



**Lelei v Nyakundi & another (Environment & Land Case
E034 of 2023) [2024] KEELC 3611 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3611 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E034 OF 2023**

LA OMOLLO, J

MAY 2, 2024

BETWEEN

JOSEPH KIBILAT LELEI APPLICANT

AND

MATURA OLIVIA NYAKUNDI 1ST RESPONDENT

ROSE KERUBO MATURA 2ND RESPONDENT

RULING

1. This ruling is in respect to the Applicant’s Notice of Motion application dated 19th June, 2023. The application seeks the following orders:
 - a. That this Honourable Court be pleased to allow for the continuity of Nakuru CMELC No. 98 of 2023 Joseph Kirirat Lelei V John Matura Jerome be heard and determined in Nakuru.
 - b. That in the alternative, this Honourable Court be pleased to allow for the transfer of Matunda Olivia Nyakundi & another V Joseph Kibilat Lelei Molo CMELC E025 of 2023 to Nakuru Chief Magistrate’s court for the same to be heard and determined conclusively.
 - c. That further in the alternative this Honourable Court be pleased to allow for the transfer of Nakuru CMELC No. 98 of 2023 Joseph Kirirat Lelei V John Matura Jerome be heard and determined in Molo Chief Magistrate’s court.
 - d. That costs of this application be in the cause.
2. The application is based on the grounds on its face and supported by the affidavit sworn on 19th June, 2023 by one Joseph Kibilat Lelei.



Factual Background.

3. The Plaintiff commenced this suit vide a plaint dated 23rd February, 2023. In the plaint, she prays for judgment against the Defendant for:
 - a. A declaration that the Plaintiff is the legal owner of parcel of land known as Nakuru/Kapsita/2517 to the exclusion of the Defendant.
 - b. A permanent injunction to be issued against the Defendant by himself, his agents, and/or proxies or any other persons acting under or on his authority or claiming through or under him from accessing or entering, remaining, using, occupying, possessing, evicting, constructing, subdividing and/or fencing or in any other manner interfering with the Plaintiff's parcel of land known as Nakuru/Kapsita/2517.
 - c. Costs of this suit
 - d. Any other or further relief which this Honourable court may deem fit to grant.

Applicant's Contention.

4. The Applicant contends that he is the owner of the suit parcel Nakuru/Kapsita/2517 where he has been doing subsistence farming.
5. He further contends that he was threatened by the Respondent which threat prompted him to file a matter in Nakuru CMELC 98 of 2023. He contends that the Respondents were served with the said pleadings and instead of filing their defence, they filed a new matter in Molo CMELC E025 of 2023.
6. It is the Applicant's contention that there was a huge likelihood that the two courts will arrive at different outcomes. The Applicant contends that it would be fair that the matter be allowed to continue in Nakuru and that the Molo matter be transferred and consolidated.
7. He deposes that he is also amenable to transferring the matter to Molo for purposes of consolidation, hearing and determination.
8. The Applicant also deposes that the interest of justice will be better served by allowing the orders sought.
9. In conclusion, the Applicant states that the court is vested with the appropriate jurisdiction to transfer and or issue directions in this matter.

Respondent's Response.

10. In response to the application, the Respondents filed a replying affidavit sworn on 3rd July, 2023 by one Mutura Olivia Nyakundi.
11. The 1st Respondent deposes that the application is scandalous and an abuse of the court process. It is her deposition that the same application was determined vide a preliminary objection in Molo ELC No. 25 of 2023.
12. The 1st Respondent deposed that the Molo court having made a determination, the only recourse for the Applicant was to seek for review and appeal against the said ruling.



13. She also deposes that the suit property belongs to the estate of John Matura Jerome (deceased) and that sometime in February 2023 they received information that some people had invaded the deceased farm.
14. The 1st Respondent further deposes that they reported to Elburgon police station and moved to court vide Molo ELC No. 25 of 2023.
15. She deposes that the Nakuru court does not have jurisdiction to hear and determine the matter as the suit property is situated within Molo sub county.
16. She further deposes that the Molo matter cannot be consolidated with the Nakuru matter as no party can be joined in a suit filed against a dead person.
17. In conclusion, she deposes that they were not a party in ELC No. 98 of 2023 and urges the court to dismiss the application with costs.

Issues for Determination.

18. The Applicant filed his submissions on 27th October, 2023. He submits that the matter herein is rather straightforward as it involves two matters filed in respect of the suit land in courts in Nakuru and Molo.
19. He submits that there is a likelihood of the two courts arriving at different conclusions over the same parcel of land.
20. He further submits that the Molo file ought to be forwarded to Nakuru for consolidation and disposal. He also submits that should the court be inclined to submit the Nakuru file to Molo, he be awarded costs as the initial suit was filed in Nakuru.
21. The Respondents filed their submissions on 3rd November, 2023. They submit that the instant application is a waste of the court's time and should be dismissed with costs.
22. They further submit that the Plaintiff in Nakuru CMC ELC 98 of 2023 filed a case against John Matura Jerome (deceased) who died on 30th April, 2018.
23. They submit that at the time of institution of the said suit, the deceased had already been buried. They further submit that the suit against him is void and a nullity.
24. The Respondents rely on the judicial decision in Benjamin Leonard Mc Foy V United Africa Company Limited (1961) All ER 1169 and Viktar Maina Ngunjiri & 4 Others v AG & 6 Others, HCC NAI NO. 21 of 2016 (2018) eKLR.
25. They submit that there is nothing capable of consolidation with Molo ELC 25 of 2023 or to be transferred to Molo as the case in Nakuru cannot stand.
26. In conclusion they urged the court to dismiss the application with costs.

Analysis and Determination.

27. It is my considered view that the sole issue for determination is;
 - a. Whether the Applicant is entitled to orders seeking transfer of this suit.
28. Section 18 of the *Civil Procedure Act* bestows upon the ELC Court powers to transfer suits of a civil nature. It provides as follows: -



- (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”.
29. The Applicant has filed the present application seeking that the instant suit proceed to be heard in Nakuru CMC ELC 98 of 2023 and have the case in Molo CMELC E025 of 2023 transferred to Nakuru or vice versa.
30. The Respondents on the other hand submits that the Molo court having already decided on the Preliminary Objection on jurisdiction, the only recourse for the Applicant was to seek for review and appeal against the said ruling.
31. They further submit that Nakuru Magistrate’s court lacks the jurisdiction to hear and determine the matter as the suit property is situated within Molo sub county.
32. This court has the discretion to transfer a suit, however, a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons as to why the transfer is merited.
33. Section 18 of the [Civil Procedure Act](#) donates power to this “Court to transfer suits. It states as follows:
- (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.”
34. In the instant case, the Applicant contends that he is the owner of the suit parcel Nakuru/Kapsita/2517. He further contends that he was threatened by the Respondents prompting him to file a matter in Nakuru CMELC 98 of 2023.
35. The Applicant contends that he is also amenable to transferring the matter to Molo for purposes of consolidation, hearing and determination.
36. The Respondents on the other hand submits that the suit property belongs to the estate of John Matura Jerome (deceased). They further submit that they moved to court vide Molo ELC No. 25 of 2023 and adds that the Nakuru court does not have jurisdiction to hear and determine the matter because the suit property is situated within Molo sub county.
37. The Respondents also submit that at the time of institution of Nakuru CMC ELC 98 of 2023, the deceased had already been buried. They further submit that the suit against him is void and a nullity.
38. I have perused the court file and it is evident that the suit property and parties in Nakuru CMC ELC 98 of 2023 and Molo ELC No. 25 of 2023 are similar.
39. It is not in dispute that the deceased died on the 30th April, 2018. A certificate of death is annexed as proof of this fact. It is evident that both suits were filed after his death.
40. In Molo ELC No. 25 of 2023 the legal representative of the deceased’s estate is the Plaintiff while in Nakuru CMC ELC 98 of 2023 the suit has been instituted in the deceased’s name.
41. In the judicial decision Housing Finance Company of Kenya Limited v Muriu (Deceased) (Civil Appeal 281 of 2011) [2024] KEHC 419 (KLR) (Civ) (24 January 2024) (Ruling) the court held that a suit filed against a dead person is a nullity.
42. This court agrees with the Respondents that the suit Nakuru CMC ELC 98 of 2023 was filed after the death of the deceased and is therefore a nullity. There is nothing to transfer or consolidate.

Disposition.

43. In the upshot, the application dated 19th June, 2023 is hereby dismissed with costs to the Respondents.
44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 2ND DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Applicant.

No appearance for the Respondents.

Court Assistant; Mr. Joseph Makori.

