



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**MISCELLANEOUS APPLICATION NO. 15 OF 2019**

**GEORGE KARANU NDEITHI ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DOUGLAS GITU NDEITHI ..... 2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**EDDY PETER NDUNGU KIMEMIA..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OS SURVEY KIAMBU..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR, KIAMBU..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

By a Notice of Motion Application dated 14<sup>th</sup> March 2019 brought under Order 51 Rule 1 and 4 of the Civil Procedure Rules 2010 and Section 3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya the Plaintiffs/ Applicants have sought for the following orders;

***1. THAT this Honourable Court be pleased to order Civil Suit No. MCL & E No. 11 of 2019 Kikuyu be transferred to the High Court ELC Court at Thika for consolidation with Civil Suit ELC No. 42 of 2019, Thika High Court for Directions and issuance of the necessary orders.***

***2. THAT the costs of the Application be in the cause.***

The Application is premised on the following grounds; that the Plaintiffs/ Applicants herein filed **ELC No. 42 of 2019**, at the **Thika ELC** on **26<sup>th</sup> February, 2019**, against the Defendants/ Respondents herein and the suit was set down for interparties hearing on **2<sup>nd</sup> April 2019**. However, the 1<sup>st</sup> Defendant/ Respondent filed another suit on **1<sup>st</sup> March, 2019**, under **Certificate of urgency** which came up for interparties hearing on **13<sup>th</sup> March 2019**, when the Court was informed that there were two suits involving the same parties on similar issues but filed in different Courts. That the learned Magistrate directed that it was only fair for the two suits to be consolidated and be heard before this Court which is seized with jurisdiction. That it is only fair and just that the file for Civil Suit **MCL & E No. 11 of 2019**, filed **Kikuyu SPM**, be transferred to this Court for consolidation with **ELC 42 of 2019**.

In his supporting Affidavit, **Patrick Maguta Kimemia**, Advocate for the Plaintiffs/ Applicants averred that the Plaintiffs / Applicants filed an Application on **26<sup>th</sup> January 2019**, while the Honorable Judge of this Court was on leave. Therefore, the matter was taken to Milimani **ELC** for directions and necessary orders. Consequently, **Summons** to enter appearance were not signed until **7<sup>th</sup> March 2019**, and served upon the Defendants/ Respondents on the same date. However by then, the 1<sup>st</sup> Defendant/Respondent had already filed another Application at the **Kikuyu Magistrates Court** being **MCL&E No. 11 of 2019**, suing the Plaintiffs in **Thika ELC No. 42 of 2019**. Therefore, he sought for the transfer of the matter from **Kikuyu SPM Court** to this Court, **Thika ELC**.

The Application is opposed and the 1<sup>st</sup> Defendant/ Respondent filed a Replying affidavit in which he averred the Applicants filed a suit at the **ELC Thika**, being **ELC 42 of 2019**, but did not serve it upon the 1<sup>st</sup> Defendant until **7<sup>th</sup> March 2019**. However at that time, the 1<sup>st</sup> Defendant had already filed a **Plaint** at Kikuyu Law Courts dated **1<sup>st</sup> March 2019**, seeking several orders against the Applicant. He denied that any directions on consolidation were given and that the Court only gave directions to the parties to apply to the Superior Court to have the matters consolidated as the Magistrate had pecuniary and territorial jurisdiction to hear and determine the matter. It was his contention that what is in dispute between the parties herein is an access road which is meant to serve the 1<sup>st</sup> Defendant/ Respondent property being **L.R No. Sigona/ 285**, that the Applicants have closed illegally by erecting a gate, wall barriers and which access road was reopened lawfully by the 2<sup>nd</sup> Defendant and that at no time was the ownership of their properties in dispute and that the access road in dispute cannot exceed 2

million in value.

He further averred that he has been advised by his Advocate that whenever a Plaintiff has a choice between several forums in which to litigate, he or she is bound to go for the one that is the lowest rank but with competent pecuniary and territorial jurisdiction. He contended that **Kikuyu Law Courts**, is best equipped to hear and determine the matter. He invited the Court to look at the forum with the most real and substantial connection in terms of convenience and expense in considering which forum is most appropriate. It was his contention that his Advocates have advised him that the dates in this **Environment & Land Court** are not readily available while if the matter was to be heard in **Kikuyu Law Courts** the availability of dates for the main hearing of the suit would not be an issue. Further, that the most reasonable directions herein would be for this matter to be heard at **Kikuyu Law courts**. He however sought for consolidation of the two matters but urged that the same be heard at the **Kikuyu Law Courts**.

The Application was canvassed by way of written submissions which this Court has carefully read and considered. The Court finds the issues for determination as follows;

**1. Whether the two matters should be consolidated**

**2. Whether ELC 42 of 2019, should be transferred to the Magistrates Court at Kikuyu or whether MCL&E 11 of 2019, should be transferred to Thika Environment & Land Court.**

**1. Whether the two matters should be consolidated**

The principles for consolidation of suits are set out in the case of **Nyati Security Guards & Services Ltd ...Vs... Municipal Council of Mombasa (2000) eKLR** where the court held as follows:

***“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where:***

- a) Some common question of law or fact arises in both or all of them;***
- b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;***
- c) For some other reason, it is desirable to make an order for consolidating them;***

Both the Plaintiffs/Applicants and the 1<sup>st</sup> Defendant/Respondent in their affidavits have acknowledged that the two matters ought to be consolidated as they both deal with common issues of facts and law and the rights and relief sought in both matters are interlocked. It is this Court’s considered view that at the core of each matter both at the **Kikuyu Law Courts** and before the **Thika Environment and Land Court**, is whether the access road in contention is public or private one and therefore ought to either be opened up for the 1<sup>st</sup> Defendant’s/Respondent’s use or for the Plaintiffs / Applicants to erect walls and barriers. This Court finds and holds that since there are common issues of facts and law in both matters, then the two matters ought to be consolidated. Consequently the prayer for consolidation is merited.

**3. Whether ELC 42 of 2019 should be transferred to th Kikuyu Magistrates Courts or whether MCL&E 11 of 2019, should be transferred to Thika Environment & Land Court at Thika.**

The Applicants herein seem to believe that the portion of the access road that is in dispute is part of their land which may be excised if it is converted to a public access road and therefore affect their properties. This would therefore mean that it would be prudent to establish the acreage and what part of the Applicants suit property is affected. These issues would only be best considered by the Court while making the final determination after calling of evidence in the main trial. Therefore, the pecuniary jurisdiction that the court will be looking at will be with in regards to whether the access road in dispute forms part of the Plaintiff’s/ Applicant’s property or whether indeed it is a public access road. The Court finds that these are issues that would be for determination would be whether the access road forms part of the Applicants property and whether the survey was in order. It is this Courts considered view that this would directly affect the suit properties in general.

The guiding provision of law in deciding whether or not to transfer a suit is found in **Section 18** of the **Civil Procedure Act, Cap. 21** of the **Laws of Kenya** which 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 an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

Further in the case of Kithita Ngeana ...Vs... Mwaniki Kisume [2018] eKLR the Court stated;

“Circumstances that would move a court to grant the order sought were considered in the *David Kabungu Case (Supra)* where Okello J stated that;

“Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

As acknowledged by the 1<sup>st</sup> Defendant/ Respondent that the pecuniary jurisdiction of the properties goes way beyond that of the lower Court, it, is this Court’s considered view that the matter that ought to be transferred is the one at the **Kikuyu Law Courts** as the said Court does not have pecuniary jurisdiction to deal with the said matter.

The Upshot of the foregoing therefore is that this Court finds and holds that **MCL & E 11 of 2019**, at **Kikuyu Law Courts** should be transferred to this Court and the same to be consolidated with **ELC 42 of 2019**.

Having now carefully read and considered the instant **Notice of Motion Application**, the affidavits and annexures thereto and the written submissions by the parties, the Court finds and holds that the said Application dated **14<sup>th</sup> March 2019**, is merited and consequently the same is allowed entirely with costs being in the cause.

It is so ordered.

**Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of March 2020.**

**L. GACHERU**

**JUDGE**

**12.3.2020**

**In the presence of**

Mr. Kimemia for the Applicant

No appearance for the 1<sup>st</sup> Defendant/ Respondent

M/s Nguru holding brief for M/s Cheserek for 2<sup>nd</sup> Defendant/ Respondent

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**12.3.2020**