



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 12 OF 2021

GILBERT DZOMBO TELE..... APPLICANT

-VERSUS-

LARRY NGEBE TUMBO.....1ST RESPONDENT

SAMINI TUMBO 2ND RESPONDENT

EDSON KAMBI NGEBE.....3RD RESPONDENT

DERRICK CHARO4TH RESPONDENT

RULING

(Application to transfer a suit from the Mombasa Chief Magistrate's Court to the Senior Principal Magistrate Court, Kaloleni; suit sought to be transferred already abated owing to the death of the plaintiff; no demonstration that suit has been revived; no subject matter to transfer; application dismissed)

1. The application before me was filed by the plaintiff on 16 March 2021. The plaintiff seeks the following orders:-

a. That this honorable court be pleased to transfer Mombasa Chief Magistrate Civil Suit No. 2323 of 2011 the Senior Principal Magistrates Court at Kaloleni for hearing and determination.

b. The cost of the suit be provided.

2. The application is based on the grounds that on 23 November 2011, the plaintiff filed Mombasa Chief Magistrate Civil Suit No. 2323 of 2011 (the suit seeking orders restraining the defendants/respondents from trespassing on land known as Kilifi/Chilulu/318 (the suit property). It is stated that on 25 July 2014, the Chief Justice issued practice directions stating that Magistrates' Courts could hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.

3. The applicant claims that the plaintiff prosecuted the suit but he fell ill sometime in the year 2016, and on 22 October 2018 he succumbed to his illness. According to the applicant, the suit property is situated in Kaloleni, the parties and witnesses to the suit live in Kaloleni, hence, it would be in the interest of justice that the suit be transferred to Kaloleni Senior Principal Magistrates Court. The applicant states that no witnesses have testified in the suit, and as a result no prejudice would be occasioned to the respondent.

4. In support of the application, the applicant swore an affidavit annexing a copy of the limited grant of letters of administration *ad litem* issued to him for purposes of prosecuting the suit. He reiterated the grounds of the application and further deposed that the suit property is valued at approximately Kshs. 3 million and is situated within the jurisdiction of the Kaloleni Senior Principle Magistrates Courts.

5. When the matter came up for *inter-partes* hearing, the respondents did not make an appearance. There is an affidavit of service on record that shows that they were duly served. The application stood unopposed. That does not however mean that I must allow the application.

6. I have gathered from this application that the plaintiff died on 22 October 2018. It is trite, following the provisions of Order 24 Rule 3, that a suit abates where no application for substitution has been made within one year of death. I have not been informed that there has been any application made to substitute the deceased plaintiff, and if so, whether such application was allowed. It follows therefore, that through operation of law, the suit Mombasa CMCC No. 2323 of 2011 has already abated. The simple effect of abatement is that there is no longer any suit pending. If the suit is abated, then there is no subject matter capable of being transferred. One cannot therefore seek to transfer an abated suit.

7. For the above reason, this application must fail and it is hereby dismissed. Since it was not opposed, I make no orders as to costs.

8. Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA