



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. NYR 160 OF 2019**

**BETWEEN**

**SAMUEL MACHARIA KIMANI.....1ST APPLICANT**

**JUDY NJERI THUO.....2ND APPLICANT**

**JOHN NG'ANG'A GATHII.....3RD APPLICANT**

**AND**

**KIANJOYA ENTERPRISES.....1ST RESPONDENT**

**CHIEF LAND REGISTRAR.....2ND RESPONDENT**

***(Application for stay of execution and proceedings pending the hearings and determination of an intended appeal against the ruling and order of the Environment and Land Court of Kenya at Nakuru (Sila, J.) dated 31st July 2019***

***in***

***ELCC No. 59 of 2019)***

**\*\*\*\*\***

**RULING OF THE COURT**

On 19th June 2019 ***the respondent, Kianjoya Enterprises*** filed a suit, ***ELC No. 59 of 2019***, in the ***Environment and Land Court (ELC)*** in Nakuru claiming ownership of the properties known as ***LR. Nos. 4630/7, 4630/8, 4630/9 and 8851/2 (the suit properties)***, which it averred had been fraudulently transferred and registered in the names of the applicants. The respondent accordingly prayed for a declaration that it was the lawful owner of the suit properties and for cancellation of the applicants' titles.

Subsequently the respondent applied in the ELC for an order of stay of proceeding of two suits pending before the ***Chief Magistrates Court at Nakuru***, namely ***CMC ELC Nos. 17 and 18 of 2019***, and their transfer to the ELC and consolidation with ELC No 59 of 2019 for hearing and determination. The applicants' resisted that application contending that the ELC did not have jurisdiction to transfer the two suits in the CMC court, if the latter court did not have jurisdiction to entertain them. For that contention they relied on the decision of this Court in ***Phoenix EA v. SM Thige t/a Newspaper Services [2019] eKLR***.

In determining the application the learned judge took in to account that the ***1st applicant, Samuel Macharia Kimani***, who was a defendant in the ELC suit was the plaintiff in ***CMC No. 17 of 2009*** where he had sued the Land Registrar, Naivasha, claiming part of the suit property. Similarly, the ***3rd applicant, John Ng'ang'a Gathii***, another defendant in the ELC suit, was the plaintiff in ***CMC No. 18 of 2009*** in which he was also claiming parts of the suit property. The learned judge found that all the three suits were largely between the same parties, involved the same suit property, and raised similar issue, which ought to be heard and determined together to avoid conflicting decisions. Accordingly he allowed the application.

That is the ruling that the applicants seek to stay, together with further proceedings in the ELC, pending the hearing and determination of their intended appeal. They submit that the ELC did not have jurisdiction to transfer and consolidate the suits in question. They urge that a

suit filed in a court without jurisdiction is void *ab initio* and is incapable of transfer or consolidation. In support of the proposition they relied on the decisions in **Equity Bank Ltd v. Bruce Mutie Mutuku t/a Diani Tour and Travel [2016] eKLR** and **Boniface Waweru Mbiyu v. Mary Njeri & Another [2002] eKLR**.

The respondent opposed the application submitting that the intended appeal is not arguable because the ELC did not make a finding that the CMC court did not have jurisdiction in the two suits before it. They added that the ELC had power under the **Constitution** and the **Environment and Land Court Act** to do justice and to stop abuse of the process of the court, which it deployed in this case. In addition, it was submitted that the ELC had power under **section 18** of the **Civil Procedure Act** to transfer to itself for hearing and determination the two suits then pending before the CMC court because no court had made any finding that the CMC court did not have jurisdiction in the suits.

We have anxiously considered the application. The applicants are obliged to satisfy the Court that their intended appeal is arguable and that it will be rendered nugatory if we do not grant the orders of stay of execution and proceedings. (See **J. K. Industries Ltd. v. Kenya Commercial Bank Ltd [1982 – 88] KAR 1088**). The main contention that the applicants intend to present at the hearing of their appeal is that the learned judge had no jurisdiction to transfer the two suits in the CMC court because they were filed in a court without jurisdiction. However the record does not bear that contention out. Neither the ELC nor the CMC made any finding that the CMC court did not have jurisdiction in the two suits before it. Even the learned judge expressed himself clearly on this issue, as follows:

*“I am opting to transfer the files to this court, not because the Magistrate’s Court has no jurisdiction, and in fact I have not made any decision on whether the magistrate’s court had jurisdiction in the first place or not, but because I feel strongly that it is necessary to have the files heard together to avoid conflict of decisions and for the proper administration of justice.”*

While the authorities cited by the applicants represent good law as regards transfer of cases from a court without jurisdiction, they have no application in the present matter. By dint of **section 19(2)** of the **Environment and Land Court Act** which allows the ELC to apply the **Civil Procedure Act**, it is evident that the ELC has power under **section 18** of the **Civil Procedure Act** to transfer and try a suit pending in a subordinate court.

In the circumstances of this application we find that the applicants have failed to demonstrate that the intended appeal is arguable. They were obliged to satisfy both considerations under **rule 5(2) (b)** and having failed to establish one of the considerations, this application must fail. (See **Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31**). The application is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**K. M’INOTI**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**