



Gathaite Farmers Co-operative Society Ltd & another v Chege (Environment and Land Miscellaneous Application 13 of 2022) [2023] KEELC 130 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 13 OF 2022
LN GACHERU, J
JANUARY 19, 2023**

BETWEEN

GATHAITE FARMERS CO-OPERATIVE SOCIETY LTD 1ST APPLICANT

NICHOLAS KIGO NDUNGU 2ND APPLICANT

AND

ARCADIUS NJORA CHEGE RESPONDENT

RULING

1. The applicants herein brought this Notice of Motion application dated July 10 2022, and sought for the following orders: -
 1. That this honourable court be pleased to issue and order for the transfer of Murang'a C M E L.C E028 OF 2021, to this Court for hearing and disposal.
 2. That the costs of this application be provided for.
2. The said application is premised on the grounds that;
 1. Murang'a E L C E028 OF 2021 was to be instituted in this court, but was erroneously filed in the Murang'a Chief Magistrates Court as Murang'a C M E L C E028 of 2021.
 2. That the value of the subject properties in question does exceed the pecuniary jurisdiction on the chief magistrates court.
 3. This application is made in good faith and the orders sought are administrative in nature.
3. Further, it is supported by the affidavits of Nicholas Kigo ndung'u and Joel Kiruku Nganga, who are the chairman and cice chairman of the 1st applicant Gathaite Farmers Cooperative Society Limited and thus competent to swear the same.



4. They averred that they filed at Murang'a Chief Magistrate's Court Murang'a CMELC E028 OF 2021, which was marked NJ 1. That their intention was that the said suit be filed and be heard at Murang'a ELC, instead of the chief magistrate's court.
5. Further that there are several rulings and judgements issued by this court pertaining to the properties held by the 1st applicant, and there is a possibility that a judgement resulting from this suit might upset those rulings and judgements, and hence the need for the suit to be heard by a court of equivalent jurisdiction.
6. They also deponed that the value of the subject properties does exceed the pecuniary jurisdiction of the chief magistrates court and thus this application seeking transfer of Murang'a CMELC E028 of 2021 to this court. It was their contention that the instant application is made in good faith and as per the directions of the court.
7. The said application is contested by the respondent Arcadius Njora Chege, who swore his Replying Affidavit on July 26, 2022, and averred that the said application and the provisions of the law pursuant to which the application is made does not apply and therefore, the application is fatally defective, incompetent and misconceived and should not lie. Further that there is no material that has been placed before this court, to warrant the transfer of the Chief Magistrate's Case ELC E028 of 2021 to this court.
8. That the said matter had been proceeding at the lower court from May 4, 2021, after it was filed by the applicants and they have never raised any indication of the transfer from the said court.
9. Further that the claim in the chief magistrate's case is not a claim for land that can be adjudicated upon by this court. He contended that if the instant prayers are allowed, then this court will be called upon to deal with a matter outside its mandate. It was also contended that the applicants have not shown the nature of the properties that exceeds the jurisdiction of the lower court and the extent of their pecuniary value as no valuation report has been exhibited. Again, that it is not legally tenable to transfer a matter from a court without jurisdiction. He further averred that the applicants were at liberty to withdraw the matter and file another, if they felt that the lower court was not clothed with the requisite jurisdiction. He urged the court to dismiss the instant application as it lacked merit and was a candidate for dismissal.
10. On September 21, 2022, the court directed the applicants to file a Further Affidavit, if there was need for that, and written submissions in support of the application. The respondent was to file his written submissions after service and the matter was to be mentioned before the deputy registrar on October 27, 2022.
11. However, on October 27, 2022, the applicants had not complied with the above directions and matter was again set for mention on November 15, 2022. On November 15, 2022, only the respondent had complied and the matter was fixed for mention on December 20, 2022. Again, on the stated date, all the parties were absent and matter was set down for ruling.
12. As the court writes this ruling, only the respondent's submissions are available for consideration.
13. The court has carefully considered the instant application and the affidavits in support and against the same. The court too has considered the written submissions by the respondent and the relevant provisions of law and funds as follows;
14. It was the applicants' contention that they erroneously filed the instant application at the lower court, whereas it was their intention to file the same in the ELC court. Further, that the value of the subject matter exceeds the pecuniary jurisdiction of the lower court.



15. The respondent has averred and submitted that the application is fatally defective as it was filed under the wrong provisions of law, that this is not a land matter and if the same was filed in a court without jurisdiction, then it cannot be transferred, but the remedy is to withdraw the same. The respondent relied on the case of *Gaikia Kimani Kiarie Vs Peter Kimani Kiramba*(2020)eKLR, where the court held that;
 - since the Applicant is seeking to transfer the suit based on the fact that the subordinate court has no jurisdiction, then the court finds that the application is not merited....
16. The suit is to be transferred from a court with no jurisdiction , then it means it is not only an incompetent suit, but also a nullity in law and thus there is nothing to transfer.....”
17. The court will first deal with the issue of whether the application is fatally defective for being brought under the wrong section of law.
18. Indeed, a look at the body of this application shows that the Notice of Motion is brought under order 50 rule 1 of the *Civil Procedure Rules* which states;
 - “Where by these rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word “month” occurs in any document which is part of any legal procedure under these rules, such time shall be computed by calendar months unless otherwise expressed.”
19. The above order deals with time.
20. The intention of the applicants herein are to have a suit that had been filed at the subordinate court transferred to this court. The above application therefore ought to have been brought under section 18 of the *Civil Procedure Act*. It is therefore evident that the application herein is brought under the wrong provision of the law. Section 18 of the *Civil Procedure Act* deals with transfer of suits.
21. Does the above commission or omission therefore renders this application fatally defective?.
22. Section 1A of the *Civil Procedure Act* provides that;
23. The overriding objective of this Act and rules made hereunder is to facilitate the just,expeditious,proportionateand affordable resolution of Civil disputes governed by the Act”.
24. The above section binds the court to facilitate, a just and proportionate resolution of civil disputes before it. Failure to quote the proper provisions of the law is technically wrong, but so long as the intention of the party can be clearly discerned from the prayers sought, then the just determination of such an application would entails the Court not to render the said application fatally defective.
25. The above scenario finds remedy in order 51 rule 10 of the *Civil Procedure Rules* which provides;
 - “Provision under which application is made to be stated.
 - 10 Every order, rule or other statutory provision under or by virtue of which any
 - (1) application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
 - 10 No application shall be defeated on a technicality or for want of form that does
 - (2) not affect the substance of the application”.



26. It is evident from the above provision of law that no application shall be refused and/or dismissed merely by reason of failure to comply with this rule. Further the order 50 rule 10(2) provides that no application shall be defeated on a technicality for want of form which does not affect the substance of the application.
27. Indeed, quoting the wrong provision of the law is a technicality, which does not affect the substance of the application. Again article 159 (2) (d) of the Constitution behoves the court to administer justice without undue regard to procedural technicalities.
28. Though the court concur with the respondent that the application herein is brought under the wrong provision of law, the said omission and/or commission does not affect the substance of the application. Therefore, this court declines to uphold that procedural technicality or form, but will consider the substance of the application.
29. The above technicality issue having been settled, the court has also considered the reasons given for transfer of subordinate court file to this court. The applicants have averred that the chief magistrate's court Lacks pecuniary jurisdiction to deal with the matter.
30. Section 18 of the Civil Procedure Act, grants the High Court or ELC for this matter, discretion to transfer any suit from the subordinate Court to itself for trial. The said section 18 provides 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 desired 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.
31. From the above provision of law, it is clear that a party applying for a transfer has the duty of providing sufficient reasons as to why the said transfer is merited.
32. The matter that is sought to be transferred must have been filed in a court with jurisdiction.
33. The applicants herein have alleged that the suit property in dispute in the subordinate court being Murang'a CMELC E028 OF 2021, exceeds the pecuniary jurisdiction of the said court. However, no valuation report was filed to confirm the value of the alleged suit property.
34. Further this court has considered the claim in the Plaint filed in Murang'a CMELC E028 of 2021, and finds that the principal prayers are for declarations on the election of the chairman and other elected officials of the 1st plaintiff. The question of occupation, use and title to land is a secondary issue. The dispute between the parties herein is basically not the one relating to environment, the use and occupation of, and title to land.
35. Therefore, the court finds that the dispute as set out in the Plaint dated April 29, 2021, filed at Murang'a CMELC E028/2021, does not fall under the ambit of this court.



36. The jurisdiction of the Environment and Land Court is provided for section 13 of the *Environment and Land Court Act* which provides;

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1] (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*. (4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court. (5) Deleted by Act No 12 of 2012, Sch. (6) Deleted by Act No 12 of 2012, Sch. (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.

37. The Environment and Land Court is created under article 162(2) (b) of the Constitution 2010 which provides;

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and the use and occupation of, and title to, land”

38. Considering the jurisdiction of this court as provided by article 162(2)(b) of the Constitution and section 13 of the *Environment and Land Court Act*, this court finds and holds that it has no jurisdiction to deal with leadership wrangles of societies and thus this court cannot order a transfer of a suit to itself where it has no jurisdiction as jurisdiction is everything. See the case of the *Owner of the Motor Vessel “Lilian(s)” vs Caltex Oil (K) Ltd* (1989) KLR 1” where the court held that; -

Jurisdiction is everything without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending 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.”



39. Having found that the cause of action as stated in Murang'a CMELC E028 of 2021, falls outside the jurisdiction of this court, then this court finds that the instant application is misdirected and lacks merit.
40. For the above reasons, the court concurs with the respondent's submissions that the instant application lacks merit, is an abuse of court process and thus a candidate for dismissal.
41. Consequently, this court proceeds to dismiss wholly the instant Notice of Motion application dated June 10, 2022, as brought by the applicants herein with costs to the respondent herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF JANUARY, 2023.

L GACHERU

JUDGE

19/1/2023

Delivered virtually in the presence of;

Joel Njonjo - Court assistant

N/A for the applicants

N/A for the respondent

L GACHERU

JUDGE

19/1/2023

