



REPUBLIC OF KENYA



**Kaunda v Wambua (Environment & Land Case 196 of 2014)
[2025] KEELC 802 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 196 OF 2014
NA MATHEKA, J
FEBRUARY 25, 2025**

BETWEEN

TABITHA NGINA KAUNDA APPLICANT

AND

FRANCISCO KAUNDA WAMBUA RESPONDENT

RULING

1. The respondent herein, Francisco Kaunda Wambua, has raised a preliminary objection dated 23rd April, 2024 and applied to have the action struck out with costs on the ground that by dint of Article 162(2) (b) of *the Constitution* of Kenya, 2010 this court does not have the jurisdiction to hear and determine this suit.
2. The applicant submitted that the Court record would show that after the matter was instituted it was placed before Justice Charles Muriithi who was a High Court Judge then who severally attended to it and even gave orders/directions such as the order dated 03/12/2014. That after sometime that the matter was placed before ELC Court which then handled the matter to conclusion at the height of the inception of the specialized courts when it was not fully settled which courts would handle which matters. That matrimonial property cases are supposed to be handled by the High Court hence the Court is divested of jurisdiction. They relied on the case of John Mwangi Karanja -vs- Alfred Ndiangu (2011) eKLR, Hatari Waweru J ruled that:

“With the enactment of sections 1A and 1B of the *Civil Procedure Act*, the time has perhaps now come for this matter of transfer of suits to be looked at afresh....It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction. If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the



overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)). The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.”

3. And also the Court of Appeal in *Daniel N. Mugendi v. Kenyatta University & 3 others* (2013) eKLR in dealing with a similar case ruled as follows;

“And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”

4. That guided by the above case law whilst invoking the court’s inherent and wide discretionary powers were urge the Honourable Court to do justice to the parties and forward the case to the High Court for hearing and determination.
5. The respondent submits that this Honourable Court does not have jurisdiction to transfer any case brought before it to any other court. Section 17 and 18 of the *Civil Procedure Act* confer on the High Court of Kenya limited jurisdiction to transfer a case instituted in a subordinate court where more than one subordinate court has jurisdiction to try the case from one such subordinate court to the order or from the High Court to a subordinate court or vice versa. Since the applicant’s counsel has conceded that this Honourable Court has no jurisdiction to hear and determine this action this court cannot do anything other than to down its tools.
6. In the famous case of *Owners of Motor Vessel “Lilians” v. Caltex Oil (Kenya) Limited* (1989) KLR cited by Mr. Justice E.K. Makori in the Malindi Environment and Land Case No. E007 of 2023 between Pius Kamau Kinuthia and David Mureithi Kanyi & another (A copy attached) Nyarangi JA said;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. Thus this Honourable Court, cannot, whether suo moto or on application by the applicant, transfer this suit to any other court. When a court of law has no jurisdiction to act in the suit or matter its duty is to down its tools by striking out the action with costs to the defendant or respondent as the case may be. That this court should strike out the Originating Summons filed on 2nd December, 2014 as being filed in a court with no jurisdiction to hear and determine it with costs to the respondent.
8. I have considered the preliminary objection which seeks to have this suit truck off as this court does not have jurisdiction. The leading decision on Preliminary Objections is the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

9. It is not in dispute that this court has no jurisdiction to entertain matrimonial disputes. The issue to be determined is whether or not the court has powers to transfer this matter back to the High Court. The applicant submitted that the Court record would show that after the matter was instituted it was placed before Justice Charles Muriithi who was a High Court Judge then who severally attended to it and even gave orders/directions such as the order dated 03/12/2014. That after sometime that the matter was placed before ELC Court which then handled the matter to conclusion at the height of the inception of the specialized courts when it was not fully settled which courts would handle which matters.
10. The power bestowed upon the High Court to transfer suits of a Civil nature is provided for in Section 18 of the [Civil Procedure Act](#) that stipulate thus:
 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”.
11. Section 1A (1) of the [Civil Procedure Act](#) provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 1B (1) of the said Act provides as follows:-

“For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

 - a. the just determination of the proceedings;
 - b. the efficient disposal of the business of the Court;
 - c. the efficient use of the available judicial and administrative resources;



- d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- e. the use of suitable technology.”
12. The issue before me is whether or not the court has jurisdiction to transfer the suit from one High Court to another High Court. In my view and finding, this Court has inherent residual jurisdiction to put right that which would otherwise be or amount to injustice within the meaning or power donated by Section 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya.
13. In the matter of the Estate of George M’Mboroki, Meru HCSC No. 357 of 2004 the court stated that;
- “ ... the court retain certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties”.
14. I find that the court should act in a manner or with the view of accomplishing a fair and proper administration of the law which would also mean or be in the interest of justice. From the court record it would appear that the court suo moto transferred the matter to the Environment and Land Court despite it having originally been filed in the High Court. In the case of Rev. Madara Evans Okanga *vs Housing Finance Company of Kenya, HCCC No. 262 of 2005* the court held that;
- “ the jurisdiction of the Court which is comprised within the term “inherent”, is that which enables it to fulfill itself properly and effectively, as a court of law... in sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and secure a fair trial between them.”
15. The court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the court to act to prevent abuse of court process by a party so that fairness is maintained between the parties. The relevant question that arises is whether such inherent or residual power of this court can authorize the court to transfer this case to the High Court which has jurisdiction?
16. In the case of Prof Daniel Mugendi vs Kenyatta University & Others, Civil Appeals No. 6 of 2012 the Court of Appeals stated that;
- “ In order to do justice in the event where the High Court, the Industrial Court or the Environmental Land Court Division comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves....”



17. Indeed, this inherent power has often been exercised by the High Court which transferred cases from one High Court to another High Court. In *Rapid Kate Services Ltd vs Freight Forwarders Kenya Limited & 2 others* (2005) IKLR 292 Emukule, J stated that;

“..... the court’s power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff had initially chosen, should be dealt with or heard or determined by the court most appropriate and suitable for those proceedings. When making or refusing an order for transfer the court will have regard to the nature and character of the proceedings and, the nature of the relief or remedy sought, the interest of the litigants and most important, the administration of justice.... It is a matter of discretion for the judge and it must be for compelling reasons which would be for the purpose of ensuring justice and this is all within the inherent powers of court under Section 3A.... whereas there is no express provision in the Civil Procedure... for the transfer of cases from one High Court to another, it does not mean that in a proper case the court cannot transfer a case before it to another registry of the High Court”

18. In conclusion the High Court and Courts of equal status have inherent jurisdiction, is means that, this court, exercising such jurisdiction can transfer the matter. I find this preliminary objection is not merited and I dismiss it with no order as to costs. Consequently, I order that this matter be transferred to the High Court Machakos for hearing and determination.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE

