



Kellingaus v Aglae (Environment and Land Miscellaneous Application E015 of 2024) [2024] KEELC 4097 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E015 OF 2024**

**LN MBUGUA, J
MAY 15, 2024**

BETWEEN

WINNIE WANGARI SCHULTE KELLINGAUS APPLICANT

AND

SHEMINA JASPAL AGLAE RESPONDENT

JUDGMENT

1. The Applicant's Originating Notice of Motion dated 2.2.2024 is for determination. She seeks orders that this court withdraws Milimani Chief Magistrate's court Suit No.6724 of 2017: Shemina Jaspal Algae v Gregor Schulte Kellinghaus aka Schulte Kellinghaus Gregor Wilhem & anor as consolidated with Milimani Chief Magistrates court, Civil Suit No. 3568 of 2017: Winnie Wangari Schulte Kellinghaus v Gregor Schulte Kellinghaus & 2 others and try it itself as well as orders that costs be provided for.
2. The application is premised on grounds on its face and on the supporting affidavit of Gibson Kamau Kuria, advocate in conduct of the mater for the Plaintiff.
3. He avers that the suit from which this application emanates from being Suit No. 6724 of 2017: was filed by the Respondent on 15.9.2017 while the Applicant filed suit No. 3568 of 2017 on 19.5.2017 and the 2 suits were consolidated by the Chief Magistrate's court for purposes of hearing and determination and they were certified ready for hearing on 7.12.2022.
4. That on 19.7.2023, the Chief Magistrates' court allowed the Applicant's prayer for valuation of the suit property and ordered that a joint valuation report be filed within 45 days.
5. Subsequently, the Applicant commissioned a valuer to undertake valuation and as per the report dated 21.8.2023, the value of the suit property is ksh.21 million which exceeds the Chief Magistrate's court pecuniary jurisdiction to hear and determine the dispute before it.



6. He avers that under Section 18 of the *Civil Procedure Act*, this court has power to withdraw a matter pending before the Chief Magistrate’s court and try it itself.
7. The application is opposed by the Respondent vide grounds of opposition dated 7.3.2024. It is contended that that the Applicant was aware of the 2 suits filed in the Chief magistrate’s court where she was represented and that suit 6724 of 2017, Shemina Jaspal Aglae v Gregor Wilhelm & another was pending judgment but it is now held in abeyance following the Applicant’s application filed in 2019 claiming that she had filed an application for consolidation of the said suit with Nairobi MCCC Suit No. 3568 of 2017.
8. The application was canvassed by way of submissions, of which the Applicant filed submissions dated 15.8. 2024. It is contended that the Respondent has misapplied pleadings and facts before this court in his grounds of opposition dated 7.3.2024, and that the fact that he failed to counter accusations by way of affidavit/a counter valuation report should indicate that the Applicant’s prayer is unopposed. The case of *Kariuki Gathitu v Attorney General* [2013] eKLR is cited.
9. The Applicant also relies on Article 165 (6) and (7) of the *Constitution*, Section 18 of the *Civil Procedure Act* and Section 7 of the *Magistrate’s Court Act* to submit that the chief Magistrate’s court ought to down its tools for want of jurisdiction.
10. The Respondent did not file submissions.
11. The Applicant seeks to transfer Civil Suit No. 6724 of 2017 and Civil Suit 3568 of 2017 from the Magistrate’s court for want of jurisdiction on the basis that the subject property is valued at ksh. ksh.21 million, which exceeds the pecuniary jurisdiction of Magistrates’ court. Section 7 of the Magistrates’ court Act caps the pecuniary jurisdiction of a chief magistrate at ksh.20 million.
12. Should this court allow the instant application on the basis that the Magistrates court lacks jurisdiction to hear the matter. In the case of *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited* [1989] KLR 1, it was stated that:

“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.....

A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.....”

13. Similarly in the case of *Dina Management v County Government of Mombasa and 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) Judgment, the Supreme Court of Kenya stated that:

“A court is bound to always satisfy itself whether or not it has jurisdiction to hear and determine a matter before it.”

14. This court is not the one seized of the matter. The applicant has not pointed out to this court the point at which she raised the issue of jurisdiction before the trial court. She simply states that the trial court allowed the application for the valuation to be done. There is nothing to indicate that the issue



of jurisdiction was properly made a subject of contest before the trial court culminating in a decision where the trial court downed its tools.

15. In the case of *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2015], the Supreme Court had this to say regarding an issue which had not been subjected through the judicial hierarchy;

“It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with “matters of general public importance”, have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the Peter Oduor Ngoge case. Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance which would be contrary to established principle, and to the design of the judicial system”.

16. Similarly, this court would be dealing with the matter as a court of first instance if it was to entertain the question of jurisdiction.
17. It is not lost to this court that the applicant has admitted to having filed one of the suits before the magistrates court. I pose the question; Didn't he know that the court had no jurisdiction? What more, the matters before the trial court are apparently at the stage of delivery of judgment!, a tell tale sign that the applicant has approached this court with unclean hands.
18. In the end, I find that this court has no basis to exercise its powers of transfer of a suit as set out under Section 18 of the *Civil Procedure Act*. In the circumstances, this suit is found to have no merits, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Munyori for Applicant

M/s Oonga for Respondent

Court assistant: Eddel

