



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. E005 OF 2021

NEWTON GATHUNGU KIBUCHI.....PLAINTIFF/APPLICANT

=VERSUS=

EMBAKASI RANCHING CO. LTD & 3 OTHERS..DEFENDANTS/RESPONDENTS

RULING

What is before me is a Notice of Motion application dated 20th January, 2021 brought by Newton Gathungu Kibuchi (hereinafter referred to as “the applicant”). The applicant is the plaintiff in Limuru SPMC ELC No. 8 of 2020, Newton Gathungu Kibuchi v Embakasi Ranching Co. Ltd. & 3 others (hereinafter referred to as “the lower court suit”). The lower court suit was filed against Embakasi Ranching Co. Ltd. & 3 others (hereinafter referred to as “the respondents”) at the Chief Magistrates Court, Milimani Commercial Court as CMC ELC No. 5765 of 2018 and was transferred to Limuru Senior Principal Magistrate’s Court in 2020 for hearing and final determination on application by the applicant and given its current case number. The dispute in the lower court concerned ownership of all that parcel of land known as L.R No. Nairobi/Block 105/5963(hereinafter referred to as “the suit property”).

Sometimes in December, 2020 the 3rd and 4th respondents filed an application in the lower court seeking an order that the court lacked jurisdiction to determine the suit in that the value of the suit property was Kshs. 25,800,000/- as at 9th December, 2020. The 3rd and 4th respondents contended that the lower court lacked pecuniary jurisdiction to entertain the suit. On 21st January, 2021, the lower court ordered that it had no jurisdiction to hear and determine the lower court suit. This is what prompted the filing of the present application.

In his present application, the applicant has sought the transfer of the lower court suit to this court for hearing and determination. The application has been brought on the ground that when the suit was filed in the lower court, the suit property was not developed and as such the value thereof was Kshs. 8,000,000/- which was within the pecuniary jurisdiction of the lower court. The applicant has contended that since the filing of the suit in the lower court, the suit property has been developed by the 3rd and 4th respondents thereby raising its value to the current Kshs. 25,800,000/- which is beyond the pecuniary jurisdiction of the lower court. The applicant has exhibited a copy of a valuation report that was prepared on 25th July, 2018 by Advent Valuers Limited which shows that as at that date, the suit property was not developed and that the same was being excavated by the 4th respondent with a view to commencing development thereon. The applicant has contended that since the lower court no longer has jurisdiction, the lower court suit should be transferred to this court for hearing and disposal. The application is supported by affidavit and further affidavit sworn by the applicant in which he has given the history of the dispute and litigation between the parties.

The application is opposed by the 3rd and 4th respondents through a replying affidavit sworn by the 4th respondent on 17th June, 2021. The 4th respondent has averred that he instructed a valuer to value the suit property and the same was valued at Kshs. 25,800,000/- on 9th December, 2020. The 4th respondent has averred that following that valuation the 3rd and 4th respondents objected to the jurisdiction of the lower court to hear the lower court suit consequent to which objection, the lower court made an order on 21st January, 2021 that it had no jurisdiction to entertain the suit. The 4th respondent has averred that since the lower court suit was filed in a court without jurisdiction, the same was a nullity and as such cannot be transferred to this court. The 4th respondent has urged the court to dismiss the applicant’s application.

The application was heard on 24th June, 2021 when Mr. Burugu appeared for the applicant while Mr. Ouma appeared for the 3rd and 4th respondents. In his submission in support of the application, Mr. Burugu reiterated that when the applicant filed the lower court suit, the lower court had jurisdiction to hear the suit. He submitted that the suit was not a nullity since it was filed in a court that had jurisdiction and as such this court has power to transfer the same.

In his submission in reply, Mr. Ouma submitted that since the lower court had made an order that it had no jurisdiction to entertain the lower court suit, all the pleadings that were filed in the lower court were incompetent and the suit a nullity. Mr. Ouma submitted that a null and void suit was not capable of being transferred. In support of this submission, Mr. Ouma relied on a number of authorities. He submitted that the only option that was open to the applicant was to file a suit in a court of competent jurisdiction.

I have considered the applicant's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the 3rd and 4th respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities that were relied on in support thereof. The following is my view on the matter. I am in agreement with the 3rd and 4th respondents that where a suit is filed in a court without jurisdiction, the same cannot be transferred to a court with jurisdiction since such suit is a nullity. From the material before me however, I am not persuaded that that position obtains in the case herein. I am satisfied that when the applicant filed the lower court suit, the value of the suit property was low since the property was not developed. The lower court therefore had jurisdiction to hear and determine the dispute between the parties. The evidence before the court shows that the lower court suit was brought against the 3rd and 4th defendants when they started developing the suit property. An application for interlocutory injunction was filed to stop them from continuing with the said development on the suit property. It appears that the development on the property continued despite the injunction. From the valuation report that has been exhibited by the 3rd and 4th respondents, as at 9th December, 2020 when the 3rd and 4th respondents took issue with the jurisdiction of the lower court, the suit property was developed with a petrol station and an incomplete storey building. These structures were not on the suit property when the lower court suit was filed. It is not disputed that these developments pushed the value of the suit property beyond the pecuniary jurisdiction of the lower court. This does not however render the pleadings that were filed before the lower court when it was lawfully seized of the matter void. Since the lower court had jurisdiction to hear the lower court suit when it was filed, it cannot be argued that the suit was a nullity *ab initio* and as such cannot be transferred. The authorities that have been relied on by the 3rd and 4th respondents do not support that position.

I am of the view that when a suit is filed in a court with jurisdiction to hear it and due to subsequent events, the court no longer has jurisdiction over the matter, nothing stops such a suit from being transferred to a court with jurisdiction to hear it. It is my finding therefore that the application before me is proper and has merit.

Due to the foregoing, I hereby make the following orders on the application;

1. Limuru SPMC ELC No. 8 of 2020, Newton Gathungu Kibuchi v Embakasi Ranching & 3 others (the lower court suit) is transferred to the Environment and Land Court at Milimani for hearing and final determination.
2. Once the lower court suit is transferred to this court, the same shall be registered and given a new case number.
3. The costs of the application dated 20th January, 2021 shall abide the outcome of the lower court suit after transfer to this court.

DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

S. OKONG'O

JUDGE

Ruling read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Feksi h/b for Mr. Burugu for the Applicant

Mr. Ouma for the 3rd and 4th Respondents

Ms. C.Nyokabi-Court Assistant