Sing'oei v Kerich (Sued as the Legal Representative and Administrator of the Estate of Kipkosgei Bwalei Kerich) (Environment & Land Case E001 of 2024) [2024] KEELC 4148 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4148 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAPSABET

ENVIRONMENT & LAND CASE E001 OF 2024

MN MWANYALE, J

MAY 16, 2024

BETWEEN

STEPHEN KIMUTAI SING'OEI ..... PLAINTIFF

AND

JOHN KIPROTICH KERICH (SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF KIPKOSGEI BWALEI KERICH) ..... DEFENDANT

RULING

1. The application for determination seeks transfer of Kapsabet CM Court ELC No. E021 of 2023 from the lower Court to this Court for hearing and determination.

2. When the matter came up *Exparte* on 27/2/2024 no interim reliefs were issued but the Court directed service of the application for interparty hearing on 18/3/2024.

3. On 18/3/2024, the Respondent's Advocate Mr. Songok sought for 2 days to file a Response, while the Applicant's Advocate Mr. Omusundi sought leave to file a further affidavit if need be within 3 days of service of the response.

4. The Court directed for filing of response within 2 days and granted leave to the Applicant to file a further affidavit, and parties were to file written submissions on the application.

5. The Respondent did file the replying affidavit deponing interalia, that the suit was filed before the Chief Magistrates Court at Kapsabet and assigned MC ELC NO. E021/2023 as per the receipt which he annexed to the said affidavit.

6. The Respondents deposed further that subsequent to filing of his defence, he filed an application to strike out the suit on the grounds interalia that the matter had been filed in a Court without pecuniary jurisdiction and that the suit offends Section 4 of the *Limitation of Actions Act*.

7. The Respondent deposed further that the application is incompetent and ought to be dismissed as it is an attempt to transfer a suit which is incompetent and a nullity; as the suit was filed before the Magistrates Court from May, 2023. And the application seeks to defeat the issues raised in the defence.

8. Although leave had been granted to the Applicant to file a further affidavit, if need be, the Applicant's Advocates did not file the further affidavit neither did he file determination.

9. The Respondent Advocates in their submissions has framed and submitted on two issues for submissions.

10. The first issue is whether the suit in the Magistrates Court is competent suit. The Respondent submits that the Applicant ought to have protested the issue of the suit having been filed before the Magistrates Court and since the suit before the Magistrate's Court is incompetent no transfer can be effected.

11. Before framing the issue for determination, the Court observes that the Applicant did not annex the plaint that he had filed erroneously before the Chief Magistrate's Court. The Respondent has annexed the memorandum of appearance, as well as the copy of statement of defence and an application dated 21st September 2023.

12. In the said annexture, it is clear the title of the suit is "in the Environment and Land Court at Kapsabet."

13. The Court also takes Judicial Notice that the e-filing at Kapsabet Court station was rolled out on 11/3/2024 and hitherto the Court operated on the email filing system where Advocates and/or litigants would email the pleadings to the Court for assessment and upon payment of requisite fees the suit would be filed.

14. Having perused the application the rival affidavits, annextures thereto and submissions the Court frames the following sole issues for determination.

i. Whether the application is merited.

15. It is the gravamen of the Applicants case that owing to an error at the registry the suit was filed before the Chief Magistrates Court as opposed to the Environment and Land Court, and that he had sent the email to "kapsabetelchighcourt@gmail.court" the email print out bearing the email address sent from the Applicants Advocates was annexed as annexture SKS1.

16. As noted in the proceeding paragraphs the Applicant did not exhibit the plaint, but from the Respondents exhibits the title of the case is "the Environmental and Land Court", and coupled with the fact that the email was sent to the kapsabetelchighcoutt@gmail.com. It must be deemed that the Applicant intended to file the suit before this Court and not before the Chief Magistrates Court and registration of the matter and filing the same before the Chief Magistrate's Court must have been made inadvertently.

17. Whose mistake was this? The mistake was occasioned by the Court officials as the Advocates from the pleadings and email address intended the suit to be filed before this Court and not the chief Magistrates Court.

18. In Richard Ncharpi Leiyagu, the Court did cite the decision of Belinda Marai & others vs Amoi Wainaina 1978 where Madan J. A described a mistake in the following terms "A mistake is a mistake, it is no less a mistake because it is un fortunate slip. It is no less pardonable because it is committed

by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily… a blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate it."

19. The Court finds that the intention of the Applicant as evidenced by the email and the title on the pleadings was to file the suit before this Court but the same was inadvertently filed before the Chief Magistrate's Court.

20. Having found that the suit was erroneously filed before the Chief Magistrates Court while the Plaintiff intended the same to be filed before this Court, I find the application to be merited.

21. The Respondent has submitted on the issue that a suit cannot be transferred when initially filed in a Court without jurisdiction. Various dicta in the Superior Courts have emerged on this issue. However, the Supreme Court in its decision in the case of *Albert Chaurembo Mumba & 7 others vs Maurice Munyao & 148 others*, the Supreme Court transferred a suit to the CEO of the RBA after finding that the High Court and the Employment and Labour Court did not both have jurisdictions.

22. Taking the que from the Supreme Court Decision, and having noted that the mistake was an excusable mistake by a Court official which should not be visited on the litigant just like mistakes of Advocates cannot be visited on the litigants.

23. The issue raised in the defence by the Respondent including the issue of limitation of time can still be addressed in this Court if the Chief Magistrates has not pronounced itself on the application dated 21st September 2023 which sought for the striking out of the suit.

24. In the premises, if the suit is still alive, in the Chief Magistrates Court in view of the application to strike out dated 21/9/2023 whose outcome this Court has not been appraised of, then the said suit is transferred to this Court for hearing and determination.

25. Orders accordingly.

RULING, DELIVERED AND DATED AT KAPSABET THIS 16TH DAY OF MAY, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Akinyi holding brief for Mr. Omusundi for the Applicant.

Mr. Kigen holding brief for Mr. Songok for the Respondent