



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC MISC NO. E19 OF 2021

KIROBON FARMERS1ST PLAINTIFF

SAMUEL KIMUTAI BIRIR.....2ND PLAINTIFF

VERSUS

DAVID KAMAU.....1ST DEFENDANT

DISTRICT LAND REGISTRAR2ND DEFENDANT

DISTRICT LAND SURVEYOR.....3RD DEFENDANT

RULING

1.The Applicants have vide a Notice of Motion dated 29th June 2021 moved this court for an order that: -

“That this Honourable court be pleased to issue an order transferring Nakuru CM ELC No.E108 OF 2021 (Kirobon Farmers & Another -vs- David Kamau & 2 others) from the Chief Magistrate’s Court to this Court (The Environment and Land Court of Kenya at Nakuru)”.

2. The reason for seeking the transfer as can be discerned from the grounds in support of the application and the affidavit sworn in support is that the value of the land parcel Njoro Ngata Block 2/55 may have from the time of purchase by the applicants have appreciated in value to more than Kshs.20 million which is the limit of the pecuniary jurisdiction of the Magistrate’s court. The applicants aver that the Magistrate’s court owing to the limit of its pecuniary jurisdiction at Kshs.20 million lacks the jurisdiction to handle the matter and hence the instant application for the transfer of the suit to this court.

3. Mary W Mwangi swore a replying affidavit dated 22nd July 2021 in opposition to the applicant’s application. She deposed that the person identified as the 1st respondent is deceased and that she was the administrator of his state. She attached a certificate of confirmation of grant issued to her by the court on 13th June 1991 in High Court Succ. Cause No. 104 of 1988. She averred that the applicants application was incompetent and lacked any merit. She averred that at the time of filing the suit the applicants were aware that the Magistrate’s court lacked the jurisdiction to handle the matter and besides the applicants have furnished no material upon which the court could determine and/or evaluate the value of the land the subject matter of the suit. The respondent further argues that if the suit was instituted before a court that had no jurisdiction, the suit was null and void *abinitio* and there was no suit capable of being transferred to any other court.

4. The application was canvassed by way of written submissions filed by the applicant and on behalf of the 1st respondent. On the basis of the pleadings and the submissions, it is unclear what the value of the suit property was at the time the suit was filed in the Chief Magistrate’s court. Although the applicant avers that the value of the suit property was meagre at the time of purchase in 1978, the applicant does not disclose the purchase price and/or the acreage of the land. On what basis did the applicant decide the lower court did not have jurisdiction? As at the time of filing the suit before the magistrate’s court did the court have jurisdiction? There is a long list of decisions to the effect that where a suit is filed before a court that has no jurisdiction such a suit is incapable of being transferred to another court. Such a suit is incompetent and void *abinitio*; see the cases of *Abraham Mwangi Wamigwi -vs- Simon Mbiriri Wanjiku & Another (2012) eKLR*; *Wamathu Gichoya -vs- Mary Wainoi Magu (2015) eKLR*; *Phoenix of EA Assurance Company Ltd -vs- S M Thiga T/a Newspaper service (2019) eKLR* and *Gaikia Kimani Kiarie -vs- Peter Kimani Kiramba (2020) eKLR*.

5. The applicant relies on the overriding objective (Oxygen principle) incorporated under section 1A and 1B and section 3A of the Civil Procedure Act Cap 21 Laws of Kenya to urge the court to exercise the discretion in his favour so as to facilitate the administration of substantive justice.

6. The applicant also relies on Article 159 (2) (d) of the constitution which enjoins courts to render justice without undue regard to technicalities of procedure. In the case of *Equity Bank limited -vs- Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR* cited with approval by the court of Appeal in the case of *Phoenix E.A Assurance Co. Ltd -vs- S.M Thiga t/a Newspaper service* (supra) the court stated:-

“ In numerous decided cases, courts including this court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that well it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the appellate Jurisdiction Act or even Article 159 of the constitution to remedy the same (emphasis added).”

6. In the instant matter the applicant has not demonstrated that at the time the suit was filed in the lower court, the court had the pecuniary jurisdiction to deal with it. There is another aspect of the matter that is unclear as regards the suit filed before the lower court. The deponent of the replying affidavit, Mary W Mwangi has deponed that the 1st respondent is infact deceased and that she is the administrator of his estate and has annexed a copy of the certificate of confirmation of grant, if that is the true position then the suit instituted by the applicants against the 1st respondent is a nullity pursuant to the provisions of the Law of Succession Act Cap 160 Laws of Kenya. A dead person cannot be sued and a suit can only be instituted against a deceased estate through the duly appointed and authorized personal legal representative. See section 82 of the Law of Succession Act, Cap 160 Laws of Kenya.

7. I am in view of the above not persuaded a proper basis has been laid to enable the court to exercise it's discretion to order the transfer of Nakuru CM ELC No. E 108 of 2021 to this court. The application dated 29th June 2021 lacks merit and the same is hereby ordered dismissed with costs to the 1st respondent.

8. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF NOVEMBER 2021.

J M MUTUNGI

JUDGE