



REPUBLIC OF KENYA



**Kakuzi PLC v Attorney General & another; Kakuzi Division Development Association, Kitoto Community IDPs, Ndula Resource Centre on behalf of Kinyangi Squatters, Kitumbua Kaloleni IDPs, Gathungururu Village, Gachagi Makuyu IDPs & Gaichanjaru Self Help Group, Kihinganda Self Help Squatters, Makuyu Sisal IDPs (Interested Party) (Environment & Land Petition 11 of 2020) [2022] KEELC 14576 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14576 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 11 OF 2020**

**MAO ODENY, J  
OCTOBER 31, 2022**

**BETWEEN**

**KAKUZI PLC ..... PETITIONER**

**AND**

**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KAKUZI DIVISION DEVELOPMENT ASSOCIATION, KITOTO COMMUNITY IDPS, NDULA RESOURCE CENTRE ON BEHALF OF KINYANGI SQUATTERS, KITUMBUA KALOLENI IDPS, GATHUNGURURU VILLAGE, GACHAGI MAKUYU IDPS & GAICHANJARU SELF HELP GROUP, KIHINGANDA SELF HELP SQUATTERS, MAKUYU SISAL IDPS ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of a notice of motion dated January 28, 2022 by the petitioner/applicant seeking the following orders: -
  - a. Spent.
  - b. That this honourable court do transfer Malindi ELC Constitutional Petition 11 of 2020 Kakuzi PLC vs The Hon AG and Others to the Nairobi Environment and Land Court for further directions and determination.



- c. That costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.
3. A brief background to this case as captured in the pleadings is that the petitioner herein filed a constitutional petition in the High Court at Nairobi being HCCC 255 of 2018, Kakuzi PLC vs the Hon Attorney General and the National Land Commission challenging the constitutionality of section 15 of the [National Land Commission Act](#) (NLC act).
4. That following the institution of the petition at Nairobi, the petitioner filed an application dated October 11, 2019 seeking the transfer of this petition to Malindi and its consolidation with Malindi ELC Constitutional Petition 19 of 2016 as consolidated with Petition 291 of 2016.
5. That the honourable court however declined the application in a ruling dated February 28, 2020 on grounds that the court lacked the jurisdiction to transfer and consolidate the two petitions filed in the High Court at Nairobi as sought by the petitioner.
6. The petitioners thereafter filed an application in the High Court at Nairobi seeking orders that the matter be transferred to the Environment and Land Court at Mombasa.
7. On October 1, 2020, the Hon Justice Makau delivered a ruling to the application dated March 13, 2020 granting the petitioner's prayer for the transfer of the petition to this court whereby the court ordered as follows: -

The Nairobi Constitutional Petition No 255 of 2018 Kakuzi PLC vs The Hon Attorney General & The National Land Commission Board is HEREBY transferred to Malindi Environment and Land Court for further directions.

8. Similarly, the honourable judge on the same date delivered a ruling in the above terms in Constitutional Petition 466 of 2018 Mabroukie Tea and Coffee Estates Limited vs The Honourable Attorney General, the National Land Commission & Others for the transfer of the matter to Malindi Environment and Land Court.
9. That upon the transfer of the matters to this honourable court, the petitioner herein and the petitioner in Petition 466 of 2018 (now Malindi ELC Petition No 10 of 2020) made Applications both dated October 7, 2020 seeking the consolidation of their petitions with Malindi ELC Constitutional Petition 19 of 2016 & 291 of 2016, and further, that the court re-opens the said petitions for the petitioner herein to be heard before judgment is delivered.
10. By a judgment delivered on October 29, 2021, this honourable court declined the petitioners' applications for consolidation on grounds that it would lead to unnecessary delay since Malindi ELC Constitutional Petition 19 of 2016 & 291 of 2016 had proceeded to conclusion.
11. The petitioner filed this application seeking the transfer of this matter to the Environment and Land Court in Nairobi for hearing and determination.
12. The applicant stated that in view of the finalization of the Malindi LSK Petition without addressing the additional issues raised in the present Petition, it is necessary to transfer the file back to the Environment and Land Court in Nairobi so that the petition can be heard and determined in respect of the additional issues raised in the current petition which petition was originally filed in Nairobi.
13. The application was also supported by the supporting affidavit of Denis Gitaka sworn on the January 28, 2022 where he deponed that in the ruling of October 1, 2020 the court noted that it would be possible for the court seized with the Malindi case to arrest judgment so that all the issues can be



addressed holistically instead of dealing with piecemeal litigation and that the court observed that a piecemeal approach on section 15 of the *National Land Commission Act* would be highly detrimental to all parties who are affected by the said section especially as this was a public interest issue.

14. The interested party opposed the application through a replying affidavit sworn by Stephen Kuria Mbugua sworn on the March 7, 2022 where he deponed that on the basis of the provisions of article 67 (1) (e) of the *Constitution* and section 15 of the *National Land Commission Act*, interested parties/ applicants in 2017 filed a claim with the National Land Commission being NLC/ HLI/006/2017 where Kakuzi was invited by the commission and they filed a response to their claim.
15. That the issues that the petitioner wanted determined have already been determined in ELC Petition No 19 of 2016 and by the application of January 28, 2022 the petitioner is forum shopping.
16. It was the respondent's case that the interested parties have also filed ELC Petition No 5 of 2021 in Murang'a and the petitioner has stayed the same until the hearing of the claim herein is determined. He asserted that Kakuzi Area is within Murang'a County which is within the jurisdiction of the Murang'a ELC court.

#### **Petitioner/applicant's submissions.**

17. Counsel identified the issue for determination namely whether the honourable court should exercise its discretion and transfer the suit herein to the Environment and Land Court at Nairobi.
18. On this issue counsel submitted that this honourable court is clothed with the jurisdiction to hear and determine this matter and hence has the jurisdiction to transfer the present suit to the Environment and Land Court in Nairobi and that the jurisdiction of this court to transfer the present suit is provided for by rule 8 (2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013* which provides as follows: -  
  
Place of filing  
  
8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.  
  
(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.
19. Counsel submitted that at the NLC investigative proceedings in respect of the historical injustice claims filed by the 1<sup>st</sup> interested party and the subject matter of the present petition were conducted in Nairobi and as such, the cause of action arose in Nairobi resulting in the petitioner filing the original suit in Nairobi High Court. Further that the petitioner only seeks that the matter be transferred to the Nairobi Environment and Land Court which court is dealing with other related matters being Nairobi JR ELC 4 of 2020 (formerly JR Misc Number 94 of 2019) therefore the interested party's allegations of forum shopping are unfounded and have no legal basis.
20. Ms Opiyo submitted that this court is vested with the power to transfer the instant petition to the Environment and Land Court in Nairobi in accordance with rule 8 (2) of the Mutunga rules, 2013 and relied on the cases of *Isaac N Githui v Samuel Munyua & another (Being sued as the Chairman, Secretary and Treasurer of the Board of Management of Nyabururu Sports Club) (2021) eKLR* and also submitted that the interested party's replying affidavit opposing the application is defective having been sworn by the advocate on record which is expressly prohibited by rule 8 and 9 the Advocates (Practice) Rules 1996, and relied on the case of *International Community of Women Living with HIV*



*Registered Trustees v Non- Governmental Organizations Co-ordination Board & 2 others; Teresia Otieno (proposed interested party) (2019) eKLR.*

21. Counsel further submitted that the application is unopposed by the respondents, the primary litigants in the instant suit. According to counsel, the interested party is a peripheral party in the instant suit and thus cannot object to the transfer of the suit and/or trajectory of the instant petition.
22. Counsel relied on the cases of *Methodist Church in Kenya v Mohamed Fugicha & 3 others (2019) eKLR* and that of *Ashok Labshanker Doshi & another v Director of Public Prosecutions & 3 others; Greenview Lodge Limited (Interested Party) (2020) eKLR* whereby the court held that it is trite law that the role of an interested party in proceedings is peripheral and urged the court to allow the application as prayed.

## **2nd interested party's submissions**

23. Counsel identified the following issue for determination; whether it will be in the interest of expediency, efficiency, transparency and access to justice to transfer the suits to the Environment and Land Court at Nairobi and submitted that the power to transfer a case for hearing to another court may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter and relied on the case of *Kagenyi v Musiramo and Another (1968) EA 43* Further that the court must satisfy itself that the transfer of a matter enhances expeditious access to justice and submitted that the petitioner is hindering access to justice by engaging in unnecessary forum shopping which amounts to abuse of court process.
24. Counsel further submitted that no good cause has been shown by the petitioner as to why the suit should be transferred to Nairobi and that the petitioner has deliberately failed to facilitate the overriding objectives of enhancing just and expeditious resolution of the matter.
25. Counsel submitted that public interest litigation is litigation instituted in the interest of the public and not the individual who files the matter and that such matter should be filed in good faith and cited the case of *Mumo Matemu v Trusted Society of Human Rights and 5 others (2013) eKLR.*
26. Counsel finally submitted the court has inherent jurisdiction to protect itself from abuse of court process and relied on the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others (2018) Eklr* and urged the court to dismissed.

## **Analysis and determination**

27. This is an application for transfer of this suit to Environment and Land Court in Nairobi for hearing and determination.
28. The background on this case is as enumerated at the beginning of this ruling which I need not repeat. It is true that this matter was originally filed in the High Court in Nairobi and was subsequently transferred to this court for hearing.
29. Vide a ruling dated October 1, 2020, the Hon Justice Makau granted the petitioner's prayer for the transfer of the petition to this court and further allowed the transfer of Constitutional Petition 466 of 2018 Mabroukie Tea and Coffee Estates Limited vs The Honourable Attorney General, the National Land Commission & Others.
30. It is also on record that upon the transfer of the matters to this honourable court, the petitioner herein and the petitioner in Petition 466 of 2018 (now Malindi ELC Petition No 10 of 2020) made applications both dated October 7, 2020 seeking the consolidation of their petitions with Malindi ELC Constitutional Petition 19 of 2016 & 291 of 2016, and further, that the court re-opens the said



petitions for the petitioner herein to be heard before judgment is delivered which applications were declined.

31. The applicant submitted that in view of the finalization of the Malindi LSK petition by the three judge bench without addressing the additional issues raised in the present petition, it would be necessary to transfer the file back to the Environment and Land Court in Nairobi so that the petition can be heard and determined in respect of the additional issues raised in the current petition which had been filed in Nairobi.
32. The interested party objected to the transfer on the grounds that it is not brought in good faith as the petitioner is forum shopping and similarly that the interested party have also filed ELC Petition No 5 of 2021 in Murang'a of which the petitioner stayed pending the hearing of this claim and submitted that Kakuzi Area is within Murang'a County which is within the jurisdiction of the Murang'a ELC court.
33. This court has jurisdiction to transfer this suit for hearing and determination as provided for under rule 8 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013.
34. When considering an application for transfer the court must be satisfied by the reasons advanced for the transfer and whether the transfer will achieve the expeditious adjudication of the suit and the transfer should also to enhance access to justice.
35. Among the reasons advanced by the applicant is that the three judge bench in Malindi ELC Petition 19 of 2016 (consolidated with 291 of 2016) Malindi Law Society vs The Hon AG, National Assembly and NLC dismissed the petitioner's application for consolidation hence that some issues were not determined
36. It is trite that the power to order transfer from one High Court to another is one that is discretionary and such discretion must be exercised judiciously. A matter can only be transferred if the court from which the applicant is seeking to have the matter transferred has jurisdiction over the said matter and that the applicant has equally satisfied the court that the transfer is necessary.
37. In the case of *[Kithita Ngeana vs Mwaniki Kisume \(2018\) eKLR](#)* where the court stated; -  

' Circumstances that would move a court to grant the order sought were considered in the David Kabungu Case where Okello J stated that: -  
  
'What the court has to consider is whether the applicant has made out a case to justify in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction it is 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 expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application 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 would be refused'
38. The applicant has stated that the matter was originally filed in Nairobi which is near the geographical jurisdiction of the petitioner which has also been alluded to by the interested party who states that it is Murang'a that has the jurisdiction. The court has to look at the balance of convenience, questions



of expense, interest of justice and possibilities of undue hardship which the court has considered in this case.

39. The court is further guided by section 4(3) of the ELC act provides as follows:

' The court shall have and exercise jurisdiction throughout Kenya and shall pursuant to section 26, ensure reasonable and equitable access to its services in every county.'

'(1) The court shall ensure reasonable and equitable access to its services in all counties.

(2) the sitting of the court may be held at such places and at such times, as the court may deem necessary for the expedient and proper discharge of its functions under this act.'

40. This court is guided by sections 1A and 1B of the Civil Procedure Act in ensuring just and timely disposal of proceedings at a cost that is affordable by the respective parties. I note that this petition was initially filed in Nairobi and that the petitioner is a limited liability company involved in the cultivation, marketing and sale of tea and that Unilever Tea Kenya Limited owns 100% shares in the petitioner's company.

41. Since this matter was originally filed in Nairobi and the reason that it was transferred to Malindi ELC has since ceased to exist and the court having not consolidated the petitions as applied it would be only in the interest of justice to transfer back this suit to where in originally begun for hearing and determination.

42. This application is therefore allowed as prayed, matter is hereby transferred ELC Nairobi for hearing and determination.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF OCTOBER, 2022.**

**MA ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

