



**Ocharo v Ocharo & another (Environment and Land Miscellaneous Application
E016 of 2023) [2024] KEELC 3568 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2023
CA OCHIENG, J
APRIL 11, 2024**

BETWEEN

MOSES KERANDI OCHARO APPLICANT

AND

MARGARET BOSIBORI OCHARO 1ST RESPONDENT

THOMAS MWANGI KING'ANGA'I 2ND RESPONDENT

RULING

1. What is before Court for determination is the Applicant's Notice of Motion application dated the 14th August, 2023 where he seeks the following Orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to arrest the hearing and/or stay of proceedings in Mavoko MC ELC No. 032 of 2021 between *Margaret Ocharo versus Moses Ocharo* pending in Mavoko Magistrates Court pending the hearing and determination of this Application.
 - d. That the suit before the subordinate Court being Mavoko MC ELC No. 032 of 2021 between *Margaret Ocharo versus Moses Ocharo* be withdrawn and brought before this Honourable Court forthwith for hearing and determination and or disposal.
 - e. That the costs of this Application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Ondari Johnson where he provides the background of the aforementioned case. He deposes that the Mavoko Magistrates' Court lacks jurisdiction to hear and determine Mavoko MC ELC No. E032 of 2021 since the combined value of the suit properties being Plot No. 309 and Plot No. 2468 is approximately Kshs.



38,000,000/= which exceeds the pecuniary jurisdiction of the Magistrates' Court. He confirms that this Honourable Court has jurisdiction to hear and determine the said suit.

3. The Respondent opposed the instant application by filing a replying affidavit sworn by Margaret Bosibori Ocharo where she deposes that the said application is an afterthought and a waste of the court's time. She claims the instant application is *res judicata*. She explains that the only property in dispute in MC ELC No. E032 of 2021 Mavoko is Plot No. 309 Mlolongo Gwata Phase 1(2). She denies that the property in dispute is valued at Kshs. 38,000,000/=. She insists that she is the registered owner of Plot No. 309 Mlolongo Gwata Phase 1(2) in which she has been in possession of, for a period of eleven (11) years, without interference from any party. Further, she has been paying land rates and filed the receipts in court. She avers that she filed the lower court suit when the Applicant commenced interfering with the suit land. She reiterates that the issues of jurisdiction has not been raised in the Counterclaim which the Applicant filed in Mavoko MC ELC No. 032 of 2021 between *Margaret Ocharo versus Moses Ocharo*. Further, the Honourable Court had already issued orders dated the 29th July, 2021 restraining the Applicant including his agents from interfering with her quiet possession of the suit land, which orders he continues to defy. She claims the Applicant had previously filed ELC Misc App No. E023 of 2023 before this Court seeking for orders of stay, which application was dismissed by Hon. Justice Annette Nyukuri as a waste of the court's time.
4. The application was canvassed by way of written submissions which I note was only filed by the Respondent.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion including the respective affidavits, annexures and submissions, the only issue for determination is whether Mavoko MC ELC No. 032 of 2021 between *Margaret Ocharo versus Moses Ocharo* should be withdrawn and transferred to this Court for hearing and determination.
6. The Applicant has sought for Mavoko MC ELC No. 032 of 2021 between *Margaret Ocharo versus Moses Ocharo*, to be withdrawn and transferred to this Honourable Court for hearing and determination. He has claimed that the lower court does not have jurisdiction to handle the matter as the value of the suit properties therein is Kshs. 38,000,000/= which is beyond the pecuniary jurisdiction of the Chief Magistrates' Court. The Respondent has opposed the instant application insisting that the only property in dispute is Plot No. 309 Mlolongo Gwata Phase 1(2) and not the two as claimed. Further, she insists the instant application is *res judicata* as the Applicant previously filed Machakos ELC Misc E023 of 2023 seeking to transfer the Mavoko Suit to the ELC which application was dismissed by Justice Nyukuri as a waste of court's time.
7. On perusal of the Complaint filed in Mavoko MC ELC No. 032 of 2021 between *Margaret Ocharo versus Moses Ocharo*, I note the Plaintiff sought the following prayers:
 - a. A permanent injunction be and is hereby issued by the Honourable Court restraining the Defendant, his agents, employees, assigns from interfering with the Plaintiff's parcel of land known as Plot No 309 Mlolongo Gwata Phase 1(2) within Machakos County.
 - b. The Defendant herein be and hereby restrained from trespassing on Plaintiff's parcel of land known as Plot No. 309 Mlolongo Gwata Phase 1(2) within Machakos County.
 - c. Cost of the suit be provided for.
 - d. Any other relief that Honourable Court may deem fit to grant.



8. While the Applicant in his Counterclaim introduced Plot 2468 and sought for the following Orders:
9.
 - a. A declaration that the 1st and 2nd Defendant holds the suit properties Plot No. 309 Mlolongo Gwata Phase 1(2) and Plot 2468 in trust and on behalf of the Plaintiff who is the rightful and lawful owner thereof.
 - b. A declaration that the purported registration of the 1st Defendant Margaret Bosibori Ocharo and 2nd Defendant Thomas Mwangi King'ang'ai as the properties of Plot No. 309 Mlolongo Gwata Phase 1(2) and Plot No. Plot 2468 for the said land is fraudulent, illegal, null and void.
 - c. An order compelling the 1st Defendant and 2nd Defendant to execute a transfer in respect of Plot No. 309 Mlolongo Gwata Phase 1 (2) and Plot 2468 in favour of the Plaintiff and in the absence thereof the same to be executed by the Executive Officer or a Deputy Registrar of this Honourable Court.
 - d. An order that the 1st Defendant hands over forthwith to the Plaintiff his John Deere tractor Registration No. KBKxxxx, ownership documents (title deed) for a plot in Kitengela, machine & tools in their custody.
 - e. Costs of the suit and counterclaim be provided.
10. The Applicant further annexed a copy of the valuation report that confirms the value of the suit properties in dispute.
11. On power to transfer of suits, Section 18 of the [Civil Procedure Act](#) provides that;
 - “(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 dipose 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”.



12. On pecuniary jurisdiction of the Magistrates' Court, section 10 of the [Magistrates' Court Act](#) stipulates that:

'A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- a. twenty million shillings, where the court is presided over by a chief magistrate;
- b. fifteen million shillings, where the court is presided over by a senior principal magistrate;
- c. ten million shillings, where the court is presided over by a principal magistrate;
- d. seven million shillings, where the court is presided over by a senior resident magistrate; or
- e. five million shillings, where the court is presided over by a resident magistrate.'

13. In the case [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) (1989) eKLR the Court held:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

14. While in the case of [Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another](#) [2012] eKLR, the Court held as follows:

"The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi vs. Musiramo (supra)*, Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In *Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (supra)*, Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the [Civil Procedure Act](#) cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited vs. National Bank of Kenya*"

See also the case of [Rebecca Chumo v Christina Cheptoo Chumo](#) [2021] eKLR

15. Based on the facts before me, noting that it is the Applicant that introduced a new parcel of land including chattels in the counterclaim, while relying on the legal provisions cited as well as associating myself with the quoted decisions, I find that the Mavoko Chief Magistrate's Court does lack jurisdiction to hear and determine the Plaintiff's claim including Counterclaim. I note the Respondent has disputed the value of the suit land including valuation report as she was not aware of the process of valuation. I opine that if the Applicant seeks other remedies including claim for chattels against the Respondent, which this court is devoid of jurisdiction to handle, it is my considered view that he should file a separate suit instead.



16. In the circumstance, I find the instant Notice of Motion application devoid of merit and will disallow it but make no order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF APRIL, 2024.

CHRISTINE OCHIENG

JUDGE

In the presence of;

Ms. Azangalala holding brief for Katunga Mbuvi for Respondents

Applicant in person

