



**Trustees Catholic Dioces of Nakuru t/a Arch Bishop Ndingi Secondary School Also
Known as Lake View Secondary v Ngure & 4 others (Environment & Land Case
12 of 2024) [2025] KEELC 3326 (KLR) (Environment and Land) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 12 OF 2024**

MC OUNDO, J

APRIL 24, 2025

BETWEEN

**THE TRUSTEES CATHOLIC DIOCES OF NAKURU T/A ARCH BISHOP
NDINGI SECONDARY SCHOOL ALSO KNOWN AS LAKE VIEW
SECONDARY PLAINTIFF**

AND

**GEORGE THARAO NGURE 1ST DEFENDANT
JULIUS NDUNGU CHUAGA 2ND DEFENDANT
SIMON K. WAINAINA 3RD DEFENDANT
THE HON. ATTORNEY GENERAL 4TH DEFENDANT
THE CHIEF LAND REGISTRAR 5TH DEFENDANT**

RULING

1. Before me for determination are three Applications, the first one dated 14th June 2024, the second one dated 24th September, 2023 and the third one dated 25th October, 2024. For ease of reference, the parties herein shall be referred to as they appear in the main suit.
2. The Application dated 14th June, 2024, is a Notice of Motion Application brought by the 2nd and 3rd Defendants pursuant to the provisions of Section 1B, 3A of the *Civil Procedure Act*, Order 2 rule 15 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law in they have sought for the striking out of the 4th and 5th Defendants' Defence dated 16th June, 2024 and for the costs of the Application.



3. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by William Kathuku Mutua, an advocate of the High Court of Kenya where he deponed that despite the court having on 21st May, 2024, ordered that the parties to cleanup of their pleadings since the matter had been transferred from a court without jurisdiction, the 4th and 5th Respondents had proceeded to un-procedurally, unlawfully and mischievously to file and serve the parties with a totally new Defence dated 12th June, 2024 completely altering the contents of the earlier Defence which had been in existence since 16th June, 2004, and this, without leave. That they now had two (2) sets of Defence on record.
4. That their action was prejudicial to the 2nd and 3rd Defendants who would not have a chance to respond to the un-procedurally filed Defence and thus it was only fair and just that the same be struck out and expunged from the Court record and the 4th and 5th Defendants be ordered to clean up the already existing Defence dated 16th June 2004.
5. In opposition to the said Application, the Plaintiff filed its Grounds of Opposition dated 22nd July, 2024 on the grounds that the Application was bad in law, inept and an abuse of the process of court and had no merit. That the application disclosed no single or sufficient grounds to warrant the grant of the orders it sought as the 2nd and 3rd Defendants have no capacity to dictate to the 4th and 5th Defendants on the manner in which they (that is the 4th and 5th Defendants) should defend the case. That it was open for any party in the civil proceedings to adjust their positions in a matter so long as the other parties had an opportunity to equally make amendments to their pleadings as the ultimate goal applicable in civil litigation was to determine cases based on the evidence, facts and pleadings that the parties would like the court to consider and not lock out pleadings or facts that a party sought to bring forth for consideration by the court.
6. That since parties had, by consent agreed to have the case commence de novo, was no prejudice to any of them adjusting their position provided that they had an opportunity to present their respective case. That the Defence filed by the 4th and 5th could be saved through an amendment for striking out a pleading was a drastic and draconian measure that could only be deployed where no other remedy was available.
7. Whereas the 1st Defendant was excused from participating in the said Application, the 4th and 5th Defendants did not file any response.
8. The second Application dated 24th September, 2024 is a Notice of Motion brought by the 2nd and 3rd Defendants pursuant to the provisions of Sections 1A, 3B of the *Civil Procedure Act*, Order 2 rule 15 and Order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law in which they sought that the Plaintiff's suit filed vide a Complaint dated 22nd April, 2004 be struck out with costs.
9. The said Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by the 2nd and 3rd Defendants herein who deponed that initially the Plaintiff had filed suit against them vide a Complaint dated 22nd April, 2004 in the Principal Magistrate Court PMCC 435 of 2004 at Naivasha. Subsequently vide an application dated 27th October 2004 in HCC Misc. 1455 of 2004, the Plaintiff had sought to have the matter transferred to the High Court in Nairobi for want of jurisdiction. The application had been allowed and the matter was transferred from Naivasha Principle Magistrate Court to the High Court in Nairobi and registered as HCC No. 1156 of 2005.
10. That later, the matter was transferred to Nakuru High Court and registered as HCC No. 109 of 2009 before it was transferred to Environment and Land Court at Nakuru as ELC Case No. 260 of 2012



which court on its own motion, transferred the same to Naivasha as ELC wherein it had been registered to it current No. ELC No.12 of 2024 (the current court).

11. That the High Court in Miscellaneous application Number 1455 of 2004 lacked jurisdiction and/or powers to order the transfer of PMCC 435 of 2004 from a subordinate court to the High Court as HCC 1156 of 2005. That the Plaintiff ought to have withdrawn Case No. PMCC 435 of 2004 and filed it in a Court with competent jurisdiction as the same had not been capable of being transferred.
12. That subsequently, upon a direction by the court that parties clean up their pleadings, the only clean up available to the Plaintiff would then have been the withdrawal of the suit herein and filing it afresh in a court with competent jurisdiction.
13. That jurisdiction being everything, proceeding with a matter that had been irregularly transferred would be unlawful, fatal and amount to miscarriage of justice. They thus prayed that the Plaintiff's suit herein be struck out.
14. In opposition to the Application, the Plaintiff vide its Replying Affidavit dated 24th October 2024 sworn by Simon Kamau Mugo deponed that the same was frivolous, vexatious, misconceived, filled with falsehood and an abuse of the court process. There having been filed three suits being Naivasha PMCC 40 of 2000, filed by the Defendants, Naivasha PMCC No. 435 of 2004 by the Plaintiff and Naivasha PMCC No. 261 of 2004, vide Nairobi Misc. App. No. 1455 of 2004 the court had, owing to the pecuniary jurisdiction of the subject matter, allowed the prayer for withdrawal, transfer and consolidation of the matters vide an order dated 24th June 2005.
15. That the suits had then been withdrawn, consolidated and transferred wherein a new suit had then been filed afresh in Nairobi as Nairobi HCCC No. 1165 of 2005 in a court with jurisdiction.
16. That the issues herein ought to have been raised before the commencement of the hearing of the suit herein. The Defendants were estopped from bringing up the issue of jurisdiction 20 years down the line, which was counterproductive, they (Defendants) having had equally filled a Statement of Defence and Counterclaim dated 5th April, 2004 in Naivasha PMCC No. 261 of 2004. That the suit had been given a new life after it was withdrawn and filed in Nairobi as Nairobi HCCC No. 1165 of 2005 and later on transferred to Nakuru and serialized as Nakuru HCCC No. 101 of 2009 and then transferred and serialized as Nakuru ELC 260 of 2012 upon the creation of the Environment and Land Court.
17. That a comprehensive reading of Section 16 of the Civil Procedure Act was to the effect that no objection as to the place of suing should be allowed on appeal unless such objection had been taken in the court of first instance and there had been a consequent failure to justice.
18. The 1st, 4th and 5th Defendants did not participate in the Application.
19. The third Application dated 25th October, 2024 was made pursuant to the leave of court of 30th September, 2024 and brought by the 4th and 5th Defendants pursuant to the provisions of Section 1A, 1B and 3 of the Civil Procedure Act and Order 8 Rules 3, 5(1) of the Civil Procedure Rules and all other enabling provisions of the law wherein they sought that for leave to amend their Statement of Defence dated 16th June, 2004 and for the costs of the Application.
20. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Chepkirui Janet, a Principal State Counsel who deponed that there had emerged new evidence which was necessary and important for determination of the matter in controversy. That they be granted leave to file an amended defence in order to bring out all the matters in controversy so as to effectually and completely adjudicate all questions in dispute.



21. That the amended defence raised a fundamental triable issue which could only be answered if it was pleaded in the defence and would assist the court in determining with finality all the real issues in controversy. That the Respondents would suffer no damages/harm if their application was granted.
22. There was no response by any party. Directions were taken for the disposal of the Applications by way of written submissions to which the Plaintiff vide its submissions dated 16th September, 2024 and in opposition to the 2nd and 3rd Defendants' Application dated 14th June, 2024 framed one issue for determination to wit; Whether the 4th and 5th Defendants' Defence ought to be struck out. After reiterating the the history of how the instant suit had been instituted up until the same had been transferred to Naivasha as Naivasha ELC Case No. 12 of 2024, the Plaintiff submitted that parties herein had agreed to begin the matter de novo thus it had only been proper that prior to compliance with order 11, at the pre-trial conference, that they put their pleadings and/or house in order.
23. Reliance was placed on the decisions in the case of Catherine Wanjiku Kagua v Chinga Tea Factory & Another [2016] eKLR and ZWO V GVB (Matrimonial Cause E002 of 2021) [2023] KEHC to submit that the case herein having been muddled with inconsistencies and was untidy pursuant to which the honourable court had directed that they provide a chronological trial bundle showcasing the inception of the case and the way it had morphed to the current point, that starting the case de novo hearing was not an opportunity to fill in gaps that had been noted during the hearing by bringing in a new set of evidence for the repeat trial because a de novo hearing was a continuation of a trial and not a second trial.
24. That the 4th and 5th Defendants' Defence had not introduced any new evidence or facts thus were the same to be altered, it should be amended and not struck out as striking it out would be draconian and shall defeat the ends of justice.
25. That the provisions of Article 159 (2) (d) (sic) was to the effect that justice should not be delayed or denied and that in order to further give life to the overriding objectives under the provisions of Section 1A and 1B (a & d) of the *Civil Procedure Act*. That the Defence herein consisted of denials which ought to be determined on merit and was not prejudicial to the parties herein. That further, the 4th and 5th Defendants were necessary party to the suit owing to the fact that they were responsible for authenticating ownership of the suit parcel of land and giving its chronological history.
26. With regards to the 2nd and 3rd Defendants' Application dated 24th September, 2024 seeking that the Plaint dated 22nd April, 2004 be struck out, the Plaintiff vide its submissions dated 20th January, 2025 summarized the factual background of the matter and then framed its issues for determination as follows:
 - i. Should the Plaint dated 22nd April, 2004, be struck out for lack of jurisdiction?
 - ii. Effects of the order dated 24th June, 2005.
 - iii. Costs.
27. On the first issue for determination as to whether the Plaint dated 22nd April, 2004 should be struck out for lack of jurisdiction, the Plaintiff's submission was that by consent and an order in Misc Nairobi CMCC No. 1455 of 2005, the Plaintiff had sought the withdrawal, transfer and consolidation of the 3 matters namely Naivasha PMCC No. 435 of 2004, Naivasha PMCC No. 261 of 2004 and Naivasha PMCC No. 40 of 2000 which prayer had duly been granted vide orders dated 24th June 2005.
28. That the instant suit had since commenced and proceeded hence the 2nd and 3rd Defendant's Application to struck out the Plaint had been an afterthought as they had been active participants



from the onset. Reliance was placed in the decided case of Republic v Attorney General & 2 Others: Kihingo Village (Waridi Gardens) Management Limited (Exparte Applicant) [2024] eKLR to invoke estoppel per rem judicatum to the effect that a determination had been made by a court of competent jurisdiction vide order dated 24th June, 2005 in Nairobi Misc App.1455 of 2005 directing that the cases be withdrawn, transferred and consolidated on the basis of the Chamber Summons dated 25th April, 2005.

29. That further, the suit had been freshly instituted in Nairobi and serialized as Nairobi 1165 of 2005. That it was then transferred to Nakuru upon the institution of a High Court in Nakuru where it was serialized as Nakuru HCCC No. 101 of 2009. Upon the establishment of the Environment and Land Court in Nakuru, the matter was transferred therein and serialized as Nakuru ELC 260 of 2012. He emphasized that the instant suit had been withdrawn and transferred on the grounds that the subject matter value (pecuniary jurisdiction) had exceeded the jurisdiction of the highest court in Naivasha at the point in time as there had been no High Court in Naivasha or in Nakuru in the year 2005. He thus maintained that it had been an afterthought for the 2nd and 3rd Defendants to bring the instant Application hence the same was an abuse of the court process.
30. Reliance was placed on the provisions of Section 6 of the *Civil Procedure Act* to submit that whereas the 2nd and 3rd Defendants had an avenue to raise the issue of jurisdiction at the time, they had failed to do so hence the withdrawal, consolidation and transfer to the relevant court at Nairobi had thus cured the defect of jurisdiction.
31. On the second issue for determination on the effect of the order dated 24th June, 2005, the Plaintiff submitted that the said order that had been issued in Nairobi Misc Appl. No. 435 of 2004 had cured the defect of the courts at Naivasha on the issue of jurisdiction wherein the matter had now been registered afresh as Nairobi HCCC No. 1165 of 2005. That the instant Application was thus Res Judicata, an afterthought, an abuse of the court process and interfered with the overriding objectives under Section 1A and 1B of the *Civil Procedure Act* whose aim was the timely disposal of all the proceedings in the court at a cost affordable by the respective parties with efficacy, hence the same ought to be dismissed.
32. On costs, the Plaintiff urged the court to order that the same be borne by the Defendants since costs follow the event as provided for by the provisions of Section 27 of the Civil Procedure Acts.
33. The 2nd and 3rd Defendants' Submissions dated 9th December, 2024 in support of their Application dated 24th September 2024 was to the effect that there had been no dispute that initially the instant matter and two other matters had been filed in a Principal Magistrate Court at Naivasha which had no pecuniary jurisdiction to hear and determine the same. That what was thus in contention was the manner in which the matter subsequently found itself in the High Court as High Court Civil Suit No. 1156 of 2005 (Nairobi).
34. They thus framed their issues for determination as follows:
 - i. Whether the High Court in Miscellaneous Application No. 1455 of 2004 had jurisdiction, powers and/or authority to transfer PMCC 435 of 2004, PMCC 261 of 2004 and PMCC 40 of 200 to itself for hearing and determination.
 - ii. Whether Section 18 of the *Civil Procedure Act* is relevant and/or applicable in the instant notice of motion and/or whether the Plaintiff had misinterpreted the same.
 - iii. Whether the 2nd and 3rd Defendants are estopped from bringing the motion on whether the suit was properly before the court at this stage.
 - iv. Who should bear the costs of the suit?



35. On the first issue for determination, the 2nd and 3rd Defendants submitted that the Plaintiff's application that had purported to transfer the instant matter from the Principal Magistrate Court to the High Court vide Miscellaneous Application No. 1455 of 2004 in Nairobi had totally been illegal, unlawful and incompetent. That all the suits herein relating to the suit property ought to have been withdrawn and filed afresh in the appropriate court with jurisdiction upon payment of the requisite court filing fees, hence the Defendants would have filed fresh defences in the matter.
36. Their reliance was placed on the decisions in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR amongst others to submit that the three (3) suits herein having been filed in a court without jurisdiction, the same had been incompetent, improper and a nullity ab initio. That what the High Court had done was to transfer a nullity and/or illegality to itself.
37. That current suit being ELC No. 12 of 2024 had emanated from three (3) suits that had been filed in a Court that lacked jurisdiction hence were incompetent. That the 2nd and 3rd Defendants having filed their defences in the said matters did not cure the nullity of the said suits/or breath any life to the same. That accordingly, the only recourse that the Plaintiff had then and which he had now was for it to withdraw the suit and file it afresh as the matter before the court was a nullity.
38. Secondly that Section 18 of the *Civil Procedure Act* was not relevant in the instant application as the Court could not use the said provisions to withdraw and transfer a matter from a subordinate court to the High Court in an instant where the subordinate court had no pecuniary jurisdiction. Reliance was placed in the decided case of Abraham Mwangi Mawigwi v Simon Mbiriri & Another [2012] eKLR.
39. On the third issue for determination as to whether the 2nd and 3rd Defendants had been estopped from bringing the motion on whether the suit had properly been before the Court at this stage, their reliance was hinged in the Court of Appeal's decision in the case of SIMON NDUNGU & another v KANGATHIA KIUNA [2008] KEHC 1382 (KLR) to submit that whereas they had filed their defences and participated in the said suits, the said acts did not give life to the suit that had been filed in a court devoid of jurisdiction. That further, the issue of jurisdiction could be raised at any time even where the matter had been partially heard since there was no limitation of time when it came to raising an issue on jurisdiction which was everything.
40. They acknowledged that whereas the matter had been in court for some time and as much as they were eager to have the same heard and determined, the court ought to do the right thing which is to order the Plaintiff to withdraw the instant matter and file the same afresh since the suit herein had arisen from an illegality.
41. On costs, the 2nd and 3rd Defendants' submission was that since it had been the Plaintiff that had filed the suit in a court without jurisdiction, it should bear the costs of the application. They thus urged the court to allow their Notice of Motion dated 24th September, 2024.
42. The 4th and 5th Defendants via their submissions dated 31st January, 2025 in support of their Application dated 25th October, 2024 was that they had sought to amend their defence dated 16th June, 2004 having since received new instructions. Their issue for determination was thus; whether the instant application was merited.
43. In affirming the same, they submitted that an amendment to their defence would assist the court to make just decision. That the amendments were also aimed at enabling the parties litigate all issues between them to bring an end to litigation in the instant matter.
44. They placed reliance in the decisions in the cases of Lewar Ventures Limited v Equity Bank (Kenya) Limited [2022] eKLR and Gladys Nduku Nthuki v Letshengo Kenya Limited; Mueni Charles



Maingi (Intended Plaintiff) [2022] eKLR to submit that no party would suffer prejudice were their Application allowed since there had been no new cause of action introduced. They thus prayed for their Application to be allowed as prayed.

Determination

45. I have considered the three applications here in filed, the grounds in opposition, the submissions therein, the law and the authorities cited. It is not disputed that this matter which had been partly heard had been scheduled for further hearing at Nakuru Environment and Land Court on the 14th, 15th and 16th October 2024, was subsequently transferred from the said Court to the Environment and Land Court Naivasha, upon its establishment.
46. On the 21st May 2024 when the matter came up for further hearing at the Environment and Land Court Naivasha, the Plaintiff's Counsel informed the court that since PW 1 had not gone very far with his testimony, that parties had agreed to start the hearing afresh. Counsel then gave out his opening statement.
47. The court then inquired from the representative of the Hon. Attorney General whether they had failed their Memorandum of Appearance and Defence as the court had not seen it. The State Counsel pointed a Memorandum of Appearance and Defence that had been filed in the Naivasha Principal Magistrate Court in PMCC 435 of 2004 upon which the court made an observation on the jurisdiction and the mode in which the matter had been transferred from the Magistracy Court in Naivasha to the Environment Court Naivasha thereby directing the parties to put their house in order to enable the matter proceed, in the interest of justice.
48. Having made this observation, the matter was taken out of the cause list for hearing wherein parties sought time to put their house in order. There were directions granting all parties 30 days to put their respective houses in order, file all pleadings, statements and necessary documents before the matter could be set down for hearing. What followed next was that the Hon Attorney General representing the 4th and 5th Defendants filed and served the parties with their Memorandum of Appearance and Defence dated the 16th June 2024 which service then gave rise to an application dated the 14th June 2024 by the 2nd and 3rd Defendants objecting to the said defence as herein above stated, they also filed another application dated the 24th September 2024 seeking to have the Plaintiff's suit struck out for having been filed in a court that had no jurisdiction in the first instance. The Hon Attorney General then filed a third application dated the 25th October 2024 seeking to amend their Defence filed on the 16th June 2004(sic).
49. It is to be noted that initially, there had been three suits instituted at the Naivasha Principal Magistrate' Court being Naivasha PMCC 40 of 2000, Naivasha PMCC No. 435 of 2004 and Naivasha PMCC No. 261 of 2004, touching on the same subject matter. Subsequently vide an application dated 27th October 2004 in Nairobi HCC Misc Application No. 1455 of 2004, the Plaintiff had sought to have the matters, which had been consolidated, withdrawn and transferred to the High Court in Nairobi. Wherein pursuant to an order dated the 24th June 2005, the application was allowed. The said files were later forwarded to the Nairobi High Court vide a letter dated the 15th July 2005 wherein they were registered as Nairobi High Court Case No. 1156 of 2005. Vide a court order of 25th February 2009 to have the matter transferred from the Nairobi High Court to the Nakuru High Court, the said matter was transmitted as directed through a letter dated the 31st March 2009 wherein it was registered as Nakuru Civil Case No. 101 of 2009 wherein it proceeded for hearing on the 8th June 2011 but the Plaintiff's Counsel interjected seeking to have statements to be served upon the parties. Directions were given to that effect.



50. On the 6th November 2012 pursuant to the establishment of the Environment and Land Court the matter was transferred to that court wherein it had been registered as ELC No. 260 of 2012 and thereafter transferred to the Naivasha Environment and Land Court and upon its establishment and within whose jurisdiction the suit land is situated.
51. Having given a chronological history of the movement of this matter from the Magistrate’s court to the current court, I have anxiously considered the order dated the 24th June 2005 in Nairobi HCC Misc Application No. 1455 of 2004 and its consequence therein. Whereas the outcomes of withdrawal and transfer might be desired concurrently, the processes are usually distinct and sequential. Withdrawal terminates the current matter in court whereas a Transfer moves an existing matter to another court. Logically, the Plaintiff upon withdrawing the consolidated matter in the Magistrate’s Court, ought to have filed a new suit in the desired court.
52. I have painstakingly perused the files in Nairobi High Court Case No. 1156 of 2005, Nakuru High Court Civil Case No. 101 of 2009 and Nakuru Environment Court Case No 260 of 2012 and note that there had been no Plaintiff filed. In essence there was no case before the previous courts and this court. A Plaintiff is the primary way the Defendant(s) learn of the case against them, the specific allegations, and what the Plaintiff seeks, it sets the boundaries of the dispute, outlining the issues the court will need to decide, the court’s jurisdiction and the legitimacy of the suit which are often established through the details provided in the Plaintiff.
53. Order 3 Rule 1 of the Civil Procedure Rules prescribes the mode in which suits should be instituted. It specifically provides that “every suit shall be instituted by presenting a Plaintiff to the court, or in such other manner as may be prescribed.” Thus the Civil Procedure Rules contemplate that suits shall be instituted by Plaintiff or “other such manner” without which, as was held in *Mcfoy vs United Africa Company Limited* (1961) 3 All ER 1169, if an act was void, then it was in law a nullity. One could not put something on nothing and expect it to stay there. It would collapse. To this effect, I find that there having been no fresh Plaintiff filed upon the Plaintiff’s withdrawal of its suit in the Magistracy Court, the Plaintiff’s suit is fatally defective and cannot be cured by the provisions of Article 159 (2)(d) of *the Constitution*. There is therefore no valid suit before me and the Plaintiffs case is herein struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 24TH DAY OF APRIL 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

