



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

MISC. APPLICATION NO. E001 OF 2020

REBECCA CHUMO.....PLAINTIFF/APPLICANT

VERSUS

CHRISTINA CHEPTOO CHUMO.....DEFENDANT/RESPONDENT

RULING

1. Coming up before me for determination is an application dated the 21st September 2020 brought under the provisions of Section 1A, 1B, 3, 3A & 18 (1) (b) & 2 of the Civil Procedure Act, Article 159 (2) of the Constitution of Kenya and all other enabling provisions of the law wherein the Applicant herein seeks substantive orders of stay of proceedings in Kericho CM ELC No. 3 of 2018, parties being Rebecca Chepngeno Chumo suing as the personal representative of the estate of Kipsigei Arap Cheplel Alias Elijah Kipsige Cheplel vs Christina Cheptoo Chumo, so that the said matter can be transferred to the Environment and Land Court, for hearing and determination.
2. The application is supported on the grounds on its face as well as by supporting affidavit sworn on the 21st September 2020 by Rebecca Chepngeno Chumo, the Applicant herein,
3. The main issues upon which the Application is brought is that the suit involves a dispute of a parcel of land No. Kericho/Kipchimchim/159 measuring approximately 6.204 hectares (15 acres) and whose value exceeds Ksh 20,000,000/-That the subordinate court lacks jurisdiction therefore to conduct this matter. Further, that no prejudice will be suffered by the Defendant if the orders sought are granted in comparison to the Plaintiff who would suffer serious prejudice if the orders are not granted.
4. The application is opposed by the Respondents via their Preliminary Objection dated the 23rd October 2020 to the effect that the court has no jurisdiction to transfer the matter from a court of no jurisdiction to a court of competent jurisdiction. That the Plaintiff's suit is barred in law, incompetent, fatally defective and an abuse of the court process.
5. The court directed for both the application dated the 21st September 2020 and the Preliminary Objection dated 23rd October 2020 to be canvassed by way of written submissions.
6. Whereas the Applicant did not file any submissions, the Respondents submissions in compliance with the court's directions and in support of their Preliminary Objection and while opposing the Applicant's application were to the effect that the said application was based on a valuation report dated 17th September 2020 conducted by ADOMAG valuers and Associates, which valuation had estimated the suit parcel of land to be worth Ksh. 46,000,000/= which was way above the Chief Magistrates' monetary jurisdiction.
7. That although this court is guided by the provisions of Section 18 of the Civil Procedure Code, yet the Applicant, being desirous to invoke the said powers was slightly misguided for the mere fact that the lower court had no jurisdiction to try and/or entertain the said suit thus the proceedings were null and void ab initio and incapable of being transferred. Reliance was placed on the decided case in **The Owners of Motor vessel Lillian 'S' vs Caltex Kenya Limited. [1989] KLR 1**
8. It was the Respondents' further submission that an order to transfer a suit from one court to another could not be made unless the suit had in the first place been brought to a court which had jurisdiction to try it. (See **Charles Omwata Omwoyo vs African Highlands & Produce C0 Ltd [2002] eKLR**. That the application was grounded on quicksand that not even the provisions of Article 159(2) of the Constitution could not salvage it. That the Application was misconceived, bad in law, untenable and constituted an abuse of the court process. They sought that the same be dismissed with costs.

Determination

9. I have considered the Defendants/Respondents' application on a point of Preliminary Objection to the effect that the Applicant's

Application should be dismissed as the court has no jurisdiction to transfer the matter from a court of no jurisdiction to a court of competent jurisdiction. I have also considered the fact that there was no response to the Preliminary Objection.

10. The case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

11. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable.

12. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed the locus classicus case on the question of jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” (supra)** where the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. The Applicant herein filed suit before the Chief Magistrate’s court in Kericho involving a dispute of a parcel of land No. Kericho/Kipchichim/159 measuring approximately 6.204 hectares (15 acres) and whose value according to a valuation report dated 17th September 2020, conducted by ADOMAG valuers and Associates, is estimated at Ksh. 46,000,000/= which is way above the Chief Magistrates’ monetary jurisdiction. The Applicant has therefore filed the present application seeking that the matter be transferred from the subordinate court to the Land and Environment Court, an application which has been objected to by the Respondent through their Preliminary Objection, to the effect that this court does not have jurisdiction to transfer a matter from a court of no jurisdiction to a court of competent jurisdiction.

14. Section 18 of the Civil Procedure Act bestows upon the High Court (read ELC) the powers to transfer suits of a civil nature. The said provisions of the law 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; 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”.

15. The power to transfer a suit is discretionary and therefore a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons as to why the transfer is merited. However, a matter can only be transferred if the Court from which the Applicant is seeking to have the same transferred from, had jurisdiction over the said matter.

16. In this case the Applicant informed the Court that the pecuniary value of the suit land is Ksh. 46,000,000/= which is way above the Chief Magistrates’ monetary jurisdiction thus her reason for seeking to transfer it to the Environment and Land Court.

17. There was an enactment of the Environment and Land Court Act, 2011, and the Magistrates’ Courts Act, 2015 so as to among others, give effect to the provisions of Articles 23 (2) and 169 (1) (a) and (2) of the Constitution and to confer jurisdiction, functions and powers on

the Magistrates' courts.

18. Section 7 of the Magistrate's Courts Act provides as follows;

A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- (a) twenty million shillings, where the court is presided over by a chief magistrate;*
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;*
- (c) ten million shillings, where the court is presided over by a principal magistrate;*
- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or*
- (e) five million shillings, where the court is presided over by a resident magistrate.*

19. Quite clearly from the above powers bestowed upon the Chief Magistrate's court, the pecuniary jurisdiction is Ksh 20,000,000/=. Could it then be said that the impugned matter was filed in a court of competent jurisdiction? It is now trite that if a matter is filed in a Court that has no jurisdiction when the claim was filed, it would mean that the said suit is incompetent and the Court does not have jurisdiction to transfer the matter.

20. In the case of **Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another [2012] eKLR**, the Court 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 the 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. In Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (supra), Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the Civil Procedure Act cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in Rainbow Manufacturers Limited vs. National Bank of Kenya (supra).

21. Further in **Boniface Waweru Mbiyu vs. Mary Njeri & Another [2005] eKLR** the court had held that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

22. And lastly in **Wamathu Gichoya v Mary Wainoi Magu [2015] eKLR** the Court held that:-

“Furthermore, according to Kagenyi v Musiramo and Another, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”

23. It is therefore clear that since this suit was instituted before the Chief Magistrate's Court that had no jurisdiction. Such a suit, it is trite cannot be transferred in pursuant to the provisions of Section 18 to the Environment and Land Court, where it ought to have been instituted in the first instance, as the same was a nullity in law. The court can only transfer a cause whose existence is recognized by law.

24. The Preliminary Objection is hereby upheld. I find that the Notice of Motion Application dated 21st September 2020, is not merited and the same is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 25TH DAY OF NOVEMBER 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE