



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

MISC. APPLICATION NO. 24 OF 2019

CHARLES GITONGA RUGOJI.....PLAINTIFF/APPLICANT

VERSUS

DAVID KIRIMI MWITHIMBU.....1ST DEFENDANT/RESPONDENT

LARSEN & TURBO LIMITED.....2ND DEFENDANT/RESPONDENT

JUDGMENT

1. This miscellaneous suit was filed vide an application dated 14.5.2019 and is brought under the provisions of section 18 (1) (b), 3 and 3A of the Civil Procedure Act. The applicant is seeking orders for the transfer of Meru CM ELC No. 15 of 2019 from that court to the ELC court and consolidate the same with ELC petition 2 of 2019 for expedient determination of the disputes.

2. The application is premised on the grounds set out on the face of the application and in the affidavit of the counsel for applicant. The applicant contends that he is the one who filed the case Meru CM ELC no. 15/2019 on 15.2.2019 against the 1st respondent herein. Upon notice of intention to be served with the court documents, the 1st respondent filed the ELC petition no. 2 of 2019 against the Land Registrar and 11 others whereby he obtained injunctive orders.

3. That on 18.3.2019 the trial magistrate declined to hear the lower court matter on account of jurisdiction based on a valuation report filed by the 1st respondent which indicated that the value of the land was 37 million.

4. The applicant therefore desires that the lower court matter be transferred to this court for consolidation with petition no. 2 of 2019.

5. The respondents opposed the application vide the grounds of opposition filed on 10.7.2019 averring that the court has no jurisdiction to transfer a case from a court that lacks jurisdiction hence the application is an abuse of the court process.

6. The respondents also relied on the list of authorities filed on 15.7.2019 that is; **Daniel Kipkemoi Siele vs Kapsasian Primary School (2017) eKLR** and **Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & another (2012) eKLR**.

7. On 15.7.2020, this court gave directions for the application to be heard by way of written submissions of which, only the applicant complied with this order.

8. I have considered all the issues raised herein as well as the submissions of the applicant and the authorities proffered by the respondents.

9. Section 18 of the Civil Procedure Act provides as follows:

“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— 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”.

10. As indicated in the cases cited by the respondents a wrongly filed suit cannot be salvaged by a transfer – see **Aphraim Kariuki**

Wamburu vs Commissioner of lands (2017) eKLR (Nyeri ELC). However, this position must be anchored on a determination. None of the parties have availed the magistrate's decision for this court's perusal. The applicant merely states that the magistrate declined to handle the matter on account of a valuation report presented by the 1st respondent. This court is therefore not able to discern what transpired in so far as the order of 18.3.2019 before the trial magistrate is concerned.

11. The respondents have not refuted that there is another case before this court namely Petition 2 of 2019 where this court has already given injunctive orders. In order to bring harmony in the resolution of the dispute, seeing that the issue revolves around the same subject matter, then I find it expedient to have the matter before the magistrates court transferred to this court.

12. On the issue of consolidation, I am alive to the fact that constitutional litigation serves to protect fundamental rights and freedoms and not to deal with all manner of disputes. I therefore decline to grant the order of consolidation. Instead, I will direct that the matters run simultaneously.

13. In the final analysis, I proceed to grant orders as follows:

(1) An order is hereby issued for the transfer of the suit Meru CM ELC no. 15 of 2019 from Meru CM's court to the Meru ELC court and the same is to be duly registered as an ELC matter.

(2) Upon registration of the file Meru CM EL 15/2019 with a new number, the said matter is to be heard simultaneously with file ELC Pet 2 of 2019 until the two suits are heard and determined or until further orders are given by the court.

(3) The applicant shall bear the costs of this application as he failed to avail the lower court decision/order.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 4.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDG