



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**MISC. CIVIL APPLICATION NO. E009 OF 2021**

**PATRICK MBIYIA MATASIO**

**(Suing as legal representatives of the estate of MATASIA SHESESE).....APPLICANT**

**VERSUS**

**NICHOLAS HOYET.....1<sup>ST</sup> RESPONDENT**

**THE KAKAMEGA COUNTY SURVEYOR.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By Notice of Motion dated 14<sup>th</sup> April 2021, the applicant herein seeks the following orders:

*1. That case no. Kakamega MCL&E No. 989 of 2018 between the parties above be and it is hereby withdrawn from Kakamega Chief Magistrate's court and transferred to this court for hearing and determination.*

*2. That the costs of this application be provided for.*

2. The application is supported by the affidavit sworn by the applicant. He deposed that on 18<sup>th</sup> December, 2018 Kakamega MCL&E No. 989 of 2018 (hereinafter the suit) came before court number 3 at the subordinate court when the honourable magistrate Hon. E. Malesi (SRM) gave a ruling which he was not satisfied with. That he wrote a letter to the Chief Magistrate complaining that he had no confidence in the magistrate whereupon the Chief Magistrate ordered that the suit proceeds before court number 2. That from then the suit was handled by court number 2 until 3<sup>rd</sup> March, 2021 when the learned magistrate at court number 2 referred the matter back to court number 3 without giving a justifiable reason. That consequently, he feels that he will not get justice if the subordinate court continues to preside over the matter. He annexed two pages of certified proceedings of the suit.

3. The first respondent opposed the application through a replying affidavit in which he deposed that the applicant was using a short cut to prefer an appeal in respect of the ruling and that if this court were to entertain the instant application it would be tantamount to sitting as an appellate court through the backdoor. That it would be unfair and dangerous to allow the applicant choose for himself which courts to determine his cases. He urged that the application be dismissed with costs. He too annexed certified proceedings of the suit, covering the period up to 9<sup>th</sup> December 2019.

4. Parties relied on the affidavits on record and urged the court to render a ruling. The second respondent did not participate in the matter.

5. I have considered the application and the affidavits. The application seeks transfer of Kakamega MCL&E No. 989 of 2018 from Kakamega Chief Magistrate's Court to this court for "hearing and determination". This court's power to withdraw a case instituted in the subordinate court and thereafter transfer it to itself for hearing and determination is governed by **Section 18** of the **Civil Procedure Act** which provides in part:

*(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.*

6. A reading of the proceedings annexed by the parties shows that the suit was dismissed on 19<sup>th</sup> November 2019 with costs to the first respondent. Nothing has been put before the court to show that the order of dismissal was ever set aside. That being the case, there is no suit capable of being transferred to this court for hearing and determination. The suit was determined by the subordinate court. Any party not satisfied with the outcome in the subordinate court could only approach this court through appeal and not otherwise.

7. Even if the suit were still pending before the subordinate court, I would not have allowed the application. I say so because all that the applicant is raising are allegations that he fears he will not get justice before the subordinate court. That cannot be a ground for transfer to this court. The applicant would need to pursue his complaints administratively with the Chief Magistrate. Needless to state, unfounded and unsubstantiated complaints would not be a basis to move the matter from one magistrate to another. Oftentimes, such complaints are efforts at forum shopping. Additionally, valid complaints of injustice can fully be cured through the normal appeal process. This is certainly not an appeal.

8. In view of the foregoing, I find no merit in Notice of Motion dated 14<sup>th</sup> April 2021. I dismiss the application with costs to the first respondent.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF OCTOBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The Applicant present in person

The 1<sup>st</sup> Respondent present in person

No appearance for the 2<sup>nd</sup> Respondent

Court Assistant: E. Juma