



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**MISCELLANEOUS APPLICATION NO. 12 OF 2019**

**[NOTICE OF MOTION DATED 30<sup>TH</sup> APRIL, 2019 AND NOTICE OF PRELIMINARY OBJECTION DATED 25<sup>TH</sup> MAY, 2019]**

**NORAH ATIENO OLWENY.....APPLICANT**

**VERSUS**

**ELIJAH KIPLAGAT.....1<sup>ST</sup> RESPONDENT**

**ELIJAH KIBET.....2<sup>ND</sup> RESPONDENT**

**UASIN GISHU LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**UASIN GISHU LAND SURVEYOR.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. **Norah Atieno Olweny**, the Applicant, moved the Court through the Motion dated 30<sup>th</sup> April, 2019 seeking for the transfer of Eldoret Chief Magistrate's Environment & Land Case No. 47 of 2019 to this court for hearing and determination. The application is based on the four grounds marked (i) to (iv) on its face, and is supported by the affidavit sworn by the Applicant on the 30<sup>th</sup> April, 2019 to which is attached the Complaint and defence by 1<sup>st</sup> and 2<sup>nd</sup> Defendant in Eldoret Chief Magistrate's Environment & Land Case No. 47 of 2019.

2. That **Elijah Kiplagat** and **Elijah Kibet**, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively, filed the notice of preliminary objection dated the 25<sup>th</sup> May, 2019 raising one ground that there is no suit capable of being transferred to this honourable Court. The said Respondents also opposed the application through the replying affidavit sworn by Elijah Kiplagat on the 25<sup>th</sup> May, 2019.

3. That application came up on the 28<sup>th</sup> May, 2019 and after hearing, Counsel for the Applicant and Respondents, the Court ordered a stay of proceedings in Eldoret Chief Magistrate's Environment & Land Case No. 47 of 2019. That the matter was then mentioned on the 12<sup>th</sup> November, 2019 when learned Counsel for the Respondents informed the Court that the valuation filed indicated the suit land was valued Kshs.24,000,000. The Counsel proposed that written submissions be filed for the application and the preliminary objection. That subsequently, the Learned Counsel for the Applicant and Respondents filed the written submissions dated the 20<sup>th</sup> December, 2019 and 6<sup>th</sup> December, 2019 respectively.

4. The first issue for the Court's determination is whether the Eldoret Chief Magistrate's Environment & Land Case No. 47 of 2017 was filed in a Court with the requisite jurisdiction and if not, whether the suit can be transferred to this Court. Secondly, who pays the costs?

5. The Court has carefully considered the grounds on the Motion and notice of preliminary objection, the affidavit evidence by both sides, the learned Counsel's written submissions, and come to the following conclusions;

(a) That the Applicant commenced Eldoret Chief Magistrate's Environment & Land Case No. 47 of 2019 as the Plaintiff against the two Respondents as 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and three Others namely, Uasin Gishu Lands Registrar, Surveyor and Attorney General as the 3<sup>rd</sup> to 5<sup>th</sup> Defendants respectively. That the subject matter of that suit is Uasin Gishu/Ngenyilel Settlement Scheme/448. That the Applicant seeks for the Respondents to be declared trespassers, being permanently enjoined, costs and interests. That in their filed statement of defence, the Respondents took issue with the Applicant's capacity [*locas standi*] and disclosed that the suit land has been subdivided into parcels 1751 and 1752 and that parcel 1751 was further subdivided into 1760 to 1763. That further, some of the parcels have been transferred to the late Wilson Kibor Mutai. That there was a previous suit between the late Eliakim Washington Olweny, whose estate the Applicant has sued on behalf, and the late Eliakim Kibor Mutai being **Eldoret ELC No.**

**609”A” of 2012**, which was over the same land and was dismissed for want of prosecution on the 16<sup>th</sup> May, 2017. The Respondents objected to the Court’s jurisdiction at paragraph 8 of their defence. The Respondents also filed the Notice of Preliminary objection dated 3<sup>rd</sup> April, 2019 raising two issues of jurisdiction and capacity. That it appears the Respondents’ preliminary objection in the Lower Court matter was not heard as the Applicant moved to this Court and filed the Motion dated 30<sup>th</sup> April, 2019 following which the Lower Court proceedings were stayed on the 28<sup>th</sup> May, 2019.

(b) That both the Applicant and the Respondents are in agreement that the value of the suit land is above the pecuniary jurisdiction of the Chief Magistrate’s Court. This is evinced by the Applicant’s filing of the Motion dated 30<sup>th</sup> April, 2019 in which at grounds (iii) and (iv), she states that she was not aware of the suit land’s value by the time she filed the suit, and that **“the Chief Magistrate’s Court lacks the requisite pecuniary jurisdiction and power to issue the prayers sought on the suit land in view of the establishment of the value of the same”**. That the Respondents only raised one ground of the Lower Court’s jurisdiction in their notice of preliminary objection dated the 25<sup>th</sup> May, 2019 and depones in the replying affidavit that **“since the Applicant has admitted that the Chief Magistrate’s Court lacks the requisite pecuniary jurisdiction then there is no suit capable of being transferred to this Honourable Court”**. That under **Section 18 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, this Court has power to transfer a suit pending before the Lower Court to another Lower Court or to itself for hearing and determination upon reasonable cause being shown. That however, such a suit must have been filed in a court with jurisdiction to entertain it. That where a suit is filed in a Court devoid of jurisdiction, the suit is a nullity, and hence *void ab initio* going by the decision in **Macfey Vs United Company Ltd [1961] 3 All ER 1169** cited in the Court of Appeal decision in **Phoenix of E. A. Assurance Company Ltd Vs S. M. Thiga t/a Newspaper Service [2019] eKLR**.

(c) That the Lower Court has no jurisdiction to hear and determine the suit Eldoret Chief Magistrate’s ELC No. 47 of 2019 that is sought to be transferred to this Court as the suit land’s value is above Kshs.20,000,000. That it follows that had the Lower Court heard the preliminary objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that was filed before this Miscellaneous Application, the Court would have struck the suit for lack of jurisdiction as per the decision of the Court of Appeal in **Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd 1989** 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 of 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....where a Court takes it upon itself to exercise jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

(d) That the act of the Applicant to move this Court through the Motion dated the 30<sup>th</sup> April, 2019 primarily to transfer the suit filed in the Court that evidently has no jurisdiction is incapable of saving or curing the suit. That the Court of Appeal in the Phoenix case cited above, at the last paragraph of their judgment pronounced itself in the following words **“20. It is clear from the foregoing that the claims...was filed before a Court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another Court; jurisdiction cannot be conferred by consent...”** That position applies in the instant suit, that is Eldoret Chief Magistrate’s Case No. 47 of 2019, as both the Applicant and Respondents are in agreement that the suit land’s value is above the Chief Magistrate’s pecuniary jurisdiction, that is limited at Kshs.20,000,000. That the suit land’s value, from the Valuer’s report availed by the Respondents and dated 30<sup>th</sup> March, 2019 is indicated as Kshs.24,000,000 [Twenty Four Million].

(e) That the Applicant’s Motion dated 30<sup>th</sup> April, 2019 seeking to transfer Eldoret Chief Magistrate’s Environment & Land Case No. 47 of 2019 to this Court cannot therefore succeed as it seeks to transfer a suit that does not exist, as it is a nullity *ab initio*.

(f) That the preliminary objection by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents has merit and is upheld.

6. That flowing from the foregoing, the Court finds and order as follows;

(a) That the Applicant’s Motion dated the 30<sup>th</sup> April, 2019 is without merit and is dismissed with costs.

(b) That the Respondent’s preliminary objection has merit and is upheld. That the Applicant’s [Plaintiff’s] suit in Eldoret Chief Magistrate’s ELC No. 47 of 2019, having been filed in a Court devoid of the requisite pecuniary jurisdiction, is hereby struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents [Defendants].

Orders accordingly.

**Dated and signed at Eldoret this 11<sup>th</sup> day of March, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Mutai for Omusundi for Applicant.

Mr. Okara for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Mr. Wambwire for 3<sup>rd</sup> to 5<sup>th</sup> Respondents.

