



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

MISC. APPLICATION No. 64 OF 2017

FRANCIAH WANJIRU.....APPLICANT

VERSUS

ELIAS MBUGUA..... RESPONDENT

**RULING**

**(An application for transfer of a suit from Chief magistrate's Court; respondent not opposing the application; no clear details of the suit to be transferred provided; different case numbers mentioned in the prayers and in the grounds of the application; copies of pleadings of the case sought to be transferred not annexed; court unable to determine if it has jurisdiction to transfer the suit; application dismissed)**

1. Before the court for determination is Notice of Motion dated 9<sup>th</sup> March 2017 seeking the following prayers:

1. Spent.

2. THAT pending the hearing and determination inter partes of this application, the respondent be restrained either by himself, his servants or agents from entering, remaining (Sic) or interfering with parcel land (sic) No. Dundori/Miroreni Block 2/958.

3. THAT the honourable court be pleaded to order the lower court file CMCCNo. 231 of 2012 FranciahWanjiru -vs- Elias Mbuguaproceedings (sic) be transferred for hearing and final determination.

4. THAT cost of this application be borne by the respondent.

2. The application is supported by the affidavit of FranciahWanjiru, the applicant. She deposed that she is the registered proprietor of the plot known as Dundori/Miroreni Block 2/958. That some time in the year 2013, she visited the plot and found that the respondent had started erecting a permanent structure thereon. That she subsequently issued a demand letter to the respondent urging him to vacate but the respondent failed to heed the demand. She therefore urges the court to order the respondent to vacate the plot and to demolish the structure that he is putting up on the property.

3. No response was filed to the application. Indeed, when the application came up for hearing on 4<sup>th</sup> May 2017, Mr. Kairu, learned counsel for the respondent informed the court that the respondent was not opposing the application. Counsel termed the application as a simple application for transfer.

4. I have considered the application and the submissions of counsel. I note that whereas prayer 3 seeks transfer of CMCC No. 231 of 2012 FranciahWanjiru -vs- Elias Mbugua, prayer 2 for some unknown reason seeks an injunction.

5. Regarding the prayer for transfer of suit, I note that while the application seeks an order of transfer in respect of CMCC No. 231 of 2012 FranciahWanjiru -vs- Elias Mbugua it is however not stated which court the said suit is to be transferred to. Even if one were to assume that the transfer is to be to this court, the confusion goes further: copies of the main pleadings in the suit such as plaint and defence are not annexed to the supporting affidavit. The court is therefore unable to determine if the issues raised in the said suit are within the jurisdiction of this court. The supporting affidavit does not even mention any intention to transfer any suit. It does not say whether the applicant filed any suit or is a party to any suit in the subordinate court.

6. The situation is compounded further by the fact that the applicant states at ground number 1 of the application that she is the plaintiff in Nakuru Chief Magistrate's Court Civil Suit No. 231 of 2014, a totally different suit from the one that is sought to be transferred. There are some other statements about the status of Nakuru Chief Magistrate's Court Civil Suit No. 231 of 2014 made in the grounds of the application. There is however no supporting evidence to back those statements.

7. Can the prayer for transfer of suit be granted in these circumstances? I do not think so. It is not clear which suit is sought to be transferred. It is also not whether the court has jurisdiction to entertain and determine the suit sought to be transferred. Even if the parties have agreed on the transfer the court still has to determine the matter. This is an especially important consideration since the jurisdiction of the environment and land court is very specific. Before ordering transfer of a matter from the subordinate court to this court, the court has to be sure that it has jurisdiction to entertain the matter. Again, whether or not the court has jurisdiction to transfer a suit depends on whether or not the suit was in the first place filed in a court with jurisdiction. Consequently, even if the parties agree on the transfer, this court still needs to see the plaint and defence filed in the suit to be transferred so as to satisfy itself as to jurisdiction. In **Heinz Isbrecht V Charles OchiengNdiga [1997] eKLR** the court held:

*When making or refusing an order of transfer the court will have regard to the nature and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case.*

8. Jurisdiction is a question of law and cannot be conferred by consent. There are numerous decisions on this. In **Equity Bank Limited v BruceMutieMutuku t/a Diani Tour & Travel [2016] eKLR** the Court of Appeal stated as follows:

*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 **Section 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 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 situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.*

9. Earlier on in **The Owners Of The Motor Vessel "Lilian S" V. Clatex Oil (Kenya) Ltd [1989] KLR 1** the Court of Appeal underscored the gravity of the issue of jurisdiction when Nyarangi JA stated:

*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 down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ...*

10. I have said enough to show that in the circumstances of this application, sufficient material has not been placed before the court to enable the court grant the prayer for transfer. The court cannot act in the dark. It would be futile to allow transfer without first establishing if there is jurisdiction to do so. Worse still, the court cannot tell which suit is sought to be transferred. The application for transfer is thus declined.

11. There was also a prayer for injunction pending hearing and determination of the application. Parties did not address the court on this prayer. The proceedings herein were commenced as a miscellaneous cause. There is therefore no suit and in any case, the injunction was sought only pending hearing and determination of the application. The application has now been determined and there no injunction sought beyond the determination of the application. Simply put, the prayer is overtaken by events.

12. In the end, the application dated 9<sup>th</sup> March 2017 is dismissed. I make no order as to costs since the respondent did not oppose the application.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of June 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the applicant

No appearance for the respondent

Court Assistant: Gichaba