



**Nyambongi (Suing Through Her Attorney Hellen Moraa Gekanana) &
another v Mochere & 3 others (Environment and Land Miscellaneous
Application E008 of 2023) [2024] KEELC 1767 (KLR) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2023**

**M SILA, J
APRIL 9, 2024**

BETWEEN

**EVALINE KENYURI NYAMBONGI (SUING THROUGH HER ATTORNEY
HELLEN MORAA GEKANANA) 1ST APPLICANT
HELLEN MORAA GEKANANA 2ND APPLICANT**

AND

**CHARLES MORIRA MOCHERE 1ST RESPONDENT
DORCAH OSORO NYABICHA 2ND RESPONDENT
ANTHONY MAMBOLEO 3RD RESPONDENT
KISII COUNTY GOVERNMENT 4TH RESPONDENT**

RULING

(Application to transfer suit from the Magistrates’ Court to this court for determination; suit filed as one of trespass; response of the defendants being that they are on the disputed land pursuant to a judgment of this court in a different matter; applicants amending their plaint to add prayers to nullify the judgment of this court; whether or not this court can nullify its own judgment through another suit to be addressed within the suit; application to transfer allowed given that the Magistrates’ Court is a subordinate court which cannot nullify a judgment of this court)

1. The substantive prayer in this miscellaneous notice of motion dated 31 October 2023 is for transfer of the suit Kisii CMCC (ELC) No.123 of 2021 to this court for hearing and disposal. The application is opposed.
2. The applicants are mother and daughter with the 1st applicant being resident in the United States of America. They aver that through a couple of agreements, respectively entered in the year 2015 and



2018, they purchased a portion of the land parcel West Kitutu/Bogusero/3894 from the proprietor thereof, one Elimelida Kerubo Mecha (Elimelida). Subsequently, the said land parcel West Kitutu/Bogusero/3894 was subdivided to carve out the portions purchased, and the said portions came to be comprised in the land parcels West Kitutu/Bogusero/9744 and 9745 (the suit properties) registered in the name of the 1st and 2nd applicants. The applicants aver that the 1st and 2nd respondents invaded the suit properties and the applicants proceeded to file the suit Kisii CMCC (ELC) No. 123 of 2021. The 1st and 2nd respondents filed pleadings wherein they contended that they were exercising rights over the Plots Nos. 18A, 18B, 35 and 36, which were alleged to be Market Plots, and that they were enforcing the judgment in Kisii ELC No. 59 of 2016 where Elimelida Kerbuo Mecha was plaintiff against the 1st and 2nd respondents. The applicants state that they proceeded to engage the Kisii County Ward Administrator for Bogusero who conducted investigations on the Market plots claimed by the 1st and 2nd respondents. It is said that it was found that their creation was a nullity. The applicants state that they amended their plaint to challenge the existence of the Market plots and the validity of the judgment in Kisii ELC No. 59 of 2016 thus the need to transfer the suit from the subordinate court to this superior court.

3. The 1st respondent filed a replying affidavit to oppose the motion. He avers that he is the registered proprietor of the Mosochi Market Plots No. 18B and 35 which were allotted to him by the County Government of Kisii. He avers that in the suit Kisii ELC No. 59 of 2016 it was determined that he is the registered proprietor of the said plots. He adds that the applicants filed an application dated 7 February 2022 in the suit Kisii ELC No. 59 of 2016 and another application in Kisii CMCC (ELC) No. 123 of 2021 which were dismissed. He contends that the issue is res judicata. He believes that the suit Kisii CMCC (ELC) No. 123 of 2021 is in a competent court.
4. The applicants filed a supplementary affidavit asserting that the judgment in Kisii ELC No. 59 of 2016 is a product of fraud and they wish to challenge it. It is urged that a judgment of a court can be challenged if it was obtained fraudulently and given that the judgment in Kisii ELC No. 59 of 2016 was made by this court, it cannot be challenged in an inferior court. There is a further affidavit filed by the 1st respondent. I have not really seen anything significantly new that is added which is different from what was in the initial replying affidavit. Nothing was filed by the 2nd – 4th respondents.
5. Both Mr. Nyamurongi, learned counsel for the applicants, and Mr. Okemwa, learned counsel for the 1st respondent, filed submissions towards the application. I have taken note of these before arriving at my decision.
6. What is before me is essentially an application for transfer of suit from the Magistrates' Court to this court. This court has jurisdiction, pursuant to Section 18 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, to transfer a suit from the subordinate court to itself for trial. That law is drawn as follows :-

18. Power of High Court to withdraw and transfer case instituted in subordinate court

- (1) 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.
7. The word ‘High Court’ used in the Section above must be read to also include this court as it is a court of equal status with the High Court. In our case, the applicants did file the suit Kisii CMCC (Land Case) No. 123 of 2020 before the Magistrates’ court against the respondents. When filed, it appeared to be a simple case of trespass over the suit properties. After seeing the response of the respondents where they asserted that they are legitimately on the suit properties pursuant to a judgment of this court in Kisii ELC No. 59 of 2016, the applicants proceeded to amend their plaint to inter alia urge that the judgment in the said suit was obtained by fraud and is illegal, null and void. It is the argument of the applicants that the law permits them to impugn a judgment of a court through another suit and they have cited the case of Sukari Sugar Industries Limited vs Ochola Peter Ariyo, High Court at Migori, Civil Appeal No. 37 of 2020 (judgment of Wendo J, delivered on 9 March 2021) as authority supporting this position.
8. In his submissions, Mr. Okemwa for the respondent argued that this court lacks jurisdiction to nullify its own decision. In my opinion, going into the merits of that debate, at this point in time, is misplaced. That will need a different level of interrogation either upon being moved through a substantive application or after hearing the case. For now, it is apparent that this is the path that the applicants wish to take and it is trite that a decision of a superior court cannot be challenged in a subordinate court. The amendment in the pleadings to assert this point was not envisaged at the time that the suit was filed and I cannot fault the applicants for initially filing the suit before the Magistrates’ Court.
9. So that the applicants can have a chance to urge their case as they wish, I will allow the application to transfer the case Kisii CMCC (Land Case) No. 123 of 2020 to this court for disposal. I see absolutely no prejudice to the respondents.
10. I make no orders as to the costs of this application.
11. Orders accordingly.

DATED AND DELIVERED THIS 9 DAY OF APRIL 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of :

Ms. Kebungo for the applicants

N/A for the respondents

Court Assistant – Aphline Owiwa

