



Odundo v Kukam Limited & another (Environment and Land Case Civil Suit 693 of 2016) [2023] KEELC 17599 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 693 OF 2016**

LN MBUGUA, J

MAY 25, 2023

BETWEEN

ANTHONY ODHIAMBO ODUNDO PLAINTIFF

AND

KUKAM LIMITED 1ST DEFENDANT

METRA INVESTMENT LIMITED 2ND DEFENDANT

RULING

1. Before me is the defendants' application dated 21.2.2023 seeking orders that the suit be transferred to the Honourable Justice J.A Mogeni for determination. The application is premised on grounds on its face and on the Supporting Affidavit sworn on 21.2.2023 by Rahab Mukiana who describes herself as a director in each of the Defendant Company.
2. She avers that the subject of this suit is the property known as Nairobi Block /72/3081 and that the said property has been the substrum of Nairobi ELC 561 of 2014 which has been heard and determined and judgement rendered by the Honourable Justice J.A Mogeni. She further avers that Nairobi ELC No. 950 of 2014 whose substrum relates to the same property was transferred to Hon. Lady Justice Mogeni by a consent of the parties therein recorded before Judge Mbugua on 21 .2.2023. She adds that the Plaintiff will not be prejudiced in any manner should this Court order a transfer.
3. The application is opposed by the plaintiff vide his replying Affidavit sworn on 2.3.2023. He avers that the application lacks merit terming it as an application for recusal. He avers that the crux of the present suit does not relate to the property known as Nairobi Block 72/3081, it concerns defendant's failure to fulfill their contractual obligations in issuing him a full refund of the balance of ksh.4,080,000/= being the sums that he paid to the Defendants towards purchase of a housing unit erected on the said property.



4. He contends that the fact that parties in ELC No. 950 of 2014 consented to that suit being transferred to Mogeni J should not automatically render this suit equally ripe for transfer before the Honourable Judge since the substrum between the said suit and this suit are substantially and materially different.
5. Parties did not file written submissions as directed by this court on 6.3.2023.
6. I have considered the rival arguments as well as the record of the court file. The decision whether to transmit this matter to Lady Justice Mogeni is discretionary. This court has jurisdiction under section 1A,1B and 3A of the *Civil Procedure Rules* to make such orders as may be necessary for the ends of justice.
7. The proceedings of 17.11.2020 indicate that the defence counsel had made an oral application for this case to be heard alongside ELC 950 of 2021, of which counsel for the plaintiff indicated that they had no objection. Thereafter on 28.6.2021, counsel for the plaintiff again brought the issue to the attention of the court that the two matters were related, adding that “determination of the issues in 950 of 2014 will dispose this suit”. Consequently, the court (Judge Ebozo sitting) made an order for the two matters to be heard alongside each other. That order is still in force, but cannot be effectuated if the two matters are before different judges.
8. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court stated that;

“ Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks”.
9. No plausible explanation has been advanced as to why the plaintiffs have suddenly changed tune, yet they have not sought a review of the orders given on 28.6.2021. All in all, I find that the application dated 21.2.2023 is merited, the same is allowed and each party is to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ndolo for defendant

Court assistant: Eddel

