



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. MISC. APP. NO. 10 OF 2020

EMBU COUNTY GOVERNMENT.....APPLICANT

VERSUS

UNIVERSITY OF EMBU.....RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 24th July 2020 expressed to be brought under **Sections 1A, 1B, 3A & 18** of the **Civil Procedure Act (Cap. 21)** and any other enabling provisions of the law, the Applicant sought the transfer of *Embu CMCC No. 4 of 2020 Embu County Government V University of Embu* from the Chief Magistrate’s court to this court for trial and disposal.

B. THE APPLICANT’S CASE

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Johnson N. Nyaga on 24th July 2020. It was contended that the suit pending before the CM’s court relates to occupation and use of land hence this court was “best suited” to hear and determine it. The rest of the grounds were merely of a general nature.

C. THE RESPONDENT’S RESPONSE

3. The Respondent filed grounds of opposition dated 27th August 2020 in response to the said application. Although the Respondent listed 12 grounds of opposition, there were really two main objections to the application. First, that the suit before the Chief Magistrate’s court was a nullity *ab initio* since it was filed in a court without jurisdiction hence the same was incapable of being transferred to this court. Second, that there was undue delay in filing the application since it was filed 6 months after the institution of the suit before the subordinate court.

D. SUBMISSIONS ON THE APPLICATION

4. When the application was listed for hearing on 14th October 2020, it was argued orally by Mr. Wamwea for the Applicant in the absence of the Respondent’s advocate who did not appear despite service. Mr. Wamwea informed the court that the subject matter of the suit before the subordinate court was 240 acres which was worth over Kshs. 360 million. When the court inquired if he had any authorities for the proposition that a suit which has been filed in a court without jurisdiction could be transferred to a competent court, Mr. Wamwea requested more time to file written submissions and authorities on the point. The material on record shows that the Applicant’s advocate filed his submissions and authorities on 21st October 2020. Although the Respondent’s advocates did not file any submissions they filed authorities in support of their objections.

E. THE ISSUES FOR DETERMINATION

5. The court has considered the Applicant’s notice of motion dated 24th July 2020 together with the supporting affidavit and annexures thereto as well as the Respondent’s grounds of opposition dated 27th August 2020. The court is of the opinion that the main questions for determination herein are as follows:

- a) *Whether the Applicant has made out a case for transfer of Embu CMCC No. 4 of 2020 to this court.*
- b) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) *Whether the Applicant has made out a case for transfer of suit*

6. The court has considered the Applicant's application and submissions on this issue. It is apparent from the application and its manner of presentation that the Applicant was not very forthright on the reason(s) for seeking transfer. The fact that the suit related to occupation and ownership of land *per se* could not be a good reason for transfer. This is because under **Section 26** of the **Environment and Land Court Act** and **Section 9** of the **Magistrates' Court Act** Magistrates gazetted for that purpose could competently handle such matters. The court is aware that the current Chief Magistrate at Embu is duly gazetted and has been handling numerous environment and land cases.

7. The mere fact that the court has general jurisdiction to transfer suits from one court to another under **Section 18** of the **Civil Procedure Act** cannot justify arbitrary transfers. There must be a genuine and valid justification for every transfer. A suit cannot be transferred at the convenience or mere say so of an applicant or simply because the respondent may not suffer prejudice by reason of such transfer.

8. Although the Applicant never expressly conceded that the Chief Magistrate's court had no pecuniary jurisdiction to handle the suit sought to be transferred it would appear that is really what motivated the Applicant in filing the instant application. And although paragraph 4 of the supporting affidavit made reference to a notice of preliminary objection filed by the Respondent in the pending suit, the Applicant was guarded not to disclose what the said preliminary objection was all about. The Applicant simply annexed the said notice and proceeded to deal with other general issues such as how a transfer order would save the litigants time and money.

9. It is apparent from the Respondent's notice of preliminary objection dated 22nd January 2020 that the key issue raised therein was that the Chief Magistrate's court had no jurisdiction to entertain the suit because the suit property was about 240 acres whose pecuniary jurisdiction was beyond the jurisdictional limit of the court. The Applicant's advocate in his oral submissions on 14th October 2020 contended that the suit property was worth Kshs. 360 million.

10. It is thus clear that whilst the said preliminary objection was pending determination before the Applicant filed the instant application seeking transfer of the impugned suit. The Applicant was, however, reluctant to set forth candidly the reasons for seeking transfer and proceeded to put forward merely general grounds to justify the application. It was only when the court questioned the propriety of transferring a suit which has been filed in a court without jurisdiction that the Applicant's advocate sought leave to file authorities and written submissions on the point.

11. The court has considered the Applicant's submissions and authorities on the issue of transfer of suit. The Applicant primarily relied upon the overriding objective of the **Civil Procedure Act** stipulated in **Sections 1A** and **1B** of the **Act** as well as **Article 159** of the **Constitution of Kenya**. The Applicant also relied on several High Court decisions which allowed transfer of suits in similar circumstances. The Applicant also cited two Court of Appeal decisions which were not directly on point but which related to transfer between the High Court and the two courts of equal status.

12. In the case of **County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 6 Others [2015] eKLR** the Court of Appeal did not find fault with the High Court's decision to transfer a labour matter to the Employment and Labour Relations Court. The second case cited by the Applicant was **TSS Investments Limited & Another v NIC Bank Limited [2019] eKLR** in which the Court of Appeal found nothing wrong with the transfer of a suit from the Environment and Land Court to the Commercial Division of the High Court. As indicated earlier, those two decisions did not deal with a situation similar to the present one. The court is of the opinion that the Court of Appeal decisions directly on the point are the ones cited by the Respondent.

13. The Respondent relied on the case of **Phoenix of E.A. Assurance Company Ltd V S.M. Thiga t/a Newspaper Service [2019] eKLR** (the **Phoenix Case**) and **Equity Bank Limited V Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR** (the **Equity Bank Limited case**).

14. In the **Phoenix Case** the High Court had transferred a suit filed in the Principal Magistrate's court to the High Court for trial and disposal on account of inadequate pecuniary jurisdiction on the part of the Magistrates' court. In a judgement dated 10th May 2019 the Court of Appeal held, *inter alia*, that:

"We are not persuaded that that proposition by the respondent is correct in law. 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 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 to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):

"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....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 judgement is given."

These words were echoed by this Court in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** in the following words:-

"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 with 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 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 same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

15. The Court of Appeal decision in the **Equity Bank Ltd case** was similar to the decision in the **Phoenix case**. In that matter, the High Court had transferred *Kwale PMCC No. 213 of 2012* to itself for trial and disposal on the ground that the claim was beyond the pecuniary jurisdiction of the Principal Magistrate’s Court. The Appellant was able to successfully challenge the order of transfer before the Court of Appeal. In *Kwale PMCC No. 213 of 2012* the Appellant had raised a preliminary objection to the jurisdiction of the court to entertain the suit and just like in the instant suit, the Respondent decided to file an application before the High Court for transfer of suit before the preliminary objection could be determined.

16. The court is thus of the opinion that on the basis of the Court of Appeal decisions in both the **Phoenix case** and **Equity Bank Ltd Case**, this court has no jurisdiction to transfer *Embu CMCC No. 4 of 2020* from the Chief Magistrates’ court to this court since that suit was a nullity in the first instance. It was a still born hence it cannot be transferred to a court of competent jurisdiction. The Applicant is, however, at liberty to discontinue it and file a proper one before a court of competent jurisdiction.

b) Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the application. Accordingly, the Respondent shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

18. The upshot of the foregoing is that the court finds no merit in the Applicant’s notice of motion dated 24th July 2020. Consequently, the same is hereby dismissed with costs to the Respondent. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **29TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Henry Wamwea for the Applicant and in the absence of the Respondent.

Y.M. ANGIMA

JUDGE

29.10.2020