



**REPUBLIC OF KENYA**

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

**MISC ELC APPLICATION NO. 11 OF 2019**

**JOHN KIRIMANA EKABU.....APPLICANT**

**VERSUS**

**STEPHEN M' IKIAMBA.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**TABITHA LARIA (suing as the legal representative of the estate**

**of SOLOMON RARIA M' ETHANGATHA).....2<sup>ND</sup> RESPONDENT/APPLICANT**

**CHARITY GAKII ITABARI (suing as the legal representative**

**of the estate of JOHN M'ITABARI THIMANGU).....3<sup>RD</sup> RESPONDENT/APPLICANT**

**JAMES. KAWALU.....4<sup>TH</sup> RESPONDENT/APPLICANT**

**JULIUS RUKIOYA EKABU.....5<sup>TH</sup> RESPONDENT/APPLICANT**

**LAND ADJUDICATION OFFICER- TIGANIA.....6<sup>TH</sup> RESPONDENT/APPLICANT**

**THE HON ATTORNEY GENERAL.....7<sup>TH</sup>RESPONDENT/APPLICANT**

**RULING**

**BRIEF HISTORY**

1. **John Kiramana Ekabu** filed this suit as a miscellaneous application dated 22<sup>nd</sup> February 2019 seeking orders that this court withdraws **Meru CMC ELC CASE NO. 592 OF 2010** and transfer the same to Tigania law court for hearing and determination. In the magistrate's court case, the 1<sup>st</sup> to 5<sup>th</sup> Respondents herein are the plaintiffs, while the applicant himself plus the 6<sup>th</sup> and 7<sup>th</sup> respondents herein are the defendants. The applicant in the present suit had argued that the suit premises are in **Uringu II Adjudication Section** within the geographical jurisdiction of Tigania Law courts.

2. **On 28<sup>th</sup> March 2019** this court ordered that the government valuer was to value the suit land and report within 14 days failure to which the application for transfer of the suit would be allowed. The valuation report was not forth coming and on **24<sup>th</sup> April 2019**, this court allowed the application dated 22<sup>nd</sup> February 2019 noting that the geographical jurisdiction was not in dispute. The Respondents however disputed the pecuniary jurisdiction. The court held that pecuniary jurisdiction issue could still be followed up in the Tigania court. Subsequently thereafter on 14.10.2019, the 1<sup>st</sup> to 5<sup>th</sup> respondents herein filed an application for review of the court order of 24.4.2019. This ruling is therefore in respect of the application for review. For ease of reference, the court will continue to identify the applicants in the application for review as the 1<sup>st</sup> to 5<sup>th</sup> respondents while John Kiramana, the applicant in the suit will still be identified as such.

**Application dated 14.10.2019**

3. The 1<sup>st</sup> to 5<sup>th</sup> Respondents have sought the following orders in the application for review;

**a. Spent**

**b. That this Honourable Court be pleased to review its order herein and retransfer former Meru CMCC No. 592 of 2010 now**

**Tigania Pm ELC 65 of 2019 to Chief Magistrate Meru or to itself for purposes of hearing and determination of the same.**

**c. Spent**

**d. Costs of the application be provided for.**

4. The Application was supported by the sworn affidavits of **Stephen M' Ikiamba (1<sup>st</sup> respondent)**, filed on 17.10.2019 and 23.10.2019 respectively. These respondents contend that when the application for transfer was made, they made it clear to the court that the value of the properties are beyond the jurisdiction of the Tigania Principal Magistrate Court which is only Kshs. 10 million. That they were to supply the valuation of the properties but the valuer was late.

5. The respondents aver that the total value of the properties is Kshs. 20,300,000/=. Going by the report of Ni-Light Consultants LTD dated 7.3.2019, while the report of the county valuer dated 29.7.2019 indicates that the properties are worth sh. 25 890 000. That it is now clear from the valuation reports that Tigania Principal Magistrate court has no jurisdiction to hear and determine the case.

6. The 1<sup>st</sup>-5<sup>th</sup> Respondents in support of their application submitted that at the time the order was made by this court for the transferring Meru CMCC 592 of 2010 to Tigania, it was not within the knowledge of the Respondents/Applicants that the value of the disputed properties will be beyond the jurisdiction of Tigania Principal Magistrate's court. On this point, they relied on the case of **Khalif Sheikh Adan vs The Attorney General Garrisa ELC No. 2018**, where the court cited the supreme court of India case of **Afit Kumar Rath vs. State of Orisa & Others 596** where the grounds for reviewing a judgment were set out as follows;

*“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made.....A review cannot be claimed or asked for, merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for tabling it”.*

7. It was further submitted that the issue of jurisdiction of the court where the suit ought to be transferred was filed is only relevant where that suit was initially in a court without jurisdiction and the same cannot be raised where a subsequent event occurs following the filing of the suit. That the court in Meru was seized of jurisdiction to handle the dispute when it was initially instituted in that court. The respondents also relied on the following authorities in support of their arguments; **Lucia Muthoni & Another versus Betha Wanjiru Muriuki & 2 Others [2016] eKLR**, **Wycliffe Mwangaza Kihugwa v Grainbuk Handlers Limited [2014] eKLR**.

8. The applicant, John Kiramana Ekabu has opposed the application for review vide his Replying Affidavit and a notice of preliminary objection both filed on 28<sup>th</sup> October 2019. He contends that a suit filed in a court without jurisdiction to hear it is legally incompetent ab initio and thus, not transferable to any other court as held by the Court of Appeal in **Phoenix E.A. Assurance Company Ltd Versus S.M.Thiga T/A Newspaper Service [2019] Eklr**. The applicant in his submissions quoted the pecuniary jurisdiction of the Chief Magistrate court under section 7 of the Magistrate court act capped at Kshs 20,000,000/= and opined that the suit having been filed in a court lacking jurisdiction to try it is not transferable to this court as there is no competent suit capable of being transferred.

#### **Analysis and Determination**

9. The main issue for determination is whether this Court ought to review its orders issued on 24<sup>th</sup> April 2019 and subsequently bring the suit in Tigania PM ELC No. 65 of 2019 to a court of competent jurisdiction. Order 45 of the Civil Procedure Act provides as follows;

*“(1) Any person considering himself aggrieved-*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.*

10. It is not in dispute that the suit in question was instituted at Meru in CMCC No. 592 of 2010. Vide a Ruling dated 24/4/2019, this court transferred the suit to Tigania, owing to the territorial jurisdiction, which was not contested. The applicant now argues that it has since come to his attention that the pecuniary jurisdiction of the suit premises is in excess of the jurisdiction of the Principal Magistrate court at Tigania and has availed reports to that effect.

11. It is well settled in law that the High Court under Section 18 of the Civil Procedure Act Cap 21 of the Laws of Kenya is empowered to withdraw and transfer any suit instituted before a lower court to itself or to another subordinate court competent to try and dispose of the same. The question of application of **section 18 1(b) of the Uganda Civil Procedure Act** which provisions are equivalent to our own Civil Procedure Act 2010 was dealt with in the case of **DAVID KABUNGA VS. ZIKARENGA & 4 OTHERS (Kampala HCC No. 36 of 1995)**, where **Okello J** stated as follows:

*“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 enough, 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 or the suit has been filed in a particular court for the purpose of working in justice. 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 by the plaintiff and hearing him to seek his remedy in another jurisdiction.....”.*

12. The above Ugandan case was cited In **Meeli Ole Naisewa v Benson Gachuki Kinyanjui [2016] eKLR**, where it was held that the provisions of section 18 of the Civil Procedure Act are fortified by sections 1A, 1B and 3A which provisions are pertinent in administration of civil justice in Kenya.

13. The suit in question was commenced at Meru Law Courts on 16<sup>th</sup> November 2010. At the time the pecuniary jurisdiction of the Chief Magistrates Court was capped at Kshs. 7 million. Section 7 of the Magistrates Court Act of 2015 increased the pecuniary value of the Chief magistrate’s court to Kshs. 20 million.

14. The development of the Magistrates court’s jurisdiction in relation to environment related matters was explained in **Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR** where the court held as follows;

*“Some four years after enactment of the Environment and Land Court Act, 2011, parliament also enacted the Magistrates’ Courts Act, 2015 so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of the Constitution and to confer jurisdiction, functions and powers on the magistrates’ courts. The Act came into operation on 2<sup>nd</sup> January, 2016..... The upshot of the provisions at Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates’ Courts Act, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land...”*

15. Going by the reports availed by the 1<sup>st</sup> -5<sup>th</sup> respondents, the two Magistrates’ court at Meru and Tigania do not have jurisdiction to handle the claim at this present time. The test therefore is whether or not the reports by the valuers are a new discovery or evidence which, after the exercise of due diligence, was not within the knowledge of the 1-5<sup>th</sup> respondents or could not be produced by them at the time they commenced these proceedings at Meru Chief magistrates court.

16. The 1-5<sup>th</sup> respondents have not provided any evidence to distinguish the pecuniary value of the suit premises at the time of commencement of the suit in Meru Civil Suit No. 592 of 2010 and at this time. It is impossible for this court to therefore discern that at the time of the commencement of the suit, the court in Meru indeed had jurisdiction to entertain the same. It is important that a party establishes the pecuniary value of the cause of action before instituting the proceedings. In this case that was not done hence the constant applications to establish the court’s jurisdiction.

17. The conditions precedent in this case to not support the application, the applicant did not provide evidence that would support the element of discovery. After all, the suit had been before the magistrate’s court at Meru for close to a decade, and just when the matter was transferred to Tigania, the 1<sup>st</sup> to 5<sup>th</sup> respondents wake up to raise the issue of jurisdiction. The element of due diligence is certainly lacking. I find that this case is distinguishable from the **Lucia Muthoni & Another vs. Betha Wanjiru & Others Supra** where it was not disputed that the previous court had jurisdiction to handle the matter.

18. I find that the 1<sup>st</sup> -5<sup>th</sup> respondents have not provided sufficient reasons to warrant the orders for review. Equally borrowing from the decision in **DAVID KABUNGA VS. ZIKARENGA & 4 OTHERS (Kampala HCC No. 36 of 1995)** want of jurisdiction of the court from which the transfer is sought is not ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused.

19. The upshot of this determination is that the application dated 14<sup>th</sup> October 2019 lacks merit and the same is therefore dismissed with costs to John Kiramana Ekabu the Respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 21<sup>ST</sup> DAY OF MAY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. 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 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling 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 JUDGE**