



Guru Mechanical Engineers Limited v Kibe & another (Miscellaneous Civil Application 11 of 2019) [2023] KEELC 17756 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEELC 17756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION 11 OF 2019**

**JO MBOYA, J
JANUARY 18, 2023**

BETWEEN
GURU MECHANICAL ENGINEERS LIMITED APPLICANT
AND
JOSEPH WAMBUNGU KIBE 1ST RESPONDENT
PYRAMID AUCTIONEERS 2ND RESPONDENT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 8th February 2019, the Applicant herein has approached the Honorable Court seeking the following Reliefs;
 - i. That the suit filed by the Applicant against the Respondents being Milimani CMCC No 6623 of 2014: Guru Mechanical Engineers Limited v. Joseph Wambugu Kibe and Another, in the Chief Magistrate's Court be transferred therefrom to the High Court at Nairobi for trial and determination.
 - ii. That the costs of this Application be provided for.
2. The instant application is premised and anchored on the various grounds which have been alluded to and contained at the foot thereof. Besides, the instant application is supported by the affidavit by one Javinder Sighn Guru sworn on the 8th February 2019.
3. On the other hand, the application is further supported by a supplementary affidavit sworn on the 1st April 2019 by the same Javinder Sighn Guru. For clarity, the supplementary affidavit has annexed a total of four documents, inter-alia, a Ruling rendered on by Hon Orange K I, Senior Resident Magistrate on the 14th August 2017.



4. Be that as it may, upon being served with the instant application, the Respondent herein filed a Notice of Preliminary objection dated the 15th March 2019, as well as a Replying affidavit sworn on even date by one Joseph D B K Kimani.
5. Other than the foregoing, the Respondents also filed a Further Replying affidavit sworn on the 8th April 2019 and same was sworn by the same Joseph D. B. K. Kimani.
6. Suffice it to point out that the subject matter was filed and lodged before the High court before same was eventually transferred/relocated to the Environment and Land Court pursuant to the orders issued on the 25th July 2022.
7. Nevertheless, prior to and before the eventual transfer of the subject matter to the Environment and Land Court, the advocate for the respective Parties had agreed to canvass and dispose of the instant application by way of written submissions.
8. Furthermore, the advocates for the Parties even proceeded to and indeed filed their respective submissions. For clarity, the Applicant filed written submissions dated the April 2019 whilst the Respondents filed written submissions dated the 2nd May 2019.
9. For completeness of record, it is appropriate to state and underscore that both sets of written submissions form part and parcel of the record of the court and shall thus be taken into account and consideration.

Submissions by the Parties:

a. Applicant's Submissions:

10. The Applicant herein raised and amplified four pertinent issues for consideration and determination by the court. In this regard, it is appropriate to set out in brief the issues which have been amplified and highlighted by counsel for the Applicant.
11. First and foremost, counsel for the Applicant has submitted that the Applicant herein was hitherto a tenant of the 1st Respondent in the premises situated along Kirinyaga Road, within the City of Nairobi. However, on or about the 31st October 2014, the 1st Respondent herein retained and instructed the 2nd Respondent to levy distress for undisclosed amount of rents.
12. Additionally, counsel for the Applicant has contended that in the course of levying distress, the 2nd Respondent herein broke into the Applicant's shop and confiscated assorted machineries and tools of trade, which formed stock of trade in the Applicant's Business.
13. Owing to and arising from the impugned Distress, the Applicant herein proceeded to and indeed filed a suit before the Chief Magistrate's Court namely, Milimani CMCC Case No 6623 of 2014, wherein same sought inter-alia compensation arising out of the impugned Distress together with General damages.
14. Besides, counsel has submitted that subsequently the Applicant filed an application for leave to amend the suit before the Chief Magistrate's Court and in particular, to implead the special Damages, relating to the monetary value of the impugned items that have been seized and confiscated.
15. Be that as it may, counsel stated and contended that the Application for Leave to amend was declined by the Lower court on account that the intended amendment would exceed the jurisdiction of the Chief magistrate's Court.



16. Secondly, counsel for the Applicant has submitted that the current application is intended to transfer the suit which had hitherto been filed and lodged before the Chief Magistrate's Court and to facilitate the hearing and determination of same on merits.
17. For coherence, counsel for the Applicant has pointed out that the reason for the intended transfer is because the tabulation of the loses that was carried out by the Applicant, has established and confirmed that the value of the claim far exceed the monetary Jurisdiction of the Chief Magistrate's Court.
18. Consequently and in the premises, counsel has submitted that the only court that has the requisite Jurisdiction to entertain and adjudicate the Applicants claim, on the basis of the tabulation is therefore the High Court. For clarity, the Application refers to the High Court and not the Environment and Land Court.
19. Thirdly, counsel for the Applicant has submitted that the Honourable court has the requisite jurisdiction to withdraw and transfer the suit that was filed before the Chief Magistrate's Court and to hear and determine same.
20. For clarity, counsel has pointed out that the jurisdiction of the court to transfer a suit from the subordinate court is wide and unfettered. In this regard, counsel has invited the court to take cognizance of the provisions of Section 18 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
21. On the other hand, counsel has also cited and relied on two decisions inter-alia, *Abardare Investments v Bernard Wachira & 5 others* (2014) eKLR and *Joseph Mururi v Godfrey Gikundi Wanjoih* (2012) eKLR, respectively, to vindicate the contention that the court is indeed seized of the requisite jurisdiction to transfer the impugned suit from the Chief Magistrate's Court.
22. Fourthly, learned counsel for the Applicant has contended that the issues pertaining to the bona-fides of the intended amendment and whether the intended amendment will alter the character of the suit before the Chief Magistrate's Court, are issues that can only be dealt with after the transfer of the suit and during the hearing of (sic) the Application for leave to amend.
23. Fifthly, counsel for the Applicant has also contended that the current application cannot also be faulted on the basis of delay, insofar as the attendant delay, if any, was caused by the lower court who took along period prior to and before delivering the ruling which was ultimately delivered on the 18th August 2017.
24. Finally, counsel for the Applicant has added that the issue of lack of jurisdiction, which has been raised and canvassed by the Respondents is ambiguous and devoid of clarity. Notwithstanding the foregoing, counsel has contended that the honourable court is seized and possessed of the requisite jurisdiction to entertain the subject application.
25. In support of the submissions that the court is seized and possessed of the requisite jurisdiction, learned counsel for the Applicant has invited the attention of the court to the decision of the Supreme Court Of Kenya in the case of *Samuel Kamau Macharia & Another v Kenya Commercial bank Ltd & 2 others* (2012) eKLR. For clarity, counsel has reproduced the contents of paragraph 68 thereof.
26. In a nutshell, counsel for the Applicant has implored the court to find and hold that the instant application is meritorious and thus ought to be allowed.

b. Respondents' Submissions:

27. Vide written submissions dated the 2nd May 2019, the Respondent has raised three pertinent issues for due consideration and determination by the Honourable Court.



28. The first issue that has been raised and canvassed by the Respondents touched on and or concerned the fact that the intended amendment is statute barred by dint of the provisions of *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
29. In respect of the foregoing submissions, learned counsel for the Respondents has contended that the impugned activities that are complained are arose in October 2014 and yet the intended amendments are being sought for well beyond the six-year duration/period provided for under the law.
30. To vindicate the submissions that no amendment can be done if the intended cause of action is barred by Limitation of Actions, counsel has cited and relied on the case of *Haron Onyancha v National Police Service Commission & another* (2017) eKLR and *Iga v Makerere University* (1972) EA 65.
31. Secondly, counsel for the Respondents has submitted that his honourable court lacks jurisdiction to entertain the subject matter, insofar as the claim at the foot of the original Plaintiff, which was filed by the Applicant in the lower court has not been heard and disposed off.
32. According to counsel for the Respondents, it behooves the Applicant to proceed and list the suit which is pending before the lower court for hearing and determination on the basis of the original plaintiff.
33. Thirdly, counsel for the Respondents has also contended and submitted that the instant application has been filed and mounted with undue and inordinate delay. In this regard, counsel has added that based on the delay, the current application ought not to be allowed.
34. Finally, counsel for the Respondents has also contended that the intended amendment (clearly not before this court) shall be contrary to and in contravention of Order 2 Rule 6 of the *Civil Procedure Rules* 2010.
35. In the premises, learned counsel for the Respondents has therefore contended that the subject application ought to be dismissed with costs to the Respondents.

Issues for Determination

36. Having reviewed the Notice of Motion Application dated the 8th February 2019 and the supporting affidavits, including the supplementary affidavit sworn on the 1st April 2019 and having similarly taken cognizance of the responses by the Respondents; and finally having considered the written submissions filed by the Parties, the following issues do arise and are this pertinent for determination;
 - i. Whether this Honourable court (the Environment and Land Court) can withdraw and transfer Milimani CMCC Case No 6623 of 2014 to the High Court for hearing and final disposition.
 - ii. Whether this court is seized of the requisite Jurisdiction to withdraw and transfer the impugned suit from the Chief Magistrate's Court on the basis that the Lower Court lacks jurisdiction to entertain and adjudicate upon the suit thereat.



Analysis and Determination

Issue Number 1

Whether this Honourable court (the Environment and Land Court) can withdraw and transfer Milimani CMCC Case No 6623 of 2014 to the High Court for hearing and final disposition.

37. It is common ground that the instant matter/application was lodged and filed before the High court. Consequently, the reliefs sought vide the instant application were directed to the honourable high court and not otherwise.
38. Be that as it may, the advocate for the respective Parties thereafter agreed to have the current suit/application to be transferred to this honourable court (Environment and Land Court) for hearing and determination.
39. Indeed, pursuant to the concurrence of the advocates for the Parties the instant application was duly transferred to the Environment and land court and hence the basis upon which this court became seized of the matter.
40. Nevertheless, upon the transfer of the instant suit/application to this honourable court, it behooved counsel for the Applicant to seek for leave to amend the application and where appropriate to designate the appropriate court before whom the suit was to be transferred to for hearing and eventual determination.
41. Needless to point out that no application for amendment was ever made and indeed the order contained on the face of the application continues to read that the suit from the Chief Magistrate's Court be transferred therefrom to the High Court for hearing and determination.
42. To be able to appreciate the tenor of the relief sought at the foot of the Application, it is appropriate to reproduce same. In this regard and even though the relief had hitherto been reproduced, same is hereby reproduced yet again.
 - i. That the suit filed by the Applicant against the Respondents being Milimani CMCC No 6623 of 2014: *Guru Mechanical Engineers Limited v Joseph Wambugu Kibe and another*, in the Chief Magistrate's Court be transferred therefrom to the High Court at Nairobi for trial and determination.
43. The question that arises for determination are twofold. Firstly, can the Environment and land court withdraw and transfer a suit from the subordinate court and dispatch same to the High Court for hearing and determination, in the manner sought vide the instant application.
44. Suffice it to point out that the Environment and land court, established pursuant to Article 162 (2) (b) of the *Constitution* 2010, is separate and distinct from the High court. Furthermore, the Jurisdiction of both courts is distinct and well delineated. In this regard, neither the high court nor the environment and land court can transfer a suit from a lower court to be heard and determined by the other.
45. To be able to understand the distinction and dichotomy between the two courts, it is appropriate to recall, restate and reiterate the elaborate decision of the Supreme Court in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR, where the Court observed as hereunder.

[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the *Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving



specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words:

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. the *Constitution* though does not define the word ‘status’. The intentions of the framers of the *Constitution* in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

(51) Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the *Constitution*, or legislation (see *In Re the Matter of the Interim Independent Electoral Commission*, at paras. 29 and 30; and *Samuel Kamau Macharia and another v Kenya Commercial Bank and Two Others*, Sup.Ct. Civil Application No 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC. Such legislation is to be interpreted in line with relevant constitutional provisions hence our position in *Gatirau Peter Munya v Dickson Mwenda Kithinji and Two Others*, Sup Ct Civil Application No 5 of 2014; [2014] eKLR, where we examined the constitutional provisions alongside legislative provisions on elections, and held [para. 77] that “the *Elections Act*, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the *Constitution*, and that in interpreting them, a Court of law cannot disengage from the *Constitution*.” In the instant case too, we take guidance from the *Constitution*, as we interpret it alongside the relevant statute law, pertaining to the specialized Courts.

(52) In addition to the above, we note that pursuant to Article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice



versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

46. Nourished and duly guided by the holding of the Supreme court (*supra*), I come to the conclusion that the Environment and Land court cannot (sic) transfer the suit from the subordinate court and thereafter order/direct the High Court to hear and determine the said suit.
47. In my humble view, to do so would be tantamount to superintending, supervising or other directing the High Court in the discharge, execution and performance of her functions/duties.
48. Simply put, such an endeavor, which colors the face of the current application would be inimical to the provisions of the *Constitution* 2010, which clearly demarcates/ delineates the Jurisdictional boundaries of the various Superior courts.
49. The second limb that does arise relates to the import and tenor of Section 18 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, which has been cited and relied upon by the Applicant.
50. Given the importance of the said provisions, it is imperative that same be reproduced. For convenience, the provisions of Section 18 of the *Civil Procedure Act* are reproduced as hereunder;

18. 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

51. My reading of the said provisions of the law drives me to the conclusion that the Superior court, whether it be the Environment and Land court, Employment and Labor Relations Court or the High Court, can only withdraw and transfer a suit pending in the subordinate court for hearing and determination by itself or to such other court subordinate to same.



52. In my humble view, this court cannot therefore purport to withdraw and transfer the suit which is pending before the chief magistrate's court and thereafter transfer same to the High court for hearing and determination, in the manner sought.
53. Clearly, the High court is not subordinate to the Environment and land court and hence the provisions of Section 18 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, do not fathom or envisage a situation like the one espoused vide the current application.
54. Be that as it may, I am alive to the decision in the case of *Joseph Mururi v Godfrey Gikundi Anjuri* (2012) eKLR, (cited and relied upon by the Counsel for the Applicant), where Hon. Justice J A Makau, Judge, found and held that the High court could withdraw and transfer a suit from the subordinate court and thereafter transmit same to the Environment and Land Court for the hearing and disposal.
55. Nevertheless, I must reiterate that my understanding and appreciation of Section 18 of the *Civil procedure Act* denote and underscore that the Superior court in question can only transfer a suit from the subordinate court unto itself or to another court subordinate to same, but not otherwise.
56. In the premises and despite the reliance in the case of Joseph Mururi (supra), I am afraid that I cannot decree a transfer of a suit from the Chief Magistrate's Court and thereafter direct that same be heard by the Honourable High Court.

Issue Number 2

Whether this Court is seized of the requisite Jurisdiction to withdraw and transfer the impugned suit from the Chief Magistrate's Court on the basis that the Lower Court lacks jurisdiction to entertain and adjudicate upon the suit thereat.

57. From the affidavit evidence and in particular the contents of paragraphs 14, 15, 16, 17, 18 and 19 of the supporting affidavit sworn on the 8th February 2019, it is evident and apparent that the reason why the Applicant seeks to transfer the suit form the Chief Magistrate's Court is because the said court is devoid and bereft of the requisite jurisdiction to entertain the said suit.
58. Put differently, the Applicant herein is keen to have the suit transferred from the subordinate court on account and basis of lack of jurisdiction.
59. In the premises, the issue that becomes necessary for determination is whether or not this honourable court or such other Superior Court would be seized of the requisite Jurisdiction and competence to transfer suit from a court without jurisdiction to one with Jurisdiction, either in the manner sought or at all.
60. In this regard, I beg to point out that case law abound. Firstly, there is the decision in the case of *Kagenyi v Musirambo & another* (1968) EA page 43 where the Court of Appeal of east Africa stated and held as hereunder;
 1. Section 18 of the *Civil Procedure Act* gives a general power to the High Court for due trial and determination on the ground that the court of the magistrate grade II, Bukoto, Kabula, before which court the case was pending, had no jurisdiction to try the case. The total value of the cattle, the subject matter of the case, was stated to be well over Shs.10,000/- whereas the jurisdiction of the magistrate in civil matters was limited to Shs.1,000/=
 2. An order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it;



3. The subject matter of the application on the admission and shoining of the applicant had been instituted in a court without jurisdiction and it was therefore incompetent the case to be transferred to the High Court for hearing and determination.
61. Other than the foregoing decision, the issue as to whether a Superior court can transfer suit which was hitherto filed before a court devoid of jurisdiction was also addressed and deliberated upon in the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, where the Court of Appeal stated and observed as hereunder;

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

62. It is also instructive to note that the debate whether or not a Superior court can transfer a suit that was hitherto filed before a court without Jurisdiction has also been calibrated upon and resolved by the Supreme Court of Kenya.
63. In this respect, it is imperative to take cognizance of the holding in the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, where the court stated and held as hereunder;

(153) In that context, the purposive reading and interpretation of Article 162 together with Article 165(5) of the *Constitution* leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) supra, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

(154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.



64. To the extent that the Applicant has conceded that the claim in the suit before the Chief Magistrate's Court exceeds the monetary Jurisdiction thereof, I come to the conclusion that this honourable court is divested and deprived of the requisite Jurisdiction to transfer same.
65. Needless to restate, that even if this court was minded to order and direct the intended transfer, (which is not the case) no such transfer could be ordered to warrant the suit being placed before the High Court for hearing and determination, either in the manner sought vide the Application or otherwise.

Final Disposition:

66. From the analysis pertaining to and concerning the topical issues which were highlighted in the body of the Ruling, it must have become apparent that the subject Application is not only misconceived, but also legally untenable.
67. Other than the foregoing, there is also the issue of Jurisdiction of this court to withdraw and transfer suit, which was clearly filed and mounted before a court without Jurisdiction.
68. Respectfully and in view of the foregoing considerations, I find and hold that the entire application is not only incompetent, misconceived but similarly, Bad in law.
69. Consequently and in the premises, the Application dated the 8th February 2019, be and is hereby struck out with costs to the Respondents.
70. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Carey Francis h/b for Mr. Omollo for the Applicant

N/A for the Respondents

