



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC NO. E004 OF 2022

EVANGELINE NKATHA MUGAMBI.....APPLICANT

VERSUS

FESTUS MURIUNGI KINOTI.....RESPONDENT

RULING

1. There are two applications filed before the court by the applicant dated 1.2.2022 and 8.3.2022 both supported by sworn affidavits of Evangeline Nkatha Mugambi on 15.2.2022 and 8.3.2022. The prayers sought are; the court to transfer Githongo ELC No. 34 of 2019 to Nkubu law courts for the hearing and determination and the respondent be stopped from blocking the access to the applicant's home erecting a pit latrine in the middle of the road to access her home.

2. The grounds are that Githongo Law Courts is the only court competent to hear land matters; the subject matter is situated in South Imenti within the jurisdiction of Nkubu Law Courts and that the defendant applicant hails from South Imenti where the nearest court is Nkubu law courts with two courts with jurisdiction to hear land matters. The applicant has attached both the plaint and defence to the lower court suits.

3. In the 2nd application dated 8.3.2022, the applicant avers she has been blocked from accessing her home through what she calls a military style trench; her peace has been disturbed; the land was allegedly sold by her son yet it was family land; she has no confidence in Githongo court which lacks jurisdiction to entertain the suit. There was need to preserve the property pending hearing; intervention by the area chief has been in vain; as elderly and sickly she is disturbed and unable to get in or out of her homestead due to the trench.

4. The application dated 1.2.2021 was opposed through a replying affidavit sworn by Festus Muriungi Kinoti on 21.2.2022 on the basis that the application was a veiled attempt to seek the recusal of the trial court for holding against her; she was forum shopping; Nkubu Law Courts has a huge backlog; justice delayed is justice denied; there has been inordinate delay of 3 years, there are no compelling reasons to order for a transfer; he lawfully bought the land; the allegations of blockage and destruction are not true and lastly. It was the applicant who had trespassed into his land.

5. Further the respondent averred that Githongo Law Court was nearer than Nkubu territorial jurisdiction has not be objected to; a scene visit was done on 17.5.2021 and by consent a hearing date taken and that it would be waste of judicial time and resources to transfer the suit.

6. By written submission dated 23.2.2022 the applicant takes the view that under Section 15 Civil Procedure Act a suit shall be instituted within the local limits of whose jurisdiction the defendant resides or the cause of action arises. She submitted the suit land was situated in Uruku South Imenti. Sub county and that Nkubu Law Courts was the one with jurisdiction to her the matter. Reliance was placed on *UNM vs SMM & another (2018) eKLR* on the proposition that section 15 Civil Procedure Act was for the convenience of the parties as it seeks to ensure that no undue hardship was visited upon a party depending on a suit.

7. As regards the trench it was submitted that under Section 14 of the Public Road and Roads of Access Act, the applicant has not been informed by anybody over the of her access road which the respondent has arbitrarily chosen to close hence hindering her access to her home. She urged the court to find her meriting in the orders sought.

8. The court finds three issues requiring its determination:

(i) If it has jurisdiction to transfer a suit.

(ii) If the applicant deserves the prayer for the transfer.

(iii) If the court should issue the prayer for the stoppage of the blockage to the access road.

9. Section 18 of Civil Procedure Act grants the court the power to transfer a suit lying in the lower court where the suit is filed in a court with jurisdiction to try it.

10. Looking at the defence dated 14.1.2021, it is obvious the applicant raised the competence of the suit on account of where the suit land was situated at the earliest opportunity possible.

11. It should therefore have become obvious to the trial court that the suit before it was incompetent. The court should have probably given direction at the earliest opportunity for jurisdiction is everything and as held in *Owners of Lilian "S" vs Caltex Oil Kenya Ltd (1989) eKLR* once the issue is raised the court should down its tools.

12. The respondent has alleged the court should find the trial court at was the most convenient and that in Nkubu Law court there are challenges. In other words, the respondent has conceded that where the suit property was situated falls under Nkubu Law Courts. Unfortunately jurisdiction cannot be conferred by consent of parties or acquiescence. (See *George C. Gichuru vs Senior Private Kioko & another (2013) eKLR*).

13. It is either there or not there. The respondent cannot choose where to file the suit but must follow the law. The respondent has averred three years were over since the suit was filed and it would be a waste of judicial resources to seek to transfer the suit. Passage or lapse of time does not and cannot confer jurisdiction. Jurisdiction is a continuum. It cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab initio or absent forever. See *Peter Gichuki Kingaria vs IEBC & 2 others (2013) eKLR*.

14. In *Phoenix of E.A Assurance Co. Ltd vs S.M Thiga t/a Newspaper service (2019) eKLR* the court held, jurisdiction was primordial in every suit. That it had to be there when the suit was filed in the first instance. That if a suit was filed without jurisdiction the only remedy was to withdraw it and file it in a court with jurisdiction. That a suit filed devoid of jurisdiction was dead on arrival and could not be remedied, since without jurisdiction a court could not confer jurisdiction.

15. In *Equity Bank Ltd vs Bruce Mutie Mutuku T/A Diani Tour Travel (2016) eKLR* the court held it was illegal for the High court in exercise of its powers under Section 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 since no competent suit existed that was capable of being transferred and such a fatality could not be cured by seeking refuge under Sections 1A, 1B and 3A Civil Procedure Act as well as Article 159 of the Constitution .

16. Applying the above principles the respondent filed a suit when he knew the court seized of jurisdiction was Nkubu Law Courts. The applicant raised a preliminary objection as to jurisdiction at the earliest opportunity possible. Instead of withdrawing the suit to file it before the court seized of jurisdiction, the respondent to date insists the court should find it convenient to entertain the suit and sustain it.

17. In *Macfoy vs United Africa Co. Ltd (1961) 3 ALL ER 1169*, the court held if an act was void then in law it was a nullity and incurably bad; null and void, that one cannot put something on nothing and expect it to stay there since it will collapse.

18. The suit herein was filed before a court without jurisdiction. It is therefore a nullity, ultimately all processes including a scene visit by the trial court was a nullity. There is therefore nothing to transfer.

19. In the premises, I find the application lacking merits since this court would be sanctioning on illegality and breathing life to a suit which was dead on arrival.

20. As regards the prayer for stopping the military trench, this is a miscellaneous application. There is no pending appeal before this court. There is also no evidence by way of a surveyors report on who has trespassed to whose land. This court cannot act on speculations or suppositions.

21. The applicant has not indicated if he raised the issue with the Public Health Office or the Public Roads. Engineer in charge of the road in the area as well as the land registrar if there has been interference or blockage of a road of access.

22. Given my finding above there is no suit capable of being transferred, the court cannot also issue orders in vacuum. Consequently, the application herein is dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF APRIL, 2022

In presence of:

Gichunge Muthuri for plaintiff

Muthomi for respondent

HON. C.K. NZILI

ELC JUDGE



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