



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCOMMISC/E 1194 OF 2020**

**DAVID KARIMI NGIRIGACHA.....APPLICANT**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LIMITED.....1<sup>st</sup> RESPONDENT**

**TOSEPH KABUNGO NJENGA.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 3<sup>rd</sup> November 2020, the applicant prays for an order that HCC ELC Appeal No. 70 of 2019 at Environment and Land Court at Thika, *David Karimi Ngirigacha v Kenya Industrial Estates Limited and Joseph Kabungo Njenga* be withdrawn and transferred to this court for trial and final disposal. He also prays for costs to be in the cause. Prayers (1), (3) & (4) of the application are spent. The application is founded on the provisions of Articles 28, 29, 40, 159 (1) (2) (d) of the Constitution, sections 1, 1A, 3A, 18 (1) (b) (i) and 63 (e) of the Civil Procedure Act, Order 22 Rule 25, Order 40 Rule (1) & (2) and Order 51 Rule (1) of the Civil Procedure Rules and all enabling provisions of the law.

2. The application is founded on the grounds that on 29<sup>th</sup> October 2020 the Environment and Land High Court at Thika declined jurisdiction to hear his case, and vacated orders staying his eviction from the subject premises. Further, he claims that the respondents have demolished his house on the said property despite the existence of a court order barring eviction.

3. He claims that the fact the said court declined jurisdiction did not render his suit useless. He states that his appeal has high chances of success and if the orders sought are not granted, it will be rendered nugatory. Lastly, he states that the eviction is illegal and offends sections 152 (E) and (G) of the Land Act and the Constitution.

**The 1<sup>st</sup> Respondent's grounds of opposition**

4. The 1<sup>st</sup> Respondent filed grounds of opposition dated 12<sup>th</sup> November 2020 stating that this court has no power under Section 18 of the Civil Procedure Act<sup>[1]</sup> and Articles 162 and 169 of the Constitution to transfer the said case. That under Article 162 of the Constitution, the said court is a superior court having equal status to the High court and that this court cannot exercise supervisory jurisdiction over the said court.

5. Additionally, it states that the appeal is a nullity because it was filed in a court without jurisdiction nor does this court have power to withdraw and transfer an appeal which is null and void. Further, that the court's judgment and decree does not have any order capable of being executed by the 1<sup>st</sup> Respondent. Also, prayers (3) & (4) have been overtaken by events.

6. Additionally, it states that the applicant has not and cannot suffer irreparable or substantial loss because he voluntarily executed the charge and or guarantee thus offering the property as security, thus, it becomes a commodity for sale unless the loan facility is fully paid. Further, the applicant's remedy lies in damages. Lastly, that the applicant never prayed for damages or cancellation of the 2<sup>nd</sup> Respondent's title in the lower court, hence, the purported appeal does not raise a *prima facie* case.

**The 2<sup>nd</sup> Respondent's Replying affidavit**

7. The 2<sup>nd</sup> Respondent's case as enumerated in his Replying affidavit dated 16<sup>th</sup> November 2020 is that a suit filed in a court without jurisdiction is a nullity in law and the court cannot purport to transfer it; that execution has since taken place and he assumed possession, hence the stay sought cannot be granted. Further, that he is a *bona fide* purchaser for value, that he took possession and rightfully demolished the house.

8. Further, that the applicant no longer stays in the property; that his claim lies in damages, but he never claimed damages in the lower court nor did he pray for cancelation of the title. Further, that his appeal has no chances of success. Additionally, that the applicant voluntarily charged his property rendering it a commodity for sale in the event of default.

**The Applicant's advocates submissions**

9. The applicant's counsel submitted that since the Environment and Land Court judge declined jurisdiction, as opposed to dismissing the application, the applicant cannot file a fresh case. He relied on *Daniel Mugendi v Kenyatta University, Wycliffe Mwangaza Kalungwa v Grain Bulk*,<sup>[2]</sup> *Kenya Power and Lighting Co. Ltd v Njumbi Residents Association and another*<sup>[3]</sup> and *Elijah Mogika Bworo v Kisii Bottlers Ltd*<sup>[4]</sup> for the proposition that where a court of equal status forms the opinion that it has no jurisdiction it ought to transfer the case to the court with jurisdiction. He urged the court to be guided by Article 159 of the Constitution and invoke its inherent jurisdiction and the oxygen principle and allow the application. He relied on *Abdulmajid Mohamed Adam v Nimish Shah t/a Flora Printers*<sup>[5]</sup> He also faulted the court for awarding costs even after finding that it has no jurisdiction.

#### The 1<sup>st</sup> Respondent's advocates submissions

10. The 1<sup>st</sup> Respondent's counsel submitted that this court has no power to withdraw and transfer a case from the Environment and Land Court under section 18 of the Civil Procedure Act<sup>[6]</sup> and Article 162 and 169 of the Constitution. He argued that under Article 162 of the Constitution, the Environment and Land Court is a court of equal status with the High Court.

11. Counsel reproduced the provisions of section 18 of the Civil Procedure Act and cited *Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited* <sup>[7]</sup> which held that the High Court can only withdraw a suit or other proceeding pending in a court subordinate to it for disposal by the High Court itself or for trial or disposal by any court subordinate to the High Court. He argued that under to Section 18 of the Civil Procedure Act, the High court can only withdraw and transfer a case to a court subordinate to it, hence, this court has no powers to withdraw a suit filed in the Environment and Land Court and transfer the same to this court.

12. Additionally, counsel submitted that the appeal pending before the Environment and Land Court is a nullity having been filed in a court without jurisdiction and this court has no power to withdraw and transfer an appeal that is a nullity. He cited *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service*<sup>[8]</sup> for the holding that jurisdiction is primordial in every suit, it has to be there when the suit is filed in the first place and if a suit is filed without jurisdiction, the only remedy is to withdraw it and file it in the court seized of jurisdiction.

13. Regarding the stay orders sought, he submitted that the judgment in CMCC 839 of 2011 was delivered on 19/ 01/2019 and the applicant filed this application on 3/ 11/ 2020 after a delay of over 1-year and 11 months. He cited *Rift Valley Railways v Jackline Aketch Apinde*<sup>[9]</sup> and *Mary Waihera Muiruri v Kuria Nganga*<sup>[10]</sup> for the proposition that delay must be accounted for.

14. Additionally, counsel submitted that prayers (2) & (3) of the application have been overtaken by events and that the only remedy available to the applicant is a claim for damages. Further, he argued that the applicant ought to have filed the instant application in Kiambu High Court. Lastly, he cited *Jeptoo Sawe v Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang*<sup>[11]</sup> and argued that execution is complete hence stay cannot issue nor has the applicant demonstrated irreparable loss.

#### The 2<sup>nd</sup> Respondent's advocates submissions

15. The 2<sup>nd</sup> Respondent's counsel cited *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* <sup>[12]</sup> and submitted that a suit filed in a court of law without jurisdiction is a nullity in law and therefore the court cannot purport to transfer it. Counsel also cited *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service*<sup>[13]</sup> and *Victoria Katuku (Suing as the legal Representative of the Estate of Eunice Mueni Muthamba v Jessinkay Enterprises & 2 others*<sup>[14]</sup> and argued that the application is overtaken by events since execution is complete and that the 2<sup>nd</sup> Respondent is an innocent purchaser for value and that the applicant's remedy lies in damages.

#### Determination

16. The power bestowed upon the High Court to transfer suits of a civil nature is located in Section 18 of the Civil Procedure Act.<sup>[15]</sup> It provides: -

(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.*

17. A reading of the above provision leaves no doubt that that this court has no power to order the transfer of a suit pending before another

High Court. On this ground alone, the applicant's application collapses.

18. Even if I were to find that under section 18 cited above this court is seized of jurisdiction to permit the transfer sought, the applicant has another dispositive hurdle to surmount. The barrier the applicant has to move out of his path is whether a suit filed before a court without jurisdiction can be transferred to another court. Put differently, the question here as I see it is whether there is a competent suit capable of being transferred. This question has been the subject of numerous court decisions. In *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another*<sup>[16]</sup> the court held: -

*“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 v 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 v 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).*

*Dealing with the same issue of jurisdiction, J B Ojwang, J (as he then was) in the Boniface Waweru Mbiyu vs. Mary Njeri & Another expressed himself as follows:*

*“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”.*

*It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further. That position was made clear by Nyarangi JA in The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1, where the learned Judge stated:*

*“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.”*

Further in the case of *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.” (Emphasis added)*

19. A suit can be said to be pending in a court only when that court had jurisdiction to entertain it; but if for any reason that court could not entertain the suit, it could not be said to be pending in that court. In other words, a suit is said to be pending in the court only when the plaint or an appeal is validly presented in that court; and a plaint or an appeal can only be said to be validly presented in a court if, on facts found, that courts could have jurisdiction to entertain the same.

20. A distinction must be drawn between cases where there is an inherent lack of jurisdiction, apparent upon the face of the record, and cases where it is doubtful, or at least not so apparent, whether the court possesses jurisdiction or not. Where there is total lack of jurisdiction, nothing can confer the same on the court, and an objection to jurisdiction cannot be waived. Therefore, even if such objection has not been raised by any party, the entire proceeding of the court from the very initial stage is without jurisdiction and void. The applicant's case in the High Court falls under this category. Even if the court proceeded with it, the entire proceedings could have been a nullity. The above principle of law applies to the instant case, hence, there would not be any proceeding pending in the legal sense of the term so as to be transferred to any other court. This being the settled position of the law, on this ground alone, the applicant's application collapses.

21. The applicant invoked this courts inherent jurisdiction and the overriding objective of the Civil Procedure Act and Rules. Simply put, the applicant invited this court to exercise its inherent powers and grant the orders sought. Courts derive their power from the Constitution and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob *Current Legal Problems*, adopted the following definition of 'inherent jurisdiction'<sup>[17]</sup>

*“... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or*

oppression, to do justice between the parties and to secure a fair trial between them...”

22. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court*<sup>[18]</sup> succinctly describes the inherent jurisdiction of the high court as follows:→

“ . . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.”

23. I.H. Jacob in *"The Inherent Jurisdiction of the Court"*<sup>[19]</sup> quoted by Jerold Taitz (supra) states:

"[it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."

24. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.<sup>[20]</sup> However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*<sup>[21]</sup> it was held: -

“While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, “extend to the assumption of jurisdiction not conferred upon it by statute. . .”

25. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.<sup>[22]</sup> As stated above, section 18 of the Civil Procedure Act reproduced earlier is clear on the powers of this court to transfer suits pending in another court. The attempt to invoke this courts inherent jurisdiction on the face of such clear provisions of the law is misguided. Similarly, the overriding objective of the civil procedure rules cannot be deployed to override a clear statutory dictate. Again, on this ground, the applicant's plea fails.

26. Having concluded, as I have done hereinabove that the applicant's application collapses on the several grounds discussed above, it is also my finding that the prayer for stay cannot stand at all, hence, it will add no utilitarian value to address it on merits. Flowing from my discussions and conclusions hereinabove discussed, I find no merit at all in the applicant's application either in law, in substance or in fact. Consequently, I dismiss the applicants' application dated 3<sup>rd</sup> November 2020 with costs to the defendants.

Orders accordingly. Right of appeal

**DATED, SIGNED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 9TH OF JULY 2021**

**JOHN M. MATIVO**

**JUDGE**

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[1] Cap 21, Laws of Kenya.

[2] {2015} e KLR

[3] {2014} e KLR

[4] {2016} e KLR

[5] {2017}e KLR.

[6] Cap 21, Laws of Kenya.

[7] {2014} e KLR.

[8] {2019} e KLR.

[9] {2019} e KLR

[10] {2019} e KLR

[11] {2016} e KLR.

[12] {2016} e KLR.

[13] {2019} e KLR.

[14] {2017} e KLR.

[15] Cap 21, Laws of Kenya.

[16] {2012} e KLR.

[17] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, *Current Legal Problems* (1970) p 51.

[18] Jerold Taitz, University of Cape Town, Juta, 1985.

[19] (1970) 23 *Current Legal Problems* 23 at pp. 51-52.

[20] *Ritchie v Andrews* (1881-1882) 2 EDL 254; *Conolly v Ferguson* 1909 TS 195.

[21] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[22] See *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at p 585F-G Vieyra J and *Union Government and Fisher v West* 1918 AD 556.