintiff states that the 2nd respondent will not suffer any prejudice when the matter is transferred to the right court that has jurisdiction.
21. The 2nd respondent filed a Further Affidavit dated 14th March 2024 and states that the entire suit MCL & E No. 119 of 2023 was dismissed on 5th March 2024 by Hon. Atiang' Mitulla.



The Applicant's Submissions

22. The applicant relies on Section 18 of the *Civil Procedure Act* and the case of Esther Mugure Karegi vs Penta Tancom Limited [2016] eKLR and submits that Thika Chief Magistrate's Court ELC Case No. E119 of 2023 only lacks geographical jurisdiction which does not make a suit a nullity and thus the instant suit is capable of being transferred. The applicant further relies on the cases of Pamoja Women Development Programme & 3 Others vs Jackson Kuhumbu Wangombe & Another [2016] eKLR, Grace Thogori Komo vs Dan Njagi Ndigwa [2013] eKLR and Esther Mugure Karegi vs Penta Tancom Limited [2016] eKLR and submits that the issue of transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction and Article 159 (2) of *the Constitution* enjoins courts to perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities. The applicant further submits that it is in the interests of justice that the suit be transferred to the appropriate court with jurisdiction despite being filed in a wrong court so that the issues at hand can be properly adjudicated.
23. The applicant submits that the instant application was made in good faith after the 1st respondent raised the issue of territorial jurisdiction in MCL & E No. 119 of 2023. Furthermore, the applicant submits that there was material disclosure on the fact that the 2nd respondent filing a preliminary objection on the basis of territorial jurisdiction in the matter. Moreover, the applicant contends that the 2nd respondent is the one who is guilty of material non-disclosure as in his application he failed to disclose that he was the one who filed Miscellaneous Application No. E30 of 2023 at Ruiru Law Courts as against the 1st respondent herein. The applicant thus argues that since he was not a party to the said miscellaneous application, he is not bound by the judgment delivered in Ruiru Miscellaneous case.
24. The applicant relies on the cases of *Rose Mbithe Ndambuki vs Peter Kimatu Wambua & 2 Others* [2019] eKLR and *Pamoja Women Development Programme & 3 Others vs Jackson Kihumbu Wangombe & Another* [2016] eKLR and urges the court to be guided by the incidental concurrent jurisdiction which includes the ability of both the High Court and equal status courts to deal with certain procedural or administrative issues where the court in question is requested to act in the interest of justice or due administration of justice.
25. The applicant submits that he shall be greatly prejudiced if the orders sought are not granted as the suit property will be auctioned and sold yet he is the rightful owner. In any event, the applicant contends that the 2nd respondent shall not suffer any prejudice if the said matter is transferred to a court of jurisdiction to hear and determine the substantive issues in dispute.

The 2nd Respondent's Submissions

26. The 2nd respondent reiterates the contents of its affidavit and submits that the subject matter of the suit is land and in any event the applicant has acknowledged that the instant court lacks jurisdiction to adjudicate the present suit but he cites Article 159 of *the Constitution* to excuse his errors. The 2nd respondent relies on the cases of *In the Matter of Interim Independent Electoral Commission* [2011] eKLR and *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others*, Application No. 2 of 2011 and submits that the High Court does not have jurisdiction over land related matters pursuant to Articles 162 (2) (b) and 165 (5)(b) of *the Constitution*. *The Constitution* established in Article 162(2)(b), the Environment and Land Court, a specialized court designated to address disputes concerning land. The 2nd respondent further relies on the case of *Malindi Law Society vs Attorney General & 4 Others* [2016] eKLR and submits that the instant court will assume jurisdiction in direct violation of *the Constitution* by entertaining the instant application. Thus it is



evident that the court cannot transfer MCL & E No. E119 of 2023 from Thika Magistrate's Court to Ruiru Magistrate's Court.

27. The 2nd respondent relies on the cases of *West Kenya Sugar Co. Limited vs Munyai Ingoshe & Others* [2021] eKLR; *Protective custody Limited vs Joseph Mumia Ndubi* [2022] eKLR; *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR and *Phoenix of E.A. Assurance Company Limited vs S. M. Thiga t/a Newspaper Service* [2019] eKLR and submits that the suit herein is a nullity ab initio and cannot be transferred to another court as the claim was initially filed before a court devoid of jurisdiction.
28. Moreover, the 2nd respondent submits that the trial court upheld the preliminary objection contesting MCL & E No. E119 of 2023 on 5th March 2024 resulting in the dismissal of the suit and therefore there is no suit available to transfer.
29. The 2nd respondent relies on the cases of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another* [2016] eKLR and Republic vs Rosemary Wairimu Munene (ex parte applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 and urges the court to award it costs as it has demonstrated the unwarranted suffering that the applicant has put it through.

The Law

Whether this court has jurisdiction to adjudicate on the application dated 2nd January 2024

30. Upon perusing the material laid before me in the two applications, I do hereby make some observations. That what is before this court are two applications dated 2nd January 2024 and 4th January 2024. The 1st application seeks for orders of transfer of Chief Magistrate Thika MCL No. E 119 of 2003 while the application dated 4th January 2024 seeks for setting aside the orders made by this court on 2nd January 2024 in respect of the first application. This court granted orders for transfer of the suit MCL 02/01/2024 No. E 119 from Thika to Ruiru which orders were set aside on 8/01/2024 following the filing of the 2nd application. The orders of the court were based on the fact that the applicant's counsel failed to disclose the fact that the Chief Magistrate Court had heard a preliminary objection in the matter pending before it and that it was slated for ruling in two days from the date the first application herein was filed.
31. Following the setting aside of the orders of this court on 08/01/2024, the application dated 04/01/2024 was spent.

As for the 1st application, the issue of jurisdiction of the High Court was raised by the respondent. Under section 18 of the *Civil Procedure Act*, the High Court is possessed of the jurisdiction to hear and determine an application for transfer of any suit, pending before the subordinate court to another subordinate court for disposal. At the time the orders of 02/01/2024 were made MCL No. E 119 was pending before the Chief Magistrate Court and this court with the facts presented before it, had the jurisdiction to withdraw the suit and order that it be transferred to Ruiru Court where the subject matter of the suit was situated.

32. What this court was not told was that the Chief Magistrate Court had already heard a preliminary objection which was pending ruling. The respondent's counsel imputed ill motive on part of the court but this court has explained itself herein and did the same on 8th January as it set aside its orders upon realising that the applicant failed to disclose material facts in its application dated 2nd January 2024.



33. It is not in doubt that three (3) days after this court issued the said orders, the MCL E119 of 2023 was dismissed. It follows that the suit having been dismissed, the applicant's application dated 02/01/2024 has been overtaken by events.
34. As such, the said application dated 02/01/2024 ought not to have been filed herein in view of the circumstances explained herein that prevailed at that time. In CM MCL E119 of 2023, that is the said matter was pending ruling. The applicant had a chance to withdraw his application dated 02/01/2024 following the dismissal of his suit on 05/01/2024 by the Magistrate Court instead of pursuing the hearing of the application for transfer when there was no longer a suit in existence to be transferred.
35. It is therefore, my considered view that the application dated 2nd January 2024 is misconceived and improperly before the court. It is hereby ordered struck out with costs to the respondents.

RULING DELIVERED, DATED AND SIGNED THIS 2ND DAY OF MAY 2024 AT THIKA

F. MUCHEMI

JUDGE

