



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

E.L.C. MISC NO. 1 OF 2020

JACINTA WANGUI MWANGI.....1ST APPLICANT

JOSEPH NJOROGE MBURU-.....2ND APPLICANT

(Suing as the administrators of the estate of KUNGU KAMWERE)

VERSUS

LUCY WANJIRU NJENGA.....1ST RESPONDENT

JOHN KIGWA NJENGA.....2ND RESPONDENT

GEORGE MUHIA.....3RD RESPONDENT

JACINTA NDUTA.....4TH RESPONDENT

PAUL KIMANI KANYI.....5TH RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 25th January, 2020 expressed to be grounded upon **Order 51 rule 1 of the Civil Procedure Rules 2010, (the Rules), Sections 1A, 1B, 3A and Section 18 (1) (b) (i) of the Civil Procedure Act (Cap. 21 Laws of Kenya), Section 4 (b) of the Environment and Land Court No. 19 of 2011, Article 162 (2) (b), Article 165 (3) (b) & (6) of the Constitution of Kenya, 2010 and all other enabling provisions of the law**, the Applicants sought transfer of Nyahururu CM L&E No. 112 of 2019 from the Chief Magistrate's court to this court.

2. The application was based on the ground that the Chief Magistrate's Court had no jurisdiction to entertain the suit because the Respondents had filed a defence and counter claim in which they alleged violation of their constitutional rights under the **Constitution of Kenya, 2010**. It was contended that this court is the only one vested with jurisdiction to determine the allegation of alleged violation of fundamental rights under **Article 162 (2) (b) of the Constitution of Kenya, 2010**. It was further contended that the value of the suit property was Kshs 200 million hence beyond the pecuniary jurisdiction of the Chief Magistrate's Court.

3. The 2nd Respondent filed a replying affidavit sworn on 17th September, 2021 in opposition to the application. It was contended that there was no evidence on record to demonstrate that the value of the suit property was above Kshs 20 million; that the reliefs sought in the plaint did not relate to the value of the land in issue; and that the Applicants had not indicated the value of the land in either their defence or counter - claim. It was further contended that if the counter - claim related to alleged violation of the Applicants' constitutional rights then the right forum would be the High Court and not the Environment and Land Court. The court was consequently urged to dismiss the application.

4. When the application was scheduled for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their submissions. The record shows that the Applicants filed their submissions on 4th August, 2021 whereas the Respondents filed theirs on 20th September, 2021.

5. The court has considered the Applicants' notice of motion dated 25th January, 2020, the 2nd Respondent's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main question for determination herein is whether or not the Applicants have made out a case for transfer of Nyahururu CM L & E No. 112 of 2019 to this court.

6. The Respondents' main objection is that the defence and counter claim before the Chief Magistrate's Court does not disclose the value of the suit property and that, in any event, they were not involved in the preparation of the valuation report the Applicants have relied upon. The Respondents further contended that if the Applicants' counter claim pleaded alleged violation of their constitutional rights, then the proper forum of litigation should be the High Court and not this court.

7. The Applicants' application for transfer is essentially based upon **Section 18 of the Civil Procedure Act (Cap. 21)** which 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.”

8. The court is of the opinion that the superior court has wide and unfettered discretion to order transfer of suits from a subordinate court to itself and vice versa, or from one subordinate court to another for trial and disposal. The main consideration in such application is whether or not it would be in the interest of justice to do so and whether the transfer would engender the overriding objectives stipulated in **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21)**.

9. The Applicants have contended that they intend to canvass the issue of the alleged violation of their constitutional rights in relation to the suit property. They have also contended that the value of the suit property could be in the region of KShs. 25 million which is way beyond the pecuniary jurisdiction of the subordinate court. They have in their counter - claim sought general damages, aggravated damages as well as exemplary damages against the Respondents. No one knows how much the Applicants may be awarded in damages should their counter - claim ultimately succeed.

10. The court does not agree with the Respondents' submissions that only the High Court would have jurisdiction to entertain the Applicants' counter - claim alleging violation of constitutional rights under the **Constitution of Kenya, 2010**. This court is equally competent to entertain a claim alleging violation of fundamental rights and freedoms in relation to matters falling within **Article 162 (2) (b) of the Constitution**. The court is further of the opinion that the Respondents' claim and the Applicants' counter - claim ought to be adjudicated upon in the same forum. Accordingly, the court finds and holds that the Applicants have made out a case for transfer of the suit pending before the subordinate court to this court. The court is consequently inclined to allow the application.

11. The upshot of the foregoing is that the court finds merit in the Applicants' application for transfer of suit. Accordingly, the notice of motion dated 25th January, 2020 is hereby allowed in terms of order (c) thereof with no order as to costs.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 14TH DAY OF OCTOBER , 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of the

Mr. Joseph Njoroge Mburu – 2nd Applicant present in person

No appearance for the Respondents

CA- Carol

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Y. M. ANGIMA

JUDGE