



Republic v Minister of Lands and Housing & another; Kibor (Interested Party); Koilege & another (Ex parte Applicants) (Miscellaneous Civil Application 295 of 2005) [2024] KEHC 5101 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 295 OF 2005
RN NYAKUNDI, J
MAY 9, 2024
IN THE MATTER OF LEAVE TO APPLY FOR
ORDERS OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF LAND PARCEL NO. 1422 SANGURUR
ADJUDICATION SECTION MARAKWET DISTRICT**

BETWEEN

REPUBLIC APPLICANT

AND

**MINISTER OF LANDS AND HOUSING 1ST RESPONDENT
DISTRICT LAND ADJUDICATOR AND SETTLEMENT OFFICE MARAKWET
DISTRICT 2ND RESPONDENT**

AND

DANIEL K. KIBOR INTERESTED PARTY

AND

**KIPKORE KOILEGE EX PARTE APPLICANT
WILLIAM KIMUTAI KIPKOECH EX PARTE APPLICANT**

RULING

1. Before me for determination is an application dated 8th February, 2024 seeking the following orders:
 - a. Spent



- b. This honourable court be pleased to transfer from this Eldoret Miscellaneous Civil Application Number 295 of 2005 to Iten Environment and Land Court for further orders and proceedings.
 - c. Any other orders that this Honourable court may deem fit to grant in the circumstance.
 - d. Costs be in the cause.
2. The motion is premised on 10 grounds together with an affidavit in support sworn by William Kimutai Kipkoech. The grounds have been crafted in the following sequence:
- i. The Eldoret Miscellaneous Civil Application No. 295 of 2005 was filed prior to the creation of the Land and Environment court.
 - ii. The Eldoret Civil Miscellaneous Civil Application No. 295 of 2005 went missing for some times.
 - iii. That the application to create a skeleton file was made upon certificate of missing records having been issued in this matter.
 - iv. That unknown to the applicant herein, the judgment had been delivered as against the Exparte applicant herein
 - v. That the applicant has a pending application to extend time for filing the appeal out of time, since at the discovery of the delivered judgment, the time for the appeal had lapse.
 - vi. That the high court has rendered itself that it does not have jurisdiction to deal with the matter anymore and that it is the environment and land court to deal with it.
 - vii. That the suit land is situated in Elgeyo Marakwet County.
3. I find it important to take a few steps back in order to find a bearing in this matter. On 8th December, 2005 the Ex-parte Applicant Kipkore Koilege filed a motion dated 5th December, 2005 seeking reliefs as follows:
- a. An order of Certiorari do issue to remove into court and quash forthwith the decision of the 1st Respondent under Sangurur Registration Section Koibatek Location Marakwet District awarding land parcel number 1422 to the interested party.
 - b. An order of Prohibition do issue so as to prohibit the 2nd Respondent from registering the Interested Party as the absolute owner of the Land Parcel Number No. 1422 Sangurur Registration Section.
 - c. Costs be provided court.
4. This court presided by Justice M.K. Ibrahim considered the said motion and, in its decision, made a determination in the following terms:
- “I have carefully considered whether the Law of Succession Act would forbid the argument of counsel and I do not find any inconsistency if it is taken that the trustee had died and the beneficiary was asserting his right. To import the provisions of Order XXIII of Civil Procedure Rules into circumstances were the same was not intended may not achieve the ends of justice. The customary right to the land parcel no. 1422 could be espoused by the Interested party as son to the deceased. The father was in the position of trustee. The trust was determined by his death. The beneficiary acquired full capacity to vindicate his own



right. For these reasons I am persuaded that the Notice of Motion lacks merit and is hereby dismissed with costs to the interested party and Respondents. It is so ordered.”

5. Fast forward, the Ex-parte applicant filed a motion dated 28th June, 2021 seeking to have the original Ex-parte applicant Kipkore Koilege who is now deceased be substituted by the applicant/legal Representative one William Kimutai Kipkeoch. This court in its decision spoke in the following terms:

“The deceased passed away in 2016. The application for substitution was filed in 2021. If the court was to consider the application of the ex parte applicant the same would still be unsuccessful as the suit had abated with regard to any claim of the ex parte applicant. The upshot of the foregoing is that the Notice of Preliminary Objection is merited and the application dated 28th June 2021 is hereby struck out on the grounds that this court has no jurisdiction to entertain the same.”

6. The court thereafter dismissed the application and with that the suit stood abated.
7. Following this decision by a court of concurrent jurisdiction, the question is whether the application by the applicant dated 8th February, 2024 has legs to stand on in terms of jurisdiction.
8. In any litigation, jurisdiction is vital. A court of law cannot make any step without jurisdiction. The Supreme Court stated *In the Matter of Interim Independent Electoral Commission* [2011] eKLR as follows:

- (29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

- (30) The *Lillian 'S' case* establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.

9. Dealing with the same issue of jurisdiction, J B Ojwang, J (as he then was) in *Boniface Waweru Mbiyu vs. Mary Njeri & Another* expressed himself as follows:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and



therefore, it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

10. The import of the foregoing authorities is that without jurisdiction this court cannot make any further step. The crux of this matter lies whether there is a live subject matter capable of being adjudicated before the ELC court, which is being pursued by the applicant as the forum of conveniens. This court considers the issues surrounding the application not justiciable before any other court if the decision by Ogola J. dated 29th November, 2022 is anything to go by in our procedural justice system. The instant application is purely cosmetic for the applicant was avoiding to have section 7 of the Civil Procedure Act on *res judicata* to act as an estoppel against any such litigation on the same subject matter.
11. In my view, the application is within the confines of the principles in John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) (2021) KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) where the Supreme court stated as follows:

We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

 - a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action
12. Whereas in the mind of applicant he has a claim against the respondent with regard to the suit property, the concurrent decision made in rem on 29th November, 2022 is binding before this court. From that decision the suit filed is devoid of jurisdiction. The ideal position besides John Florence Maritime Services Limited (*supra*) the legal threshold in the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR is a complete bar by any party to claim locus standi to pursue a suit which has already abated on whose rights by that one legal denominator is no longer a cause of action to be adjudicated before any court of law. The court in this case spoke firmly on similar circumstances as the ones facing the applicant in the instant application.

In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not



through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

The motion dated 8th February, 2024 is denied.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY 2024.

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Kiboi Advocate

Mr. Kenei Advocates

