



Were & another v Muhudi (Suing as the official Grace Calvary Christian also known as God's Voice of End Time Ministry) (Environment and Land Miscellaneous Application 6 of 2023) [2024] KEELC 450 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 6 OF 2023
FO NYAGAKA, J
JANUARY 31, 2024**

BETWEEN

WALTER WERE 1ST APPLICANT

JAMES WALWEYO 2ND APPLICANT

AND

RASHID MUKHWANA MUHUDI RESPONDENT

**SUING AS THE OFFICIAL GRACE CALVARY CHRISTIAN ALSO KNOWN AS
GOD'S VOICE OF END TIME MINISTRY**

RULING

1. The Applicants moved this Court vide a Notice of Motion dated 02/10/2023 supported by two Affidavits of one Walter Were, one which was sworn on the same date and another on 23/10/2023. They brought the Application under Sections 18 and 89 of the *Civil Procedure Act*. They prayed for the following orders:
 1. ...spent
 2. That this Honourable court do withdraw Kitale CMCC Land Case No. 137 of 2021 and transfer it to this Court for consolidation and trial together with Kitale ELC Case No. 2 of 2022 for hearing and determination.
 3. Costs of this application be in the cause.
2. The application was based on four grounds. These were that there was a pending suit before this Court, being Kitale ELC Case No. 2 of 2022 with similar parties as Kitale CMC Land Case No. 137 of 2021 and dealing with the same issue which emanates from land parcel No. Trans Nzoia/Kipsoen/1645; initially the respondent filed Kitale Land Case No. 137 of 2021 concerning land parcel No. Kipsoen



Scheme 1175 but after the applicant filed Kitale ELC No. 2 of 2022 concerning LR. No. Trans Nzoia/Kipsoen/1645 the respondent amended their pleadings in Kitale CMC Land Case No. 137 of 2021 by removing Land Parcel Kipsoen Scheme 1175 and replacing it with Trans Nzoia/Kipsoen/1645; that consolidation will avoid multiplicity of suits on the same or similar issues and save the court's time; and the interests of justice demand that the application be allowed.

3. In the Affidavit the Applicants deponed over the content of the grounds and added that it would be proper to transfer the lower court matter to the High Court and consolidate the two cases so that all issues between the parties be heard and determined at the same time. He also deponed that the respondent would suffer no prejudice of the application was granted.
4. The Respondent opposed the Application through a Replying Affidavit sworn on 16/10/2023. He deponed that the application was incompetent, an afterthought, baseless, frivolous, misconceived, lacked merit and was an abuse of the process of the Court.
5. In the supplementary affidavit the Applicants deponed that the application was brought in good faith and not an afterthought. That the applicants to their best of knowledge disclosed all the material facts about Kitale CMC Land Case No. 137 of 2021 and Kitale ELC No. 2 of 2022. That at filing the two cases, the two cases referred to were dealing with a different parcel number hence the issues in the two were different. The purpose of the instant application was to help avoid a multiplicity of suits and save the court's time. That the suit property being LR. No. Trans Nzoia/Kipsoen/1645 was worth over two million Kenya shillings. He annexed a copy of a valuer's report and marked it as WW-1 to evidence the assertion.
6. The Applicants filed, on 24/10/2023, a one-page set of submissions dated 23/10/2023. They summarised the prayers of the Application and argued that since the Respondent had filed the lower court case earlier and amended the Plaintiff to reflect a different parcel number from the one that he initially had, and the issues are similar now in both suits, it would be proper to transfer the lower court matter now that issues emanate from the same parcel No. being Trans Nzoia/Kipsoen/1645. They stated that the suit property had a value of over Kshs. 20,000,000/=, and they had disclosed all the facts concerning the two suits. They prayed for the orders sought.
7. I have considered the application, the law and the submissions by the rival parties. I have only two issues to determine herein. They are whether the application has merits and who to bear the costs thereof.
8. Regarding the first issue, removal and transfer of a suit by the High Court (or ELC or ELRC for that matter) from a subordinate Court to the High Court and vice versa is provided for under Section 18 of the *Civil Procedure Rules*. Regarding transfer of a suit from a subordinate court to the Court (ELC for that matter), the relevant part of the provision 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- (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter- (i) try or dispose of the same;...”

9. Section 89 of the *Act* is in regard to the application of the procedure in the Act in relation to suits to be applicable as much as practicable to other proceedings. In terms of transfer of a matter from a subordinate Court for trial in the ELC, High Court or ELRC, the question that a party should first satisfy the Court on is whether the court from where the matter is sought to be transferred had jurisdiction to handle the matter. This is because jurisdiction is everything, as was stated in the case of *Owners of the Motor Vessel "Lillian" -vs- Caltex Oil (Kenya) Ltd* [1989] eKLR. Thus, if the Court



before which a suit was filed did not have jurisdiction, the transfer of a suit therefrom as to cure or move the matter to a court that has jurisdiction would be an unacceptable ‘sanitization’ which the law does not permit. Once something is illegal it remains a nullity and no amount of ‘laundering’ thereof can clothe it with ‘cleanliness’ in terms of legality. The best a party can do is to withdraw the suit: actually, move that it be struck out for want of jurisdiction and thereafter file it in a Court which has jurisdiction.

10. In *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another* [2012] eKLR where the Court held that:-

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi vs. Musiramo (supra)*, Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In *Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (supra)*, 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. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited vs. National Bank of Kenya (supra)*.

11. In a matter that dealt with the same issue of jurisdiction, J B Ojwang, J (as he then was) in the *Boniface Waweru Mbiyu vs. Mary Njeri & Another* held:

“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”.

12. In the instant application, it is clear that Kitale CMC Land Case No. 137 of 2021 was filed and the Respondent herein moved the trial court to strike it out for want of jurisdiction. His argument was that the lower court lacked pecuniary jurisdiction to try the suit. In its ruling rendered on 04/04/2023 the trial Court found that it had jurisdiction. The party never appealed the decision. It therefore means that as the issue is currently, the lower court has jurisdiction to hear and determine the suit before it. What that means also is that if the Court were to be moved, as in the instant application, it can, if the application is meritorious, withdraw and transfer the suit to itself for determination, in terms of Section 18(1)(b)(i) of the *Act*.

13. This leaves me with one further question: is the Application meritorious? To answer that this Court needs to examine the reasons for the application for transfer of the lower court suit. The applicant argues that the lower Court matter is on the same subject and between same parties but inversely, and that to avoid duplicity it would be in the interest of justice to transfer the lower court suit to this Court. In essence, the Applicant admits that suit No. Kitale ELC No. 2 of 2022 which was filed after the earlier one is the reason for the transfer of the lower Court one due to similarity of the issues.



14. It is not denied that this Court has jurisdiction to try suit number Kitale ELC No. 2 of 2022. It is not disputed either that the lower Court has the requisite jurisdiction to try the matters raised in the said matter. That being so, the provisions of Section 6 of the Act apply in the circumstances. The provision is to the effect that where a party files two suits in separate or same courts over the same matter, the Court shall stay the proceedings in the latter suit until the hearing and determination of the former or prior suit.
15. The Court would be prepared to stay the proceedings in Kitale ELC No 2 of 2022. However, since the issues raised in the suit could be well handled in the lower court but the Applicant herein elected to file the instant suit and then applied to transfer an earlier filed suit from the lower court to the instant one, and not the other way round, it is the humble view of this Court that the deliberate step of the Respondent was to indirectly forum, increase costs onto the Applicant and vex or abuse the process of the Court. It is illogical and not open for the Applicant herein to deliberately file another suit over the same issues basically in another court on a later date than or subsequent to the one he seeks to have transferred and then moves the court that the earlier suit (or even the latter) suit be transferred to the other court in order to avoid duplicity. It is he/she himself/herself who has caused duplicity yet he asks the Court to intervene. Such conduct is abhorrent and clearly an abuse of the process of the Court. It is for that matter that this Court declines the instant application. I dismiss it with costs to the Respondent.
16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JANUARY, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE

ELC, KITALE

