



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC MISC.NO. E013 OF 2021

JOSEPH WAWERU NJORGE

(Suing as the attorney of JOHN JOEL MAINA THUO.....APPLICANT

VERSUS

LUCY WAIRIMU KARIUKI.....1ST RESPONDENT

DENNIS ANYEGA NYAMBEGA.....2ND RESPONDENT

KENEDY MACANICA AYIEKO.....3RD RESPONDENT

JOHN CHEGU NGUGI.....4TH RESPONDENT

VINCENT KIPLAGAT KIPCHUMBA.....5TH RESPONDENT

MARGARET AYUMA.....6TH RESPONDENT

JASTAS MOGIRE ORERO.....7TH RESPONDENT

JOSEPH KAMAU NDUNGU.....8TH RESPONDENT

OBADIAH SAGIM ORERO.....9TH RESPONDENT

CHRISTOPHER ERABONGA MBASU.....10TH RESPONDENT

ALEX OMWENGA ONGIRO.....11TH RESPONDENT

LUCAS NYARINGA OGUTA12TH RESPONDENT

VIOLA JEBET KIMUTAI13TH RESPONDENT

CHARLES MATORA.....14TH RESPONDENT

BENARD ACHOTE.....15TH RESPONDENT

MONICAH MOGURE16TH RESPONDENT

TABITHA NJERI.....17TH RESPONDENT

GIBSON NZALWA.....18TH RESPONDENT

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| PETER NDUNG'U..... | 19 TH RESPONDENT |
| BENJAMIN KOSGEL..... | 20 TH RESPONDENT |
| PETER KARIBA..... | 21 ST RESPONDENT |
| PATRICK MASADIA | 22 ND RESPONDENT |
| COUNTY LAND REGISTRAR UASIN GISHU..... | 23 RD RESPONDENT |
| HON. ATTORNEY GENERAL..... | 24 TH RESPONDENT |

RULING

1. This is a ruling in respect of Notice of Motion dated 15th April, 2021, in which the Applicant seeks the following orders:-

a) The Honourable Court be pleased to withdraw Eldoret CMCC ELC No.8 of 2020 or any proceedings therein from Eldoret Chief Magistrates Court and thereafter try the same on merit from where it had reached.

b) Costs of this application be in the cause.

2. The Applicant contends that Eldoret CMCC ELC No.8 of 2020 proceeded exparte and judgment was delivered on 30th October, 2020. At the time of filing Eldoret CMCC ELC No.8 of 2020, a valuation conducted in respect of UASIN-GISHU/ILLULA/81 showed that its value was Kshs.18,000,000/=. The Respondents availed another valuation report which indicated that the suit property was valued at Kshs.30,000,000/=.

3. The Applicant states that the monetary jurisdiction of the Chief Magistrate's Court stands at Kshs.20,000,000/= and that therefore this matter ought to be heard by this court which is competent to hear matters with monetary jurisdiction of over Kshs.20,000,000/=.

4. The Respondents opposed the Applicant's application based on grounds of opposition dated 27th April, 2021 and a replying affidavit sworn on 18th October, 2020. The Respondents contend that this court cannot transfer a suit which was filed in the subordinate court which had no pecuniary jurisdiction to handle the same and that some of the Respondents in this application were not parties in the suit before the subordinate court.

5. The Respondents further contend that the Applicant is seeking to transfer a suit which had 13 defendants whereas the present application has 24 Respondents. The Respondents argue that though the exparte judgment was against 13 Defendants, the judgment affected other parties who were not party to the suit and that those affected without being heard sought to be joined as interested parties before the subordinate court. Before the affected parties could be joined in the suit, the exparte judgment was set aside by consent. This in essence brought an end to the interested parties interest in the suit before the lower court and that as such, they cannot be named as Respondents in these proceedings without a formal application for their joinder.

6. The parties were directed to file written submissions in respect of the application. The Applicant filed submissions dated 5th October 2021. The Respondents filed submissions dated 18th October, 2021. The 23rd and 24th Respondents did not file any grounds of opposition or replying affidavit as they were not opposed to the application by the Applicant. I have considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions filed by the Applicant and the Respondents. The only issued for determination is whether the case before the subordinate court can be transferred to this court for hearing by this court.

7. The Applicant has made this application pursuant to the Provisions of Section 18 of the Civil Procedure Act which provides 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;

(iii) Re transfer 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. Before a transfer can be allowed, the party applying for transfer has to justify that there are reasons for the transfer of the suit and that the court from which the suit is sought to be transferred had the requisite jurisdiction to handle the case. In the instant case, though there was a valuation indicating that the suit property was valued at Kshs.18,00,000/=, the ex parte hearing proceeded before a Senior Resident magistrate whose pecuniary jurisdiction was Kshs.7,000,000/=

9. The Applicant is seeking to have the case transferred and proceedings to go on from where the same has reached. This means that the Applicant wants this court to call for the file and proceed from where the proceedings had reached. There is a pending application for joinder of some interested parties. The Respondents seem to argue that this application was spent the moment the ex parte judgment was set aside. On the other hand, the Applicant seems to argue that application was allowed by Hon. Menya Senior Resident Magistrate. On 30th December, 2020. If this be the case and given the fact that the Respondents had indicated to court that the value of the suit property was Kshs.30,000,000/= then the Magistrate had no jurisdiction to grant orders of joinder in a matter which was beyond her monetary jurisdiction.

10. This court can only transfer a matter if the same had been filed before a court with competent jurisdiction. In the case of *Kithita Ngeana vs Mwaniki Kisuma [2018] eKLR* it was stated as follows:-

“Circumstances that would have a court to grant the order sought were considered in the David Kabungu Case (Supra) where Okello J. Stated that: -

“What the court has to consider is whether the Applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the Plaintiff and leaving him seek his remedy in another jurisdiction----- . It is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the Principal matters to be taken into consideration are the balance of convenience, questions of expense, interest of justice and possibilities of undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused----- want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused-----”.

11. In the case of *Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & another [2012] eKLR* it was held as follows:-

“The law relating to transfer of suits from Subordinate courts to the High Court or any transfer for that matter is very clear. In Kagenyi vs Musiramo (Supra), Sir Udo Udoma CJ made it clear that an order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it”.

12. It is clear from the Applicant’s application that this case proceeded before a magistrate who had no pecuniary jurisdiction to handle it. A judgement was delivered by the same magistrate who did not have jurisdiction. This is despite the case being prosecuted by an Advocate who was aware that the value of the subject matter was Kshs.18,000,000/=. It is no cure to this lack of jurisdiction that the judgement which was a nullity ab initio was set aside by consent and that the matter had been allocated to the Senior Resident Magistrate administratively. The issue of jurisdiction of magistrates is a matter of statute and the Applicant’s Advocate should have brought this to the attention of the trial magistrate that she did not have jurisdiction.

13. Despite the issue of jurisdiction being brought to the fore, further proceedings were filed before another Senior Resident Magistrate whose monetary jurisdiction was way below the value of the suit property. This court cannot therefore transfer a suit and take over proceedings which were a nullity ab initio. The upshot of this is that the Applicant’s application fails. The same is dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 25TH DAY of NOVEMBER, 2021.

E.O. OBAGA

JUDGE

the virtual presence of:-

Mr. Oduor for Applicant

Court Assistant – Mercy

E.O. OBAGA

JUDGE