



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC MISC. APPLICATION NO. 35 OF 2021

MBARUK AYUB ALI.....APPLICANT

-VERSUS-

COOTOW & ASSOCIATES.....RESPONDENT

RULING

The application is dated 28th September 2021 and is brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, IB, 18, 63(e) and 89 of the Civil Procedure Act Cap 21 Laws of Kenya and Article 159 of the Constitution of Kenya seeking the following orders;

1. That this Honourable court be pleased to withdraw ELC Suit No. 92 of 2020 between Mbaruk Ayub Ali Mbaruk and Cootow & Associates pending before the chief Magistrates Court at Mombasa and thereafter transfer the same to the Environmental and Land Court at Mombasa for trial and / or disposal.
2. That cost of this application be in the cause.

It is based on the grounds that the Plaintiff/Applicant filed ELC Suit No. 92 of 2020 Mbaruk Ayub Ali Mbaruk vs Cootow & Associates via plaint dated 14th August 2020 in the Chief Magistrates Court at Mombasa. That though the Plaintiff's claim is Kshs. 6,674,237/- the conveyancing transaction the basis of the Suit in aggregate involved a sum in excess of Kshs. 70,000,000/- That this Court is the proper forum to resolve this dispute. That the aforesaid orders are sought to facilitate just, expeditious and proportionate resolution of this suit. That it is in the interests of justice that this application be allowed. That the Defendant herein will suffer no prejudice if this application is allowed.

The respondent submitted that the Application is bad in law and incurably defective. The Application is misconceived, lacks merit and is a gross abuse of Court process. That the Applicant herein filed the instant suit in a Court that lacked jurisdiction to hear the subject matter and therefore there is no competent suit that exists in the subordinate court that is capable of being transferred. That this Honourable Court cannot transfer an incompetent suit for want of jurisdiction to a competent Court for hearing and determination. That when a suit is filed in a Court without jurisdiction it is a nullity ab initio and this Honourable Court cannot sanctify an otherwise incompetent suit through transfer. That when a suit is filed without jurisdiction, the only remedy is to withdraw the said suit and file a complaint suit in the Court seized of jurisdiction. That the Application is an abuse of Court process and the same ought to be dismissed with costs to the Respondents.

This court has considered the application and submissions therein. Section 18 of the Civil Procedure Act provides that;

“(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.

It is the Applicant's submissions that the Plaintiff/Applicant filed ELC Suit No. 92 of 2020 Mbaruk Ayub Ali Mbaruk vs COOTOW & Associates via plaint dated 14th August 2020 in the Chief Magistrates Court at Mombasa. That though the Plaintiff's claim is Kshs. 6,674,237/- the conveyancing transaction the basis of the suit in aggregate involved a sum in excess of Kshs. 70,000,000/- That this Court is the proper forum to resolve this dispute. The Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* (1989) eKLR, held that jurisdiction is at the center of any trial and a court should be sensitive to that before disposing of it, for without jurisdiction, nothing moves. The court stated that;

"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In a more recent decision, *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, the Court of Appeal said:

"... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. without jurisdiction, the Court cannot confer jurisdiction upon itself ..."

When it comes to exercise of power to transfer suits or appeals, filed before a court without jurisdiction like in the instant case, the Court of Appeal stated, in *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, as follows:

"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 having 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 the waters and allow confusion to reign. It is settled law that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where 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."

In the case of **Phoenix of East Africa Assurance Co. Ltd vs S M Thiga T/A Newspaper Service (2019) eKLR** the Court of Appeal while dealing with transfer of a matter from one court to another over question of jurisdiction, held as follows;

"Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and filed a complaint one in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself."

In the case of *Mini Bakeries (NRB) Limited vs Levi Kariz Oriedo* (2020) eKLR the court stated that;

"A suit or appeal filed before a court which has no jurisdiction is incompetent, and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck out."

In the case of *Tata Chemicals Magadi Limited vs County Governor, Kajiado County & another; National Environmental Management Authority & another (Interested Parties)* (2020) eKLR, the court held the same view and stated that;

"Further, I am of the view that since Jurisdiction is primordial and cannot be equated to a procedural technicality, and where a court lacks jurisdiction and has downed its tools, the same cannot be cured by Sections 1A, 1B and 18 of the Civil Procedure Act. I opine that the Applicant has a remedy to withdraw the lower court suit and file a fresh one in this court for hearing and final determination".

In the circumstance of this case I find that the suit was filed in a Court without jurisdiction and the court cannot rescue an incompetent suit through transfer. The remedy is to withdraw the said suit and file it in a court with competent jurisdiction. I therefore find the application dated 28th September 2021 unmerited and dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8TH DECEMBER 2021.

N.A. MATHEKA

JUDGE