



**Chemengu v Chepkukui & 6 others (Miscellaneous Application
E005 of 2023) [2024] KEELC 3268 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E005 OF 2023
EC CHERONO, J
APRIL 11, 2024**

BETWEEN

BEATRICE NAMACHI CHEMENGU APPLICANT

AND

BERNARD NAIBEI CHEPKUKUI 1ST RESPONDENT

JUMA KAPTUNO 2ND RESPONDENT

ELIUD MONZO 3RD RESPONDENT

WYCLIFFE MATEYA 4TH RESPONDENT

SASURI CO-OPERATE SOCIETY 5TH RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 6TH RESPONDENT

COUNTY SERVEYOR BUNGOMA 7TH RESPONDENT

RULING

1. By Notice of Motion dated 9th November, 2023 the Applicant sought for the following orders: -
 - a. That the honourable court be pleased to grant orders for transfer of Sirisia ELC NO.2 of 2022 to Bungoma High Court Environment and Land for hearing and determination.
 - b. Costs be in the cause
 - c. Other orders the court may deem just to grant.
2. The application is based on the grounds thereof and the Supporting Affidavit sworn on 9th November, 2023 by the applicant herein. It is deposed that the applicant filed an application for injunction against the 1st, 2nd and 4th respondents dated 6th of June, 2023 and the court made a determination that the application be dismissed with costs to the 1st to 5th respondents. Being aggrieved by the decision the



applicant states that she filed an appeal being ELCA No. 12 of 2003 in which she asserts she was not granted audience and as such she has lost confidence in the court.

3. To the application the applicant has attached a copy of a plaint for Sirisia SRM Court being ELC Case No. 2 of 2022 where she asserts that defendants have constructed on an access road- which curves out portions of her land illegally and unlawfully. She therefore prays for judgment against the respondents in her plaint for a permanent injunction and costs.
4. Section 18 of the *Civil Procedure Act* donates power to this Court to transfer suits. It states 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.

5. In the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995, the Court had the following to say on the circumstances under which the order to transfer suits may be granted-

“Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be



taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused....."

5. From the foregoing, the power to transfer a suit is discretionary. The burden of providing sufficient reasons of the transfer rests with the Applicant. It is the applicant's averments that she filed an application seeking injunctive orders in the Senior Resident Magistrates Court in Sirisia which application was dismissed with costs to the defendants and being aggrieved by the said decision, she appealed against the same. The applicant further states that when the matter came up for hearing of the main suit, she was not granted audience by the trial court. It was her argument that she has lost confidence in the said court for biasness and thus she wishes to have this matter transferred to this court for further determination. It should however be noted that the power to transfer a suit as envisaged in Section 18(1)(a) is from one court to another court of concurrent jurisdiction and not to the High Court as requested by the applicant due to the strict rules on jurisdiction.
6. In what circumstances therefore should the high court transfer case docket from one subordinate court to another is crystal clear from the provisions of Section 18 of the *Civil Procedure Act*. This is in addition to the principles as illuminated in the above precedent. As a matter of emphasis, the convenience of parties and witnesses is often considered as some of the critical factors. This being a matter filed in Sirisia Magistrate Court, it follows that the respondents/defendants are residents of that area and it is likely that financial difficulties will be visited upon them in the event the matter is transferred to this court which is 25 Kilometres away.
7. Further, the court in exercising its discretion has to balance the competing rights of the parties in a manner that such a transfer is essential to serve the interest of justice. The applicant hinges her application on the allegation that the trial court is biased. This determinant is particularly not sufficient to oust the Senior Resident Magistrate's Court of jurisdiction to adjudicate over the claim. In this respect our legal system substantially places emphasis on pecuniary jurisdiction of a magistrate's court and other responsive factors as stipulated Under Section 18 of the *Civil Procedure Act*.
8. This court takes judicial notice that this particular court station has two judicial officers and in the event the applicant feels that one court is biased, she can always apply to have the particular court recuse itself and the matter handled by the other court as long as it has jurisdiction. Indeed, there are serious anomalies in the approach taken by the applicant on the application to seek leave of the court to transfer the suit to this Court. Unfortunately, this forum is not appropriate to say the least in terms of the pecuniary jurisdiction and its caseloads.
9. Further, the applicant has not demonstrated and/or proved her allegation of judicial biasness which requires to be strictly proven. It is trite that judicial officers perform their mandate impartially and independently and allegations of biasness need to be strictly proven. It would be a dangerous precedent to allow an application such as the one before the court since any litigant who receives unfavourable outcome in a case can allege biasness. The applicant is expected to prove to the required standard that indeed the court is biased. It is not enough to perceive or infer biasness



10. 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:”

11. For this court to allow the transfer of the applicants claim to Bungoma, It would be acting contrary to the intended purpose of the overriding objective and therefore lead to wastage of time and resources.

12. In the end, I find that the applicants application dated 9th November,2023 lacks merit and the same is hereby dismissed. Costs shall be in the cause.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF APRIL, 2024.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

- 1. Applicant-present
- 2. Respondent-absent
- 3. Bett C/A

