



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISCELLANEOUS CAUSE NO. 20 OF 2020

TATA CHEMICALS MAGADI LIMITED.....APPLICANT

VERSUS

THE COUNTY GOVERNOR, KAJIADO COUNTY.....1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO.....2ND RESPONDENT

AND

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

WATER RESOURCES

MANAGEMENT AUTHORITY.....2ND INTERESTED PARTY

RULING

What is before Court for determination is the Applicant’s Notice of Motion dated the 22nd July, 2020 brought pursuant to sections 18(1) (b), 1A, 1B and 3A of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks an order to transfer Kajiado CM ELC 21 of 2019 (Tata Chemicals Magadi Ltd V County Governor of Kajiado and Another) from the Kajiado Chief Magistrate’s Court to the Environment and Land Court at Kajiado for hearing including final determination.

The Application is premised on the grounds on the face of it and the supporting affidavit of LEBU ANGELA ANYANGO Applicant’s Head of Legal Compliance who explains that on 21st March, 2019, the Applicant filed a suit against the Respondents in the Chief Magistrate’s Court being Kajiado CM ELC 21 of 2019 (Tata Chemicals Magadi Ltd V County Governor of Kajiado and Another) where it sought various orders including injunctive reliefs. She avers that on 22nd March, 2019 the Court issued a temporary injunction restraining the Respondents including their servants and or employees from demolishing, opening the diversion channel in the dykes or whatsoever interfering with the diversion of the seasonal Kisamis River or dykes constructed thereon, pending the determination of the Applicant’s Notice of Motion dated the 21st March, 2020. She confirms that on 15th July, 2020, the subordinate court (Hon. Kahuya I. M (PM) delivered a ruling expressing the view that the subordinate court lacked pecuniary jurisdiction to hear the matter substantively and directed the parties to move the matter to a court of competent jurisdiction for hearing and final determination. She states that the Applicant has filed the instant application seeking necessary orders to transfer Kajiado CM ELC 21 of 2019 (Tata Chemicals Magadi Ltd V County Governor of Kajiado and Another) from the Kajiado Chief Magistrate’s Court to the Environment and Land Court at Kajiado for hearing including final determination. She reiterates that no prejudice shall be suffered by the Respondents if the orders sought are granted.

The Respondents filed the Grounds of Opposition dated 20th August, 2020 which are summarized here below: This court lacks jurisdiction to entertain this application for the sole reason that no competent suit exists that is capable of being transferred in the manner encapsulated under Section 18 of the Civil Procedure Act; the suit filed in the Chief Magistrate’s Court vide **Kajiado CMC ELC No. 21 of 2019** is a nullity ab initio, owing to the fact that the Magistrate’s Court downed its tools for want of pecuniary jurisdiction to try or dispose of the matter this Honourable Court has no jurisdiction to order for the transfer of Kajiado CMCC ELC No. 21 of 2019 from the Chief Magistrate’s Court to itself unless the said suit has been, in the first instance been brought to a court which has jurisdiction to try it; Kajiado CMC ELC No. 21 of 2020 is a nullity, incompetent, void in law and incapable of being transferred to the High Court or any other court or tribunal; the Principal Magistrate who was seized of the matter, declared the status of Kajiado CMC No. 21 of 2019 as a nullity in her ruling made on 15th July 2020 in which she expressly stated that she lacked the requisite pecuniary jurisdiction to try the matter which has a subject value of

Kshs. 100,000,000/= it would be illegal for this Honourable Court, in exercise of its powers under Section 18 of the Civil Procedure Act, to transfer a suit filed in a subordinate court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit; Kajiado CMC ELC No. 21 of 2019 was filed in a court without jurisdiction and the only remedy available to the applicant is to withdraw KAJIADO CMC ELC No. 21 of 2019 and file another complaint suit in another court seized of jurisdiction; The applicant's hands are soiled and exceedingly unclean for falsely misrepresenting to this Honourable Court, through the affidavit sworn by Ms. Angela Lebo on 22nd July 2020, that the temporary order of injunction issued by the Senior Principal Magistrate on 22nd March 2019 continues to remain in place, the **Principal Magistrate's in her ruling of 15th July 2020** made a final determination of the Plaintiff's application dated 21st March 2019 by holding that **"Unfortunately I am unable to grant the said orders because I am ceased of the pecuniary jurisdiction to deal with this matter which has a subject value of Kshs. 100,000,000/= as per Ground 6 of the application"**; the Exparte temporary injunction issued on 22nd March 2019, pending the inter partes hearing and final determination of the application dated 21st March 2019, lapsed on 15th July 2020 when the trial Magistrate, after hearing the parties declared she lacked pecuniary jurisdiction to entertain either the Plaintiff's application dated 21st March 2019, or the main suit; the application is also incurably defective for failing to, in the first instance, seek an order of withdrawal of **KAJIADO CMC ELC No. 21 of 2019** by the High Court from the Chief Magistrate's Court in accordance with the provisions of Section 18(b) of the Civil Procedure Act, before seeking an order of the High Court to transfer and try or dispose of the suit in accordance with the provisions of Section 18(b) (i) of the Civil Procedure Act; the Applicant conceals the fact that both the application dated 21st March 2019, together with the main suit in KAJIADO CMC ELC No. 21 of 2019, were declared a nullity when the trial Magistrate downed her tools for want of jurisdiction, and that therefore there is nothing to be transferred to this Honourable Court; Jurisdiction is a cardinal matter that cannot be equated to procedural technicality, and accordingly, lack of jurisdiction cannot be cured either by the overriding objective under Sections 1A and 1B of the Civil Procedure Act or Article 159(2) (d) of the Constitution of Kenya, 2010; The entire application is incurably defective and ought to be struck out or dismissed with costs to the 1st and 2nd Respondents herein.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 22nd July, 2020 including the supporting affidavit, Grounds of Opposition and rivaling submissions, the only issue for determination is whether Kajiado CM ELC 21 of 2019 (Tata Chemicals Magadi Ltd V County Governor of Kajiado and Another) should be transferred to this Court for hearing and final determination.

The Applicant has sought for transfer of the aforementioned suit which application is vehemently opposed by the Respondents. The Applicant in its submissions reiterated its claim and relied on the decisions of **Gipson Kiplangat Langat V Kenya Kazi Services Limited (2012) eKLR; Sharad Wadhia V Wadhia Polymers EA Limited (2020) eKLR and Grace Thongori Komo V Dan Njagi Ndwiga (2013) eKLR**. The Respondents in their submissions contended that this Court cannot transfer a suit filed in the subordinate court to itself before withdrawal from the subordinate court. Further, a suit filed in a court lacking jurisdiction cannot be transferred to this court. To buttress their averments, they relied on the following decisions: **Phoenix of East Africa Assurance Co. Ltd V S M Thiga T/A Newspaper Service (2019) eKLR; Equity Bank Limited V Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR; Kagenyi V Musirambo (1968) EA 43; Boniface Waweru Mbiyu V Mary Njeri & Another (2005) eKLR; Abraham Wamigwi V Simon Mbiriri Wanjiku (2012) eKLR and Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Ltd (1989)**.

Section 18 of the Civil Procedure Act provides that: **' (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 of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.'

From a reading of section 18 which is cited above, it grants the High Court discretion to transfer a suit for hearing and final determination. In the instant case, the Principal Magistrate downed her tools citing lack of pecuniary jurisdiction to handle the matter. From a perusal of the excerpt of her Ruling which was quoted in the Respondents' Grounds of Opposition, I note she neither struck off nor dismissed the suit. This in essence means the suit is still pending before the lower court. The Applicant has sought for the transfer of the aforementioned suit from Kajiado Chief Magistrate's Court to this Court and contends that no prejudice will be suffered by the Respondents if this is done. In the case of **Phoenix of East Africa Assurance Co. Ltd V S M Thiga T/A Newspaper Service (2019) eKLR** the Court of Appeal while dealing with transfer of a matter from one court to another over question of jurisdiction, held as follows: **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 filed a complaint one in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.**

Further, in the case of **Equity Bank Limited V Bruce Mutie Mutuku t/a Diana Tour Travel (2016) eKLR** the Court of Appeal held thus: **'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.'**

I note the Applicant has provided authorities from the High Court that support the transfer of the matter from the lower court to the High Court for hearing and final determination, which decisions are persuasive and not binding on this court. However, based on the facts before me and in associating myself with the two decisions from the Court of Appeal which bind this Court, I find that since the trial Magistrate had downed her tools and expressly stated that she lacked pecuniary jurisdiction to handle Kajiado CM ELC 21 of 2019 (Tata Chemicals Magadi Ltd V County Governor of Kajiado and Another), it would be futile for this Court to transfer the said suit to it. Further, I am of the view that since Jurisdiction is primordial and cannot be equated to a procedural technicality, and where a court lacks jurisdiction and has downed its tools, the same cannot be cured by Sections 1A, 1B and 18 of the Civil Procedure Act. I opine that the Applicant has a remedy to withdraw the lower court suit and file a fresh one in this court for hearing and final determination.

In the circumstance, I find the application dated 22nd July, 2020 unmerited and will proceed to dismiss it with costs.

Dated Signed and Delivered at Kajiado this 3rd Day of December, 2020.

CHRISTINE OCHIENG

JUDGE