



REPUBLIC OF KENYA



**M’Muthuri & another v M’Muga & 15 others (Environment and Land Miscellaneous Application 10 of 2023) [2024] KEELC 747 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 10 OF 2023  
CK NZILI, J  
FEBRUARY 14, 2024**

**BETWEEN**

**DANIEL KAUMBUTHU M’MUTHURI ..... 1<sup>ST</sup> APPLICANT**

**M’TWERANDU M’MUGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SAMSON NTIRIO M’MUGA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH M’ITONGA M’MUGA ..... 2<sup>ND</sup> RESPONDENT**

**PAUL MURIUKI M’ITONGA ..... 3<sup>RD</sup> RESPONDENT**

**KIROMI MOSES GITONGA ..... 4<sup>TH</sup> RESPONDENT**

**JOASH ONDIEKI ONTITA ..... 5<sup>TH</sup> RESPONDENT**

**ANDREW KIRIMI MUNGIRIA ..... 6<sup>TH</sup> RESPONDENT**

**MARTIN MWENDA M’ITONGA ..... 7<sup>TH</sup> RESPONDENT**

**MOSES KIOGORA KIRONGO ..... 8<sup>TH</sup> RESPONDENT**

**EDWIN KIRIMI KIREMA ..... 9<sup>TH</sup> RESPONDENT**

**JAPHET KOOME NCHEBERE ..... 10<sup>TH</sup> RESPONDENT**

**SOFIA MUKIRI KINOTI ..... 11<sup>TH</sup> RESPONDENT**

**MARTHA KIOGORWE MAITIMA ..... 12<sup>TH</sup> RESPONDENT**

**CATHERINE KENDI MWIRICHIA ..... 13<sup>TH</sup> RESPONDENT**

**ANASTACIA KIENDE KINYUA ..... 14<sup>TH</sup> RESPONDENT**

**ROSEMARY NTINYARI ..... 15<sup>TH</sup> RESPONDENT**



**PATRICK GITONGA KIMATHI (SUED AS REGISTERED TRUSTEES FOR  
RIVER LAND WELFARE SELF-HELP GROUP) ..... 16<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court is the application dated 20.9.2023 by the applicants, who are the plaintiffs in the lower court. They ask the court to;- stay proceedings in Meru CM ELC No. 55 of 2023, withdraw and transfer the suit to this court, and issue further orders as it may deem fit. The grounds are obtained on the face of the application and in the supporting affidavit sworn by Kiogora Mugambi, advocate on 20.9.2023.
2. It was averred on behalf of the applicants that following the issuance of letters of administration ad litem to represent their late father, they filed as CMC ELC No. 55 of 2023 against the respondents for fraudulently subdividing and transferring the suit land to themselves without knowledge and consent of the deceased or his family. Attached to the supporting affidavit were the grant ad litem and a plaint as an annexure marked K.M. "1" and "2".
3. The applicants aver the respondents filed a valuation report together with the statement of defense, which shows the suit land is valued at over Kshs.20,000,000/=. Therefore, the land is beyond the pecuniary jurisdiction of the lower court. Further, the applicants aver they were surprised how fast the respondents developed the suit premises to such value, which information was not within their knowledge when they filed the suit.
4. The applicants also aver that they were not able to access the suit premises for valuation before filing the suit due to the security surrounding the it since the 11<sup>th</sup> and 12<sup>th</sup> respondents are guarded round the clock by the police, who have denied them access. It was averred that armed with the valuation report; the respondents have even moved the trial court to have the suit dismissed for lack of jurisdiction as per annexure marked K.M. "4".
5. In addition, the applicants aver that it was only fair for this court to correct the oversight on their part by transferring the suit to a court with jurisdiction. The applicants also aver that the title deed for the suit parcels of land was issued between 2021 and 2022 when the land was below Kshs.20,000,000, before the valuation was conducted under the respondent's instructions in 2023.
6. The application is opposed by replying to affidavits sworn by Japhet Koome Nchebere Samson Ntiro M'Muga and Andrew Kirimi Mungiria. On 5.10.2023, 18.10.2023 and 1.11.2023 respectively. The three swear the affidavits on behalf of the 12<sup>th</sup> respondents, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> respondents, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> respondents respectively.
7. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> respondents averred that the application was an abuse of the court process for the Chief Magistrate had no jurisdiction to entertain the suit in the first instance; hence the same was dead on arrival, which this court cannot revive or transfer except to strike it out.
8. The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> respondents aver that jurisdiction was everything, and without jurisdiction, a court cannot move any step forward. To this end, it was averred that this court has no powers to transfer a dead case and that the only option for the applicants was to withdraw the suit and file a fresh one before a court with jurisdiction.
9. The 11<sup>th</sup> and 12<sup>th</sup> respondents aver the application was a dishonest move, misconceived, and an abuse of the court process, because the developments carried out on the suit land could not have been done



- between June 2022 and the filing of the suit. The 11<sup>th</sup> and 12<sup>th</sup> respondents averred they commenced developments on the land on 15.6.2020 after obtaining the requisite licenses and permits from the relevant government agencies. Similarly, they aver that the developments were openly carried out next to Meru-Giaki Miomponi tarmac road, which was visible for everyone to see, including passers-by.
10. The 11<sup>th</sup> respondent avers that the applicants should have been aware of the status of the suit premises. In any event, he averred that he assumed the status of an inspector general of police from 11.11.2022. Therefore, there was no basis for supporting an incompetent suit or using the guarding of the suit property by the police as a red herring. Besides, the 11<sup>th</sup> respondent denied that the suit premises were being guarded as alleged or at all for the applicants to say that they were prevented from valuing the suit premises. Further the 11<sup>th</sup> respondent avers that since there was an admission of filing the suit in a court without jurisdiction, an incompetent suit could not be stayed or transferred.
  11. With leave parties filed written submissions dated 20.11.2023 and 3.11.2020 for the applicants and the 11<sup>th</sup> and 12<sup>th</sup> respondents.
  12. As to whether the suit was a nullity, the applicants submitted that the developments on the suit premises took place during the pendency of the Probate Cause No. E052 of 2022, which was a calculated move to defeat the ends of justice. Therefore, the suit was proper for transfer under Section 18 of the *Civil Procedure Act*; otherwise, it was not filed in bad faith or with an improper motive since the valuation report was not available at the time it was filed.
  13. On whether to withdraw or transfer the suit, the applicants relying on Pamoja Women Development Program and others vs Jackson Kihumbu Wangombe & another (2016) eKLR, submitted the court has inherent jurisdiction in the absence of bad faith to transfer the suit on such conditions as are just as held in Aberdare Investments vs Bernard Wachira & others (2014) eKLR, namely, the interests of parties, the administration of justice and the expenses likely to be incurred.
  14. On whether the respondents transferred and undertook developments in June 2022 and during the pendency of Meru Misc. Succession Cause No. E022 of 2022, it was submitted that the fraud was discovered in 2021 when the respondents visited the suit land in the company of land surveyors to fix boundaries, yet no letters of grant had been issued for the estate of the deceased.
  15. It was submitted that a copy of the green card would show the transfer that occurred during the pendency of the succession case and so has been the developments; otherwise, the suit should not be dismissed but transferred.
  16. The 11<sup>th</sup> and 12<sup>th</sup> respondents submitted that a High Court could not transfer a suit filed in a court without jurisdiction as held in Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & another (2012) eKLR, Equity Bank Ltd vs Bruce Mutie Mutuku t/a Diani Tour & Travel (2016) eKLR. Moreso, the 11<sup>th</sup> and 12<sup>th</sup> respondents submitted that under Article 159 of *the Constitution*, this court cannot remedy the situation and sanctify an otherwise incompetent suit that was a nullity. The 11<sup>th</sup> and 12<sup>th</sup> respondents also submitted that this application was a means to circumvent the objection they had raised at the lower court. Reliance was placed on Macfoy vs United Africa Co. Ltd (1961) 3 ALL ER 1169.
  17. The issue for determination is whether the court should withdraw, stay, or transfer the lower court suit. The applicants moved to this court on 26.9.2023, after an application dated 17.8.2023 was filed on 17.8.2023, by the 11<sup>th</sup> and 12<sup>th</sup> respondents at the lower court, seeking the striking out under Section 7 of the Magistrates Court Act, 2015.



18. The basis of the application at the lower court is that the suit properties in dispute have been valued at Kshs.186,050,000/=, which is well above the jurisdiction of the Magistrate's Court. The 11<sup>th</sup> and 12<sup>th</sup> respondents rely on a valuation report dated 28.7.2023.
19. The applicants herein aver that the 11<sup>th</sup> and 12<sup>th</sup> respondents raised the issue of jurisdiction in a statement of defense. The applicants state that they were not aware that the value of the suit properties had gone up by the time they filed the suit since they could not access the suit properties due to security reasons to appraise themselves on the status of the land. Further, the applicants maintain they filed the suit in good faith, with no ulterior motive, and therefore, this court should exercise its inherent jurisdiction and allow this motion.
20. There is no dispute that the application at the lower court is yet to be heard one way or the other. Either way, it is determined this court is likely to be called upon to determine any issue or appeal by either of the parties.
21. The applicants took almost a month and a half to move to this court following the application at the lower court. The delay in moving to this court has not been explained. The responses by the applicants and the other parties to the application pending at the lower court, have not been attached to this application.
22. In essence, the applicants are asking this court to determine the exact issue which is before the lower court. The trial court is ideally the first port of call to determine whether it has jurisdiction or not. Since it is already seized of the matter, it was premature for the applicants to jump the gun. The applicants have not attached the pleadings, especially the plaint and the statements of defense, for this court to establish what the issues are.
23. Staying of suits is a serious, grave and fundamental interruption on the right of a party to be heard and access justice. It is a power a court sparingly uses and only in exceptional circumstances. See Halsburry's Laws of England 4<sup>th</sup> Edition Vol. 37, pages 330 and 332.
24. Section 6 of the Civil Procedure Act provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. I think the application before this court suffers from the doctrine of sub-judice. The applicants knew of the issue being before the trial court, but instead of awaiting its determination, they ran away to seek refuge before this court.
25. In Republic vs Paul Kihara Kariuki AG & others exparte Law Society of Kenya (2020) eKLR, the court held a matter filed later ought to be stayed in order to await the determination to be made in the earlier suit. To avoid conflicting decisions, I am inclined to find that the issues raised in this application are sub-judice and not ripe for determination at this stage.
26. The application is dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

**ON THIS 14<sup>TH</sup> DAY OF FEBRUARY 2024**

**In presence of**

C.A Kananu

Applicants

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> respondents



Gatwiri Mwiti for applicants

Miss Nelima for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 8<sup>th</sup> respondents and holding brief for Mr. Ondiek for 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> & 16<sup>th</sup> respondents

Miss Kerubo for 11<sup>th</sup> & 12<sup>th</sup> respondents

**HON. CK NZILI**

**JUDGE**

ELC MISC NO. 10 OF 2023 - RULING	0
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