



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 557 OF 2009**

MACHETHA KARIUKI.....1<sup>ST</sup> PLAINTIFF  
WAMBUI NJOROGE.....2<sup>ND</sup> PLAINTIFF  
WAMBUI NJAU.....3<sup>RD</sup> PLAINTIFF  
MARIA KAROKI.....4<sup>TH</sup> PLAINTIFF  
NYAMBURA KABIA.....5<sup>TH</sup> PLAINTIFF  
NJERI MUNYAO.....6<sup>TH</sup> PLAINTIFF  
NJERI MBINDYO.....7<sup>TH</sup> PLAINTIFF  
(Suing on their behalf and as representatives of Kasarini Farmers Co-operative Society)

**VERSUS**

SAMUEL GITHEGI MBUGUA.....1<sup>ST</sup> DEFENDANT  
GRACE MUTHONI GITHEGI.....2<sup>ND</sup> DEFENDANT  
SAMUEL MBUGUA KIBATHI.....3<sup>RD</sup> DEFENDANT  
MARGARET NYOKABI MBUGUA.....4<sup>TH</sup> DEFENDANT  
RUTH NJERI KABOGO.....5<sup>TH</sup> DEFENDANT  
MOSES MBUGUA MWANGI.....6<sup>TH</sup> DEFENDANT  
CHRISTINE MITHIRI MBUGUA.....7<sup>TH</sup> DEFENDANT  
ZACHARIAH KIMEMIA GAKUNJU.....8<sup>TH</sup> DEFENDANT  
MARY WARURII GAKUNJU.....9<sup>TH</sup> DEFENDANT  
COMMISSIONER OF LANDS.....10<sup>TH</sup> DEFENDANT  
REGISTRAR OF TITLES, NAIROBI.....11<sup>TH</sup> DEFENDANT

**RULING**

What is before the court is the 2<sup>nd</sup> to 7<sup>th</sup> plaintiffs' Notice of Motion application dated 5<sup>th</sup> September 2019 brought under section 3 of the Environment and Land Court Act, 2011 and all other enabling provisions of the law seeking an order that this suit be transferred to the Environment and Land Court(ELC) at Thika for hearing and final determination. The application which is supported by the affidavit of the

2<sup>nd</sup> plaintiff, Jacinta Wambui Njoroge sworn on 5<sup>th</sup> September 2019 was brought on the following grounds; the property the subject of this suit is situated in Kiambu County within the territorial jurisdiction of the court to which the suit is sought to be transferred, the suit is likely to be heard more timeously on account of lesser backlog in the ELC at Thika, it is in the interest of justice that the order be granted considering that the matter has been pending hearing for 10 years and that none of the parties would suffer prejudice if the order is granted.

In her affidavit in support of the application, the 2<sup>nd</sup> plaintiff has stated that this court is overburdened by matters mostly emanating from Kiambu County which are yet to be transferred to the ELC at Thika and that the plaintiffs are apprehensive that any more delay in the determination of this suit would diminish their chances of finally getting justice. The 2<sup>nd</sup> plaintiff has stated that if this suit is transferred to the ELC at Thika, there are chances that it would be heard faster. The 2<sup>nd</sup> plaintiff has reiterated that no party would suffer prejudice if the suit is transferred to the ELC at Thika.

The application is opposed by the 4<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants and the interested parties. The 4<sup>th</sup> defendant has opposed the application through grounds of opposition dated 15<sup>th</sup> May 2020. The 4<sup>th</sup> defendant has contended that the application is scandalous, frivolous, vexatious and amounts to an abuse of the process of the court. The 4<sup>th</sup> defendant has contended that the application is yet another attempt by the plaintiffs to cause unreasonable delay in the conclusion of this suit. The 4<sup>th</sup> defendant has averred that the plaintiffs are yet to comply with the pre-trial directions that were given by the court on 11<sup>th</sup> October 2017. The 4<sup>th</sup> defendant has contended further that there is no suit pending which is capable of being transferred to the ELC at Thika for hearing. The 4<sup>th</sup> defendant has contended that the suit herein was to a large extent filed by deceased persons against deceased persons. The 4<sup>th</sup> defendant has averred that in a ruling delivered on 13<sup>th</sup> June 2019, the court ordered that this suit had abated as against the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants. The 4<sup>th</sup> defendant has contended that the application is an attempt by the plaintiffs to revive an otherwise dead suit. The 4<sup>th</sup> defendant has averred that this court is competent to hear and determine this suit and that no reasonable justification has been disclosed in the application to warrant the grant of the order sought.

The 8<sup>th</sup> and 9<sup>th</sup> defendants have opposed the application through grounds of opposition dated 2<sup>nd</sup> December 2019. The 8<sup>th</sup> and 9<sup>th</sup> defendants have contended that transferring this suit to the ELC at Thika will result in more delay in the disposal of the suit. The 8<sup>th</sup> and 9<sup>th</sup> defendants have averred that this court has dealt with other matters related to this suit and as such is best placed to expeditiously resolve the matter. The 8<sup>th</sup> and 9<sup>th</sup> defendants have contended that the plaintiffs are to blame for the delay they are complaining about. The 8<sup>th</sup> and 9<sup>th</sup> defendants have contended that save for the 4<sup>th</sup> defendant, the other defendants are deceased. The 8<sup>th</sup> and 9<sup>th</sup> defendants have contended further that the society on whose behalf the suit has been brought by the plaintiffs is similarly defunct. The 8<sup>th</sup> and 9<sup>th</sup> defendants have contended that in the circumstances, there is no suit pending that can be transferred to the ELC at Thika. The 8<sup>th</sup> and 9<sup>th</sup> defendants have averred that the court has power under section 26 of the Environment and Land Court Act, 2011 to hear the suit and that the plaintiffs' application is an attempt at forum shopping.

The interested parties, St. Mary's School, Runda and Ndunde Investments Limited have opposed the application through grounds of opposition dated 12<sup>th</sup> June 2020. The interested parties have contended that the application is scandalous, frivolous and amounts to an abuse of the process of the court. The interested parties have contended further that the plaintiffs are guilty of laches and that the application is aimed at forum shopping. The interested parties have contended further that the application is aimed at delaying the determination of the suit.

The court directed that the application be argued by way of written submissions and gave timelines for the filing of the same. Only the 8<sup>th</sup> and 9<sup>th</sup> defendants filed submissions on 14<sup>th</sup> April 2021. The plaintiffs and the other defendants did not file submissions. I have considered the plaintiffs' application together with the supporting affidavit. I have also considered the grounds of opposition filed by the defendants and the interested parties in opposition to the application. Finally, I have considered the 8<sup>th</sup> and 9<sup>th</sup> written submissions.

This suit was filed in the ELC Division of the High Court at Nairobi on 2<sup>nd</sup> November 2009 before the establishment of the ELC. After the establishment of the ELC, the suit was taken over by this court. The ELC at Thika was established in 2017 to serve the residents of Kiambu County. Several cases originating from Kiambu County were transferred from this court to the ELC at Thika on application by the parties and by the court on its own motion. A number of cases originating from Kiambu County like the present one remained at the ELC Milimani for various reasons. The reasons why some of the Kiambu cases remained at the ELC Milimani included the ages of the cases, the stages of prosecution the cases had reached and the infrastructural challenges that were being experienced by the ELC at Thika. The plaintiffs have not given an explanation why they did not move the court earlier to have this suit transferred to the ELC at Thika. I can only guess that it may have been due to the age of the matter and the extent to which the ELC at Milimani had dealt with the matter and related cases.

There is no doubt that under sections 3 and 26 of the Environment and Land Court Act, 2011, this court has power to transfer a suit pending before it to another ELC if it can be conveniently and expeditiously determined in that other ELC. What I need to determine is whether sufficient grounds have been put forward by the plaintiffs to warrant the transfer of this suit to the ELC at Thika. In summary, the application for transfer has been brought on the ground that the property in dispute in this suit is situated in Kiambu County within the jurisdiction of the ELC at Thika and that the suit is likely to be heard expeditiously in the ELC at Thika. I am not persuaded that the application for the transfer of this suit to the ELC at Thika is informed by the need to have the suit expeditiously determined. From the record, this suit was fixed for hearing for the first time on 11<sup>th</sup> October 2017 when the same was listed for hearing on 19<sup>th</sup> June 2018. Before that hearing date, the plaintiffs brought an interlocutory application which frustrated the hearing of the suit. The plaintiffs have since then brought one interlocutory application after the other. One of the plaintiffs many applications was brought on 13<sup>th</sup> June 2018 by way of Notice of Motion of the same date seeking leave to amend the plaint. In a ruling that was made by the court on 13<sup>th</sup> June 2019 in that application, the court struck out the application with costs. The court made a finding that the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants died on 7<sup>th</sup> May 2017, 19<sup>th</sup> October 2011, 4<sup>th</sup> May 1997, 6<sup>th</sup> April 2017, 16<sup>th</sup> May 2008 and 30<sup>th</sup> August 2013 respectively and as such some of them were sued while deceased while the suit as against others had abated. The court held that a suit against a deceased person is a nullity and cannot be amended while a suit which has abated cannot be amended until it is revived.

Since the suit as against two (2) of the defendants was a nullity they having been sued while deceased and the suit as against five (5) of the defendants had abated, the court ruled that it was not in order to allow the application for amendment with regard to the remaining four (4)

defendants until the plaintiffs regularized the status of the other seven (7) defendants. In the said proceedings, the court was informed that two (2) of the plaintiffs were also deceased. The court was however unable to make an order for their substitution since the plaintiffs placed no evidence before the court in proof of their death.

As things stand now, two of the defendants were sued while deceased and as such the suit as against them is a nullity. Secondly, the suit as against five of the defendants has abated and the plaintiffs are yet to make an application for the revival of the suits and substitution of the deceased defendants with their legal representatives. Finally, two of the plaintiffs are deceased and are yet to be substituted with their legal representatives. In the circumstances, the application for the transfer of the suit before me is incompetent as it relates to seven of the defendants. It is also not clear how two of the plaintiffs who are deceased can maintain an application for the transfer of the suit.

There is no doubt from the foregoing that the transfer of this suit to the ELC at Thika would not facilitate its just, expeditious, proportionate and accessible disposal. The plaintiffs have some housekeeping to do in the matter before the court where the matter is currently pending before they can think of having the matter transferred to another court.

The upshot of the foregoing is that the plaintiffs' application dated 5<sup>th</sup> September 2019 has no merit. The application is dismissed with costs to be in the cause.

**DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF JANUARY 2022**

**S. OKONG'O**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

**N/A FOR THE 1ST PLAINTIFF**

**N/A FOR THE 2ND TO 7TH PLAINTIFFS**

**N/A FOR THE 1ST DEFENDANT**

**MRS. OMUTIMBA FOR THE 4TH DEFENDANT**

**N/A FOR 2ND, 8TH AND 9TH DEFENDANTS**

**N/A FOR 3RD , 5TH , 6TH AND 7TH DEFENDANTS**

**N/A FOR THE 10TH AND 11TH DEFENDANTS**

**MRS. WAMBUGU FOR THE INTERESTED PARTIES**

**MS. CATHERINE NYOKABI-COURT ASSISTANT**