



## REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC MSC APPL NO 7 OF 2020

NICHOLAS KIHUNGI KIMARI ..... 1<sup>ST</sup> APPLICANT

DUNCAN NJARIA KIMARI .....2<sup>ND</sup> APPLICANT

DAVID MAINA KIMARI ..... 3<sup>RD</sup> APPLICANT

FLORENCE MUTHONI KIMARI..... 4<sup>TH</sup> APPLICANT

VS

KIMARI MAINA .....1<sup>ST</sup> RESPONDENT

MARGARET NYOKABI KIMARI..... 2<sup>ND</sup> RESPONDENT

SAMUEL MAINA KIMARI .....3<sup>RD</sup> RESPONDENT

STANLEY KURIA KIMARI.....4<sup>TH</sup> RESPONDENT

### JUDGEMENT

1. The Applicants filed a Notice of Motion under section 18(b) of the Civil Procedure Act and sought orders to withdraw SPM ELC No 12 of 2019, Kangema and transfer to this Court for hearing and disposal.
2. The application is based on the grounds annexed thereto and the supporting affidavit of Mr. Duncan Mindo, the Advocate for the Applicants who deponed that the subject lands in the SPM ELC No 12 of 2019 are similar to those in Matrimonial cause No 4 of 2016, Muranga High Court. That the trial Court in Kangema on its own motion felt that the suit should be transferred to the Environment and Land Court(ELC)in Murang'a and gave timelines for the same.
3. The application has been opposed by the Respondents who argue that there is a Preliminary Objection pending in Kangema suit which ought to be heard first as it has the ability to bring the suit to an end.
4. That the properties in SPM ELC 12 of 2019 are subject of the dispute in Matrimonial Property cause No 4 of 2016 which cause is yet to be determined. The Court issued orders in the cause restraining any dealings with the subject properties. That it is the basis of the pending preliminary objection which challenges the jurisdiction of the Kangema Court to determine the suit.
5. That the Applicants have not demonstrated the reasons for the transfer of the suit to this Court seeing that the value of the properties is not over Kshs 20 million thus within the pecuniary jurisdiction of the Court. That transferring the suit to Muranga will occasion the Respondents unjustified expenses and inconveniences.
6. At the hearing of the application in open Court, the Applicants' Advocate stated that he was opposed to the transfer of the suit to this Court and the Respondents Counsel did not support him when the Hon Magistrate felt the suit should be transferred to this Court and gave timelines for the same.
7. Sections 11 to 18 of the Civil Procedure Act governs and regulates the venue within Kenya and prescribes rules for the assumption of territorial jurisdiction by Courts in matters within their cognizance.

8. Section 18 provides as follows;

“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. transfers any suit, appeal or other proceeding pending before it or 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.

9. This suit is brought under section 18(b) of the Civil Procedure Act. This section gives this Court general powers to transfer suits at any stage of the proceedings even suo moto. Where the application is initiated by a party, notice must be issued to the opponent and the parties must be heard on the application. But where the Court moves itself suo moto no notice need be issued to the parties before the issuance of an order to transfer.

10. The power to transfer a suit by this Court is discretionary. Some of the factors that the Court takes into consideration are; that the expenses and difficulties of the trial would be so great as to cause injustice; the case has been filed in particular Court for the purposes of occasioning injustice; that it is necessary to transfer for purpose of convenience; that there are pecuniary or other personal interests in the presiding judge; there is reasonable apprehension that the litigant will not get a fair trial.

11. What reasons have been advanced by the Applicants? From the above it is clear that a suit shall not be transferred or withdrawn for the sake of it. The Court must be persuaded that the transfer or withdrawal is merited. In this case the Applicants have stated that it was the feeling of the Court in Kangema that the suit be transferred. Interestingly the Applicants Advocate at the hearing stated that he is opposed to the withdrawal/transfer of the case from Kangema. The suit belongs to parties and not the Court. No reason has been advanced for the withdrawal of the suit from Kangema into this Court for hearing. I have perused the plaint in SPMELC No 12 of 2019 and the Applicants under para 19 has declared a value of Kshs 5 million being the value of the suit lands to wit LOC 19/GACHARAGEINI/3616, 3617,3525 and 3526.

12. Section 7 of the Magistrates Act provides the jurisdiction of the Court with respect to civil suits as follows;

“A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- a. twenty million shillings, where the Court is presided over by a chief magistrate;
- b. fifteen million shillings, where the Court is presided over by a senior principal magistrate;
- c. ten million shillings, where the Court is presided over by a principal magistrate;
- d. seven million shillings, where the Court is presided over by a senior resident magistrate; or
- e. five million shillings, where the Court is presided over by a resident magistrate

13. Applying the above provision of the law, it follows that the SPM Court in Kangema has jurisdiction to hear and determine the matter.

14. The Prayers being sought in the plaint are interalia injunctive reliefs and customary trust in land which in all respects, the Magistrates Court has jurisdiction to determine as seen under section 7 (3) which states as follows;

“A magistrate's Court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —

- a. land held under customary tenure;
- b. ....

16. Where a party seeks to transfer a suit from one Court to another the burden is on him to make a strong case for the withdrawal and transfer of the suit into this Court. It is the finding of the Court that the Applicants have not discharged this burden at all.

16. Section 18 of the Civil Procedure Act is explicit that a Magistrates Court has no power to withdraw and transfer suits to either another

magistrate's Court or to the High Court. It is a power reserved to the High Court (read ELC Court).

17. The Respondents has explained the prejudice that it stands to suffer in form of financial expenses and difficulties in travelling to Muranga given that the parties reside in Kangema. The reason was not controverted by the Applicants.

18. Going by the reasons given above coupled with the Applicants non conviction on the reasons for the transfer of the suit, this Court finds the application unmerited.

19. The application is dismissed with costs to the Respondents.

**20. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3<sup>RD</sup> DAY OF DECEMBER 2020.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

1<sup>st</sup> Applicant: Present

2<sup>nd</sup> – 4<sup>th</sup> Defendants: Absent

Ms Bundi HB for Mutunga for the 1<sup>st</sup> – 4<sup>th</sup> Respondents

Njeri and Kuyiki, Court Assistants