



Imbogo & another v Imbogo (Environment and Land Miscellaneous Application E007 of 2022) [2022] KEELC 14799 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2022
DO OHUNGO, J
NOVEMBER 15, 2022**

BETWEEN

CHIBEU SHAMALLA IMBOGO 1ST APPLICANT

GEORGE OKWEMBA IMBOGO 2ND APPLICANT

AND

CHRISTINE MAKOKHA IMBOGO RESPONDENT

RULING

1. By notice of motion dated March 15, 2022, the applicants seek the following orders:
 1. [Spent]
 2. That Butali Principal Magistrates Court ELC Case No 182 of 2018 as consolidated with Butali Court ELC No 183 of 2018 be transferred to the environment and land court at Kakamega for hearing and determination.
 3. Costs of this application be in the cause.
2. The application is supported by an affidavit sworn by Chibeu Shamalla Imbogo, the first applicant. He deposed that the suit is in respect of land parcel number Kakamega/Chemuche/823 which has been subdivided into parcels 3900, 3901, 3902 and 3903 and land parcel number S/Kabras/Chemuche/903. That valuation reports dated December 9, 2021 and prepared by Chrisca Real Estate indicated that land parcel number Kakamega/Chemuche/823 is valued at Kshs 25,000,000 while land parcel number S/Kabras/Chemuche/903 is valued at Kshs 4,750,000. That the subject matter in the of the suit in the Subordinate Court is valued at Kshs 29,750,000 which is far beyond the jurisdiction of the Principal Magistrate's Court. He annexed copies of the complaints as well as the valuation reports and therefore prayed that Butali PMC ELC Case No 182 of 2018 be transferred to this court.



3. In response, the respondent filed a replying affidavit in which she deposed that the open market value in the valuation report by Chrisca Real Estate Valuers is exaggerated and that the value of the suit properties does not exceed the pecuniary jurisdiction of the Butali Senior Principal Magistrate's court. That the open market value of land parcel number Kakamega/Chemuche/3900, 3901, 3902 and 3903 according to a valuation report dated March 29, 2022 by the Ministry of Land and Physical Planning is KShs 15,600,000. She further deposed that land parcel number S/Kabras/Chemuche/903 is not a subject matter in the claim before the Subordinate Court and that the application is a delaying tactic by the applicants since she (the respondent) is the one who filed the case. That the subject matter is located in Malava and that Butali Law Courts are right in the vicinity and more convenient for her. She therefore prayed that the application be dismissed with costs.
4. In response to the replying affidavit, the first applicant filed a supplementary affidavit on May 10, 2022, whose contents I have noted.
5. The application was canvassed by way of written submissions. The applicants submitted that the subordinate court lacks jurisdiction to hear and determine to hear the suit before it since the suit properties are valued at KShs 29,750,000, an amount far beyond the jurisdiction of the Principal Magistrates Court. They further argued that the respondent's valuation report is false some parcels of land which form part of the subject of the suit have been omitted from it. They cited section 18 (1) of the *Civil Procedure Act* and urged the court to allow the application.
6. In reply, the respondent reiterated her replying affidavit and argued that the applicants' valuation is exaggerated and that the values of the properties in issue do not exceed the pecuniary jurisdiction of the subordinate court. She posed the question of whether the transfer is necessary in the light of the conflicting valuations. In conclusion, she urged the court to dismiss the application.
7. I have considered the application, the affidavits, and the submissions. The issue for determination is whether the orders sought should issue.
8. Pursuant to section 18 (1) (b) (i) of the *Civil Procedure Act*, the court has power to withdraw a case from the subordinate court and transfer it to itself for hearing and determination. The section provides:

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; ...
9. The suit sought to be transferred to this court is Butali Principal Magistrates Court ELC Case No 182 of 2018 which was consolidated with Butali Principal Magistrates Court ELC Case No 183 of 2018. Copies of complaints in both matters are annexed. The Magistrates Court at Butali is presided over by a Senior Principal Magistrate. Pursuant to section 7 (1) (b) of the *Magistrates' Courts Act, 2015*, a magistrate's court presided over by a Senior Principal Magistrate can only exercise jurisdiction in proceedings of a civil nature in which the value of the subject matter does not exceed Fifteen Million Shillings. According to the respondent, the subject matter in the suits before the subordinate



court is valued at Kshs 15,600,000 and that the matter should remain before the subordinate court. The applicants contend that the subject matter is valued at Kshs 29,750,000, hence the reason for seeking transfer. Either way, the values adopted by both parties put the matter beyond the pecuniary jurisdiction of the senior most judicial officer at Butali Law Courts.

10. I am keenly aware that neither the present application nor the suit before the subordinate court is about determination of the value of the suit properties. In view of the conflicting valuation reports, I cannot purport to determine which report is more accurate than the other. Assuming that the respondent's valuation report was accurate, and suppose a chief magistrate was posted to Butali Law Courts, the matter would fall comfortably within the pecuniary jurisdiction of the Chief Magistrate. If on the other hand the applicants' valuation is the accurate one, the matter would be beyond the pecuniary jurisdiction of a chief magistrate.
11. I am aware that the court can only withdraw and transfer a matter to itself under section 18 (1) (b) (i) of the *Civil Procedure Act* if the subordinate court itself had jurisdiction. See *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR. The suits sought to be transferred were filed in the year 2018 while the dates of the competing valuation reports range from December 9, 2021 to March 29, 2022. The applicants have even introduced another report dated April 16, 2018, in respect of one of the properties which puts the value at Kshs 2,500,000, in an effort to discredit the respondent's valuation report. There are all sorts of figures flying around, all claiming to be the value of the suit properties. It is also possible that at the time the suits were filed, the value of the suit properties was within the pecuniary jurisdiction of the senior most judicial officer at Butali Law Courts. Even if a trial within a trial were to be held on the question of the value of the suit properties, its outcome may not be conclusive and final as to the actual market value. As noted earlier, neither the present application nor the suits before the subordinate court are about determination of the value of the suit properties.
12. The courts now have a wider latitude to ensure that substantive justice prevails, and that judicial time is better utilized. Article 159 (2) (b) and (d) of the *Constitution* and section 3 of the *Environment and Land Court Act* emphasise that mission. The Court of Appeal emphasised as much when it stated in *Coast Development Authority v Adam Kazungu Mzamba & 49 others* [2016] eKLR as follows:

... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In *Salat v IEBC & 7 Others*, Petition No 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in *Lamanken Aramat v Harun Maitamei Lempaka*, Petition No 5 of 2014 the same court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under article 159, is indeed cured. The court concluded thus:

“The court's authority under article 159 of the *Constitution* remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice.”

As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. ...
13. In the wider interest of substantive justice, and to save the parties from anxieties as to whether the subordinate court has the requisite pecuniary jurisdiction, I find it necessary and appropriate to order transfer of the suit to this court for hearing and determination.
14. In view of the foregoing, I make the following orders:



- a) Butali Principal Magistrates Court ELC Case No 182 of 2018 as consolidated with Butali Principal Magistrates Court ELC Case No 183 of 2018 is hereby withdrawn from the said court and transferred to this court for hearing and determination.
- b) Costs of notice of motion dated March 15, 2022 shall be in the cause.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the applicants

No appearance for the respondent

Court Assistant: E. Juma

