



**Githae v Abby & 2 others (Miscellaneous Application
E012 of 2024) [2025] KEELC 3296 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
MISCELLANEOUS APPLICATION E012 OF 2024**

LL NAIKUNI, J

APRIL 8, 2025

BETWEEN

GEORGE KAMAU GITHAE APPLICANT

AND

NAIMA HASSAN ABBY 1ST RESPONDENT

KWALE LAND REGISTRAR 2ND RESPONDENT

KWALE DISTRICT SURVEYOR 3RD RESPONDENT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Motion application dated 2nd October, 2024 by George Kamau Githae, the Plaintiff/Applicant herein under the provisions of Sections 1A,1B, 3A,18 of *Civil Procedure Act*, Chapter 21, Laws of Kenya, Article 50,159 and 162(2)(b) of the *Constitution of Kenya* 2010 and Section 13 of the *Environment and Land Court Act* No. 19 of 2011.
2. Upon service of the Application to the Respondents, the Interested Party files their replies through a Replying Affidavit dated 10th December, 2024. The Honourable Court shall be dealing with it in depth at a later stage of this Ruling.

II. The Applicant's case

3. The Applicant sought for the following orders: -
 - a. That this Honourable Court be pleased to issue orders to transfer ELC Cause No.E001 Of 2022 - Kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor* to the Environment and Land Court Kwale.
 - b. That the costs of this application be in the cause.



4. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 10 Paragraphed annexed affidavit of George Kamau Githae, the Plaintiff/Applicant herein. The Deponent averred that:
- a. ELC Cause No. E001 Of 2022-kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor*, was instituted at the Senior Resident Magistrates in Kwale. Annexed and Marked as “GKG-1” was a copy of the Application under Certificate of Urgency dated 23rd December 2021.
 - b. The subject matter of the suit are all those properties registered as Kwale/Galu Kinondo/709,2022 and 2023 which are located in Kwale County within the jurisdiction of the Environment and Land Court in Kwale.
 - c. The value of the property was over a sum of Kenya Shillings Twenty Million (Kshs 20,000,000/-) which was beyond the pecuniary jurisdiction of the trial court and therefore it would be in the interest of justice if the application herein was allowed.
 - d. It was only fair and just if the court grants orders as prayed to transfer the suit to the Environment and Land Court of Kenya at Kwale.
 - e. The suit in the primary suit had never proceeded for hearing.
 - f. No prejudice would be occasioned to the Respondent if the suit herein is transferred to the court with the pecuniary Jurisdiction.
 - g. The Affidavit was sworn in support of the application herein.

III. The Interested Party’s response

5. Through a 9 paragraphed replying affidavit sworn on 10th December, 2024 by Mustafa A. Jama, the Interested Party herein where he deposed that:-
- a. The Deponent and the 1st Respondent being the main parties in defense of the suit, were only the registered owners of Kwale/Galu Kinondo 2022 and Kwale/Galu Kinondo 2023. Attached in the affidavit copies of the title deeds and marked as “KMK – 2”.
 - b. It was the Plaintiff who initiated the lower court suit in 2022 a Plaint dated 23rd December,2021 and received on 6th January, 2022; the suit was later cited as Environment And Land case No. E001 OF 2022.
 - c. By dint of being the plaintiff, the aforementioned applicant had the opportunity to determine the value of the subject matter. The fact that they filed the same before the lower court was evident that indeed the said suit met the pecuniary standards of the Magistracy.
 - d. The Applicant had merely mentioned that the lower court has no pecuniary jurisdiction over the suit, but does not in any way disclose the so called value. That left parties and this court with speculation rather than facts.
 - e. The Applicant had not disclosed reasons for the change of heart in proceedings before the lower court, nor shown what had led to the upgrade in value since January 2022 to date or how the same has taken place. No material evidence had since been attached other than speculations and mere assertions and averments.



- f. The suit before the lower court was already set for hearing in 2025, and the attempts to transfer the file to this Honourable Court was meant to delay the suit by restarting a process that had since commenced; all with an intention to delay or force himself and the 1st Respondent to give up on their rightful properties.
- g. The Applicant would not suffer any harm if the said suit that they themselves before the Magistracy was heard and determined to its final conclusion.

IV. Submissions

- 6. On 29th January, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 2nd October, 2024 be disposed of by way of written submissions and all the parties complied. Unfortunately, by the time of penning down this Ruling, the Court could not access any of the submissions by any of the parties herein. Pursuant to that, a ruling date was reserved on 8th April, 2025 by Court accordingly.

V. Analysis and Determination

- 7. I have carefully read and considered the pleadings herein and the relevant provisions made by the parties. In order to arrive at an informed decision, the Honourable Court has framed the following two (2) issues for its determination.
 - a. Whether this Honourable Court should issue orders to transfer ELC Cause No.E001 Of 2022 - Kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor* to the Environment and Land Court Kwale.
 - b. Who will bear the Costs of Notice of Motion application 2nd October, 2024.

Issue No. a). Whether this Honourable Court should issue orders to transfer ELC Cause No.E001 Of 2022 - Kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor To The Environment And Land Court Kwale.*

- 8. Under this sub – title, the jurisdiction of the High Court to transfer suits from one Court to another is provided under the provision of Section 18 of the *Civil Procedure Act*, Cap 21 which provides:-

“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.



- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”
9. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn. Section 18 of the *Act* empowers the High Court to withdraw and transfer a case instituted in a subordinate court on application of any of the parties or on its own motion. For the court to grant an order of transfer the applicant must satisfy the court as to the reasons for such orders.
10. In the case of “*David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995”, the Court had the following to say on the circumstances under which the order to transfer suits may be granted:-
- “Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well-established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused.....”
11. This principle was enunciated in the case of:- “*Julius Lekuruito & Another v Nottingham Mwangi & Another* (2018) eKLR” where the court held:-
- “Under Section 17 and 18 of the Act, upon an application by a party, or on its own motion, the High Court may transfer the suit to another subordinate court with territorial jurisdiction, when justice of the case demands such action.”
12. In the present case, the i. ELC Cause No. E001 Of 2022-kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor*, was instituted at the Senior Resident Magistrates in Kwale.ii. The subject matter of the suit are all those properties registered as Kwale/ Galu Kinondo/709, 2022 and 2023 which are located in Kwale County within the jurisdiction of the Environment and Land Court in Kwale. The value of the property was over a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) which was beyond the pecuniary jurisdiction of the trial court and therefore it would be in the interest of justice if the application herein was allowed. It was only fair



and just if the court grants orders as prayed to transfer the suit to the Environment and Land Court of Kenya at Kwale.

13. According to the Interested Party, himself and the 1st Respondent being the main parties in defense of the suit, were only the registered owners of Kwale/Galu Kinondo 2022 and Kwale/Galu Kinondo 2023. It was the Plaintiff who initiated the lower court suit in the year 2022 though a Plaint dated 23rd December, 2021 and received on 6th January, 2022; the suit was later cited as Environment and Land case No. E001 of 2022. By dint of being the Plaintiff, the aforementioned applicant had the opportunity to determine the value of the subject matter. The fact that they filed the same before the lower court is evident that indeed the said suit met the pecuniary standards of the Magistracy. The suit before the lower court was already set for hearing in the year 2025, and the attempts to transfer the file to this Honourable Court are meant to delay the suit by restarting a process that had since commenced; all with an intention to delay or force himself and the 1st Respondent to give up on hour rightful properties.
14. The provision of Section 1A(1) of the *Civil Procedure Act*, Cap. 21 provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 1B(1) of the said *Act* provides as follows-

“For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

15. If this Court was to allow “ELC Cause No. E001 of 2022 -Kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor*” to proceed in the Senior Resident Magistrate’s Court in Kwale it would be working contrary to the intended purpose of the overriding objective. It would lead to wastage of time by two courts hearing 2 cases which could have been heard and determined in one suit. I therefore hold that it is in the interest of justice to transfer of “ELC Cause No. E001 of 2022 -Kwale, *George Kamau Githae v Naima Hassan Abby, Kwale Land Registrar & Kwale Land Surveyor*” to the Environment and Land Court Kwale for hearing and determination in accordance to the provisions of Section 18(1)(b)(i) of the *Civil Procedure Act*, Cap. 21 Laws of Kenya. In addition, once the said suit has been transferred to the Environment and Land Court, the same shall be consolidated with the suit herein for reasons I have highlighted hereinabove so as to avoid having a multiplicity of suits involving the same parties over the same subject matter. In the premise, I find the Notice of Motion application dated 2nd October, 2024 is merited and thus should be allowed accordingly.

Issue No. b). Who will bear the Costs of Notice of Motion application 2nd October, 2024.

16. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The



Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “*Harun Mutwiri v Nairobi City County Government* [2018] eKLR and “*Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another* [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

17. I have well stated in previous precedence and most especially in “*Sagalla Lodge Limited v Samuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased)* [2022] eKLR”, that:

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

18. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In the case of “*Hussein Mubumed Sirat v Attorney General & Another* [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects not to award any costs.

VI. Conclusion and Disposition

19. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.

20. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 2nd October, 2024 be and is hereby found to have merit and is allowed.
- b. That an order be and is hereby issued transferring ELC Cause No.E001 of 2022- Kwale, *George Kamau Githae v Naima Hassan Abby, kwale Land Registrar & Kwale Land Surveyor* to the Environment and Land Court Kwale.
- c. That there shall be a mention on 30th June, 2025 for purposes of taking direction and fixing a hearing date of these matters hereof.
- d. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 8TH DAY OF APRIL 2025.



HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT KWALE

Ruling delivered in the presence of:-

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Washalla Advocate holding brief for Mr. Mungai Kamau Advocate for the Applicant.
- c. M/s. Ngara Advocate holding brief for Mr. Sadik Advocate for the Interested Party.
- d. No appearance for the 1st, 2nd & 3rd Respondents.

