



**REPUBLIC OF KENYA**

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

**AT NYAHURURU**

**ENVIRONMENT AND LAND MISC No. 1 OF 2019**

**KENNETH AKIBAYA**

**EZINA ALUSA AKIBAYA (Suing as Administrators of the Estate of**

**JAIRO AKIBAAYA ELLOGA (Deceased)..... APPLICANTS**

**VERSUS**

**JOSEPH MUCHAI MUNDU & 19 OTHERS.....RESPONDENTS**

**RULING**

1. Before me for determination is a Notice of motion dated the 13<sup>th</sup> March 2019 and filed on the 14<sup>th</sup> March 2019 wherein the Applicant seeks that the matter filed in Nyahururu CMCC ELC No. 7 of 2018 be withdrawn and transferred to this court for hearing and determination.

2. The Application is supported by the grounds on the face of it and the supporting affidavit of Kenneth Akibaya herein sworn on the 13<sup>th</sup> March 2019.

3. The said Application was served upon the Respondents wherein the same was urged orally on the 9<sup>th</sup> April 2019.

**The Applicants' submission.**

4. The Applicants' submission was to the effect that the application before court sought for the withdrawal of the suit in Nyahururu CMCC ELC No 7 of 2019 the parties being Kenneth Akibaya & Ezina Alusa suing as the administrators of the estate of Jairu Akibaya (deceased) vs Joseph Muchani and 19 others.

5. That they sought the withdrawal of the suit and subsequent transfer of the same to the ELC Nyahururu for hearing and disposal of the same. They also sought that if the court deemed it fit to transfer the matter, that leave be granted to amend their Notice of Motion dated 18<sup>th</sup> January 2019 wherein the draft annexed application would be deemed as properly filed save for payment of the requisite court fee.

6. That the application was based on the grounds on its face and the supporting affidavits of Kenneth Akibaya as well as their list of authorities dated 8<sup>th</sup> April 2019 and filed on 9<sup>th</sup> April 2019.

7. It was their submission that the subordinate court lacked the pecuniary jurisdiction to handle this matter which at the time of filing was unknown to the Applicants' with the result that the matter was in avertedly filed in the subordinate court.

8. Counsel for the Applicant submitted that an acre of the subject land at the current market value was not less than 1 million Kshs and therefore the whole parcel of land which had an acreage of about 35 acres or thereabout would not be less than Ksh 35 million.

9. That in the replying affidavits sworn and filed on the 25<sup>th</sup> March 2019, the Respondents did not dispute the fact that the Chief Magistrate's court could not handle the matter because of jurisdiction. Both parties were therefore on the same page in regards to the pecuniary jurisdiction of the Chief Magistrate's court.

10. That the court had the power to have the matter withdrawn from the subordinate court and transferred to itself for hearing and determination.

11. That from the authorities annexed, the honorable judges had found that if a suit found itself in the wrong court that it would be in the interest of justice that it is forwarded to the proper court with jurisdiction so that the issues therein could be properly adjudicated. That there was not going to be any prejudice occasioned to the Respondents if the matter was transferred to this court.

12. That the overriding objective under Section 1A and 1B of the Civil Procedure Act was to the effect that this court looks at the overriding objective to which matters were to be disposed of expeditiously.

13. That assuming the application was disallowed, the prejudice that would be caused to both parties would be greater because the matter filed in the lower court even if it had merited, would be dismissed or struck out which would not be in the interest of justice.

14. That keeping in mind that the Plaintiff was filed on 22<sup>nd</sup> January 2019 before the subordinate court wherein the present application was filed immediately the mistake was noticed raised, there was no inordinate delay. Therefore it will be fair to give the applicant room to rectify the mistake. That the principle of law in regard to transferring cases under Section 18 of the Civil Procedure Act are no longer good law and should no longer be persuasive as times had changed. The court should now consider the overriding objective.

15. That in regard to their 3<sup>rd</sup> prayer, where their application sought for leave to amend their notice of motion dated 18<sup>th</sup> January 2019, that it was true that they did not amend the same in the subordinate court and there would be no harm if the court granted and/or extended leave to have the notice of motion dated as in any case, the subordinate court had no jurisdiction to grant orders for lack of jurisdiction.

16. That the amended plaintiff had been duly filed in the subordinate court because there had been no need to seek leave as the pleadings had not closed. That they had sought to amend the notice of motion because they had quoted the mother title and subsequently there had been a sub division of the said mother title.

**Respondents' submission.**

17. In opposing the Applicants' application, it was the Respondents' submission that they had filed two documents being a replying affidavit sworn on 25<sup>th</sup> February 2019 as well as a list of their authorities dated 1<sup>st</sup> April 2019 which documents have been duly served to which they did not wish to replicate but prayed that the court goes through the same.

18. That there are two issues presented before court for determination.

- i. Whether suit filed to the Chief Magistrate's court which has no pecuniary jurisdiction can be withdrawn and heard by this court.
- ii. Whether this court has jurisdiction to grant leave to amend a pleadings of a matter that is not before it.

19. Counsel for the Defendant gave a short synopsis of the history of the matter to the effect that 3 months ago, the Applicants in this matter guided by counsel before court filed CMC ELC No. 7 of 2019 wherein summons were served and the Defendants contested the suit. Among the issues raised were that the Chief Magistrate's court had no jurisdiction to hear and determine the suit.

20. After that, the Applicants rushed to the court and were now requesting the court to withdraw the case before the Chief Magistrate and to have the same transferred to this court for hearing and determination.

21. That it was not contested that the subject matter in the Chief Magistrate's court is valued at least Ksh. 35 million well beyond the jurisdiction of the Chief Magistrate's court. That it was also not contested that the Applicants guided by the counsel, made a decision to file the said case before the Chief Magistrate's court.

22. It was therefore their submissions that this court had no jurisdiction to withdraw the case pending before the Chief Magistrate so that it could itself try the suit. That the case No. CMC ELC 7 of 2019 pending before the Chief Magistrate was a nullity and void ab initio and therefore not transferable. That consequently in law, there was nothing before the Chief Magistrate's court that could be withdrawn and tried by the court.

23. Counsel submitted that he was fortified in his submissions by the list of authorities herein:

**i. Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another [2012] eKLR**

**ii. Boniface Waweru Mbiyu vs Mary Njeri & Another [2005] eKLR**

24. The Respondent further submitted that the resent issue was not one of discretion but one of jurisdiction. The crux of the application was that the Applicants together with their advocates made a grave mistake of the law. They were not diligent. The Respondents had nothing to do with the mistake and therefore the Applicants should face the consequence of their actions.

25. They relied on the following authorities;

**i. Charles Omwata Omwoyo vs African Highlands & Produce Co. Ltd [2002] eKLR**

**ii. Simon Njogu Karithi & Another vs cleti Kembio Kimaiyo [2015] eKLR**

### iii. Josiah M.R Karui vs Simon Gichangi Kabugi [2017] eKLR

26. It was their submission that the case before the Chief Magistrate is a nullity void ab initio and incapable of being transferred to this court. They therefore urged the court to reject the submissions by the Applicants' counsel. That the list of authorities that the Applicants had quoted and relied upon amounted to an ambush and ought to be expunged from the court record as they were served upon the Respondents' counsel in court as the Applicant's counsel on her feet. They ought to have been served three clear days to avoid ambush so that the other party could have a look at what was contained to enable them put in their input.

27. On the 2<sup>nd</sup> issue as to whether the court had jurisdiction to grant leave to a pleading lying in another court, it was the Respondent's submission that since the Notice of Motion was before the Chief Magistrate's court, the said application was pre mature and needed to be made at an opportune time. The said Notice of Motion to grant leave was still pending at the Chief Magistrate's court and therefore there was some misapprehension of the law in the said application. That since the matter before the Chief Magistrate was a nullity in law, a party could not request this court to breathe some breath of life in the said matter. That if the plaint was amended, where did the Applicants get the authority to amend?

28. They sought that the application dated 18<sup>th</sup> March 2019 be dismissed with costs.

29. In rejoinder, counsel for the Applicant submitted that at the time of filing the suit in the subordinate court, they had not known its current market value. Their mistake was innocent and the court had jurisdiction to grant the prayers so sought for justice to be duly served. That there was no misapprehension of the law.

#### **Analyses and Determination.**

30. I have considered the matter herein. The issues for determination that arise are:

- i. What is the fate of a matter filed in a court without jurisdiction.
- ii. Does this court have jurisdiction to transfer the same to itself to hear and determine it.

31. Section 18 of the Civil procedure Code provides as follows;

#### *Power of High Court to withdraw and transfer case instituted in subordinate court*

*(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.*

32. Indeed from the above captioned provisions of the law it is clear that the High Court and courts of similar Status are clothed with jurisdiction to transfer a suit, after due Notice to the parties and after hearing such of them as desires to be heard, or on its own motion without such notice, from or to a subordinate court. However what happens in a scenario where the matter to be transferred was filed in a court that had no jurisdiction as in the instance?

33. **In the celebrated case of Kagenyi vs. Musiramo and Another [1968] EA 43** the court held that where the subordinate court lacks jurisdiction to determine a matter, one court could transfer a suit to another court unless the suit had in the first instance been brought to a court which had jurisdiction to try it. In other words, it made it clear that an order for the transfer of a suit from one court to another could not be made unless the suit had been, in the first instance brought to a court which has jurisdiction to try it.

34. **Similarly in the case of Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others HCCC No. 556 of 2009, Koome, J** (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the Civil Procedure Act cannot be exercised in a matter where the suit was filed in a court without jurisdiction.

35. **Further, in the case of Boniface Waweru Mbiyu vs. Mary Njeri & Another [2005] eKLR** the court expressed itself as follows:

***“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.***

36. In the celebrated case of *The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1*, the learned Judge stated 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 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 has no jurisdiction.”*

37. In the present case it is not in dispute that the matter filed in the CMC ELC No. 7 of 2019 was a matter that exceeded the court’s pecuniary jurisdiction, a matter which the Applicants have sought to have transferred to this court in the Application herein. The entry point into any Court proceeding is *jurisdiction*. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question.

38. Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client.

39. I find that the suit filed in the subordinate court being CMC ELC No. 7 of 2019 is incompetent and void in law; and therefore it is not a motion or suit that can be *transferred* to any other Court.

40. The application is herein dismissed with costs to the Respondent.

**Dated and delivered at Nyahururu this 30<sup>th</sup> day of May 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**