



**Kiarie v Kiramba (Miscellaneous Application 42 of 2019)
[2020] KEELC 1180 (KLR) (1 October 2020) (Ruling)**

Gaikia Kimani Kiarie v Peter Kimani Kiramba [2020] eKLR

Neutral citation: [2020] KEELC 1180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 42 OF 2019**

LN GACHERU, J

OCTOBER 1, 2020

BETWEEN

GAIKIA KIMANI KIARIE APPLICANT

AND

PETER KIMANI KIRAMBA RESPONDENT

RULING

1. The matter for determination is the Notice of Motion Application dated 11th September 2019, by the Applicant seeking for orders that;
 1. That the Court file for the suit Gatundu CMCC ELC No. 13 of 2019 (formerly Thika ELC No. 367 of 2017) be transferred back to the High Court Environment and Land Court at Thika for hearing and determination.
 2. That the Costs be provided for
2. The Application is premised on the grounds that this Court has powers to call the Court file from the subordinate Court to the High Court for hearing and determination. That the prayers sought by the Defendants Counter claim can only be granted by the High Court.
3. In his supporting Affidavit Gaikia Kimani Kiarie, the Applicant herein averred that the suit was brought vide a Plaint dated 13th August 2017, by the Respondent. That he then instructed his Advocates who entered appearance and filed a Notice of Appointment dated 14th September 2017. It was his contention that he was informed by his Advocate that the matter was mentioned and orders were issued that the suit be transferred to Chief Magistrate’s Court Gatundu. He further averred that on 16th July 2019, his Advocates filed his statement of Defence and Counter Claim dated 16th July 2019, which issues the lower Court lacks jurisdiction to entertain.



4. It was his contention that the High Court has jurisdiction to entertain the suit as per the orders sought in the Counter claim. It was his further contention that it is in the best interest of Justice that where a suit finds itself in a Court that lacks jurisdiction, the suit should be forwarded to the right Court for hearing and disposal. He further averred that he stands to be highly prejudiced as he is at risk of being dispossessed of the suit property and that the Application has been made without any delay. He contended that the interest of justice will be better served by allowing the orders sought in the Application so that the suit can be determined on merit.
5. The Application is opposed and the Respondent filed a Replying Affidavit sworn on 20th February 2020. It was his contention that the lower Court has jurisdiction to hear and determine suit No. ELC 13 of 2019, hence the reason the Court transferred it as it perused the pleadings before making the directions. He further averred that at the time the Court was making the said directions for the transfer of the suit, the Applicant's counsel on record was present in Court and did not make any objection, hence it is unfair and waste of Judicial time and resources for the same counsel to file an application seeking to reverse a decision he consented to. He further averred that at the time the decision to transfer was made, the Applicant had not filed his Defence and Counter claim and it is therefore ridiculous for the Applicant to file a Counter claim and use it to claim that the lower Court does not have jurisdiction. He further averred that the prayers sought by the Applicant introduces new parties who are not parties to the pleadings in ELC 13 of 2019 . Further that the award which is subsequently adopted can only be declared unlawful , null and void by an appellate Court and that the said suit is not an appeal whatsoever over the decision/award of Gatundu Land Disputes Tribunal case No. 25 of 2006. He further averred that if the Applicant wants to appeal or the decision declared unlawful, he ought to use the correct procedure. Further that the Applicant is using delay tactics since he is in possession and that that is an abuse of the Court process. He urged the Court to dismiss the Application.
6. On the 4th of June 2020, the Court directed the parties to file their written submissions .In compliance with the said directions, the Applicant through the Law Firm of Kimani Kagwima & Company Advocates filed its written submissions dated 29th September 2020, and submitted that the Applicant being the Defendant in Gatundu CMCC Environment and Land Court No. 13 of 2019, filed its Statement of Defence and Counter Claim, which prayers sought are beyond the jurisdiction of the Chief Magistrate. That only the High Court has powers to issue declaratory reliefs.It was further submitted that transfer of suits is a procedural issue that has been elevated to the status of jurisdiction and if a suit finds itself in the wrong Court, it is in the interest of Justice that the suit be forwarded to the appropriate Court with jurisdiction . The Applicant relied on various decided cases amongst them the case of John Mwangi Karanja V Alfred Ndiangui [2011] eKLR where the Court held that;

With the enactment of sections 1A and 1B of the [Civil Procedure Act](#), the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These sections provide as follows:-

“ 1A.

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).



- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.

1B.

- (1) 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.”

It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).

The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.”

7. The Court has now carefully read and considered the Application the affidavits and the written submissions and the issue for determination is whether the Applicant is entitled to the orders sought.
8. Section 18 of the *Civil procedure Act* bestows upon the High Court the powers to transfer suits of a civil nature. It provides;

- “(1) 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”.

It is therefore not in doubt that the party applying for a transfer has the burden of providing sufficient reasons as to why the transfer is merited. It is not in doubt that the matter which the Applicant is seeking to have transferred to this Court was transferred from this Court to the lower Court at Gatundu. It is the Applicant’s contention that he has since filed a Defence and a Counter claim which the Lower Court has no jurisdiction over. So that in essence, the Applicant is seeking for the transfer of the suit property based on the fact that the subordinate Court does not have the Jurisdiction to deal with the matter.

Jurisdiction is everything and without jurisdiction the Court has no option but to down its tools. It is not in doubt that though the powers to order transfer by the High Court which has an equal status to the Environment and Land Court are discretionary, however, a matter can only be transferred if the Court from which the Applicant is seeking to have the matter transferred from had jurisdiction over the said matter and the Applicant has satisfied the Court that the transfer is necessary. See the case of *Kithita Ngeana ...Vs... Mwaniki Kisume* [2018] eKLR where the the Court stated;

“Circumstances that would move a court to grant the order sought were considered in the *David Kabungu Case* (Supra) where Okello J stated that;.....

“What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is 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 expense, interest of justice and possibilities of undue hardship, and if the



court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application 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 would be refused...”

If the Court has no jurisdiction over the matter when the claim was filed, it would then mean that the said Counter Claim by the Defendants is a nullity in law and as the suit is incompetent and the Court does not have jurisdiction to transfer the matter. See the case of Abraham Mwangi Wamigwi ...V... Simon Mbiriri Wanjiku & Another [2012] eKLR where the Court held that;-

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In Kagenyi vs. Musiramo (supra), Sir Udo Udoma, CJ made it clear that 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. In Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (supra), Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in Rainbow Manufacturers Limited vs. National Bank of Kenya (supra).

Dealing with the same issue of jurisdiction, J B Ojwang, J (as he then was) in the Boniface Waweru Mbiyu vs. Mary Njeri & Another expressed himself as follows:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot



purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further. That position was made clear by Nyarangi JA in *The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited* (1989) KLR 1, where the learned Judge stated:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

9. Further in the case of *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR the Court held that:-

“Furthermore, according to *Kagenyi v Musiramo and Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”

10. 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 as already held above by the Court. 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. Consequently, the Court holds and finds that the Applicant has not satisfied this Court that it warrants the grant of the orders sought and therefore he is not entitled to the prayers sought.

11. The Upshot of the foregoing is that the Notice of Motion Application dated September 11, 2019, is not merited and the same is dismissed entirely with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 1ST DAY OF OCTOBER 2020

L. GACHERU

JUDGE

1/10/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consents. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kimani for the Applicant

No appearance for the Respondent

