



Musyoki (As the legal representative of the Estate of the Late Henry Musyoki Kilonzi) v Makau & 11 others (Environment & Land Case 250 & 386 of 2017 (Consolidated)) [2023] KEELC 21149 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21149 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 250 & 386 OF 2017 (CONSOLIDATED)
CA OCHIENG, J
OCTOBER 31, 2023

BETWEEN

MESHACK MWAKA MUSYOKI (AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE HENRY MUSYOKI KILONZI) PLAINTIFF

AND

GLADYS MUTHEU MAKAU 1ST DEFENDANT
JOSEPH MBONGE KYATHE 2ND DEFENDANT
BENSON MAKULA MUTHWI 3RD DEFENDANT
BENJAMIN KILONZO 4TH DEFENDANT
HANDSON NYAMBARIGA 5TH DEFENDANT
JOEL NTHEI MWANZIA 6TH DEFENDANT
KELLEN IGOKI MURITHI 7TH DEFENDANT
ANDREW WAMBARI NG'ANG'A 8TH DEFENDANT
AMINA SHIDA ADAM 9TH DEFENDANT
ANNE KERUBO SAMOKA 10TH DEFENDANT
FRANCIS WANDHOGHO MWAITA 11TH DEFENDANT
ONDITI OUMA 12TH DEFENDANT



RULING

1. What is before court for determination is the defendants' notice of motion application dated the February 27, 2023 brought pursuant to sections 3, 3A and 18 of the Civil Procedure Act. The defendants seek the following orders:
 1. Spent
 2. That upon hearing of this Application, this Honourable Court be pleased to order and it is hereby ordered that the suit at Mavoko Magistrate's Court CMELC No. 64 of 2019 be withdrawn;
 3. That costs of this Application be awarded to the Applicants.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 8th Defendant Amina Shida where she deposes that she instructed her Advocates to file ELC No. 386 of 2017: Amina Shida Adam & Another Vs Meshack Mwaka Musyoki but she did not know that ELC 250 of 2017: Meshack Mwaka Musyoki Vs Gladys Makau Mutheu had already been filed. Further, that they applied for consolidation of the two ELC suits as parties including issues raised therein were similar being ownership of LR No. 12715/179. She explains that vide this Court's Ruling dated the 5th June, 2020, both suits were consolidated and it further nullified the subdivision of LR No. 12715/179 which had also resulted in Plot No. LR 12715/ 13406. She claims the Respondent Meshack Mwaka Musyoki had subsequent to filing ELC 250 of 2017: Meshack Mwaka Musyoki Vs Gladys Makau Mutheu also filed Mavoko CMELC No. 64 of 2019 Meshack Mwaka Musyoki Vs Amina Shida Adam & Anne Kerubo Samoka. Further, that the Respondent sought orders of injunction and eviction of the two named Defendants therein, from LR No. 12715/13406 without disclosing the pendency of the aforementioned two ELC matters which is related to the same subject matter as well as parties. She avers that vide a Preliminary Objection dated the 9th December, 2019 and filed on 10th December, 2019, she drew the Magistrate's Court attention to the existence of the two ELC suits and sought to stop the hearing of the aforementioned matter on account of *sub judice* but the said Magistrate's Court vide its Ruling dated the 23rd June, 2022 dismissed the objection stating that it is misconceived. She reiterates that the Magistrate's Court effectively asserted jurisdiction over the matter and is now taking the '*suit*' through trial motions with an intention of hearing the issues, despite the pendency of the consolidated suit.
3. The Respondents did not file any response or written submissions to controvert the instant Notice of Motion Application.

Analysis and Determination

4. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit and Defendants' submissions, the only issue for determination is whether Mavoko Magistrate's Court CMELC No. 64 of 2019 should be withdrawn.
5. The Defendants in their submissions reiterated their averments as per the Supporting Affidavit and contended that the Applicants are entitled to orders as sought in the instant Application. They insisted that the Plaintiff had abused the court process by filing the lower court suit. To support their averments, they relied on the following decisions: Kennedy Mwaura Kibebe & 3 others v Anne Wanjiku Kibeh & 3 others (2021) eKLR; International Commission of Jurists v Attorney General & 2 others (2021) eKLR and Satya Bhama Gandhi V Director of Public Prosecutions & 3 Others (2018) eKLR.



6. In this instance, the defendants' claim the respondent Meshack Mwaka Musyoki had subsequent to filing ELC 250 of 2017: Meshack Mwaka Musyoki vs Gladys Makau Muthu also filed Mavoko CMELC No. 64 of 2019 Meshack Mwaka Musyoki vs Amina Shida Adam & Anne Kerubo Samoka. They explain that the Respondent sought orders of injunction and eviction of the two named Defendants therein, from LR No. 12715/13406 without disclosing the pendency of the consolidated suits which touch on the same subject matter as well as parties. They confirm that despite raising a Preliminary Objection, the Magistrate's Court disregarded the same and is now proceeding with the said suit, yet it is sub judice.
7. The respondent despite being duly served did not controvert the defendants' averments.
8. Section 18(1) of the *Civil Procedure Act* gives this Court Power to withdraw and transfer a case instituted in a subordinate court and provides inter alia:
 - (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.”
9. I note as per annexure 'ASA 4' which is the Notice of preliminary objection filed in the Mavoko CMELC No. 64 of 2019, the Defendants' actually informed court of the two aforementioned ELC suits and their relationship with the dispute in the said lower court matter. Further, as per annexure 'ASA 1' which was the Ruling dated the 5th June, 2020, by Justice Angote in ELC No. 250 of 2017, he stayed subdivision of LR No. 12715/179 and consolidated ELC No. 250 of 2017 with ELC No. 386 of 2017. I note the Respondent did not deny that subdivision of LR No. 12715/179 also produced his plot being LR No. 12715/ 13406.
10. Based on the facts as presented, noting that the same was not controverted while relying on the legal provisions I have cited above, since the Respondent did not deny that Mavoko CM ELC No. 64 of 2019 relates to the consolidated suits, I find the Respondent's act of filing the said Mavoko CM ELC No. 64 of 2019 during the pendency of the two ELC suits amounted to an abuse of the court process. I opine that it is pertinent to withdraw the Mavoko CM ELC No. 64 of 2019 as it is sub judice.
11. In the foregoing, I find the Notice of Motion Application dated the February 27, 2023 merited.
12. I proceed to make the following final orders:
 - a. That the Mavoko Magistrate's Court CMELC No. 64 of 2019 be and is hereby withdrawn.
 - b. That the costs of this Application is awarded to the Applicants.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF
OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

