



**Motuka v Henry Abuga County Surveyor, Nyamira & 3 others (Environment and Land
Judicial Review Case E001 of 2022) [2023] KEELC 18723 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18723 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022

JM KAMAU, J

JULY 6, 2023

**IN THE MATTER OF AN APPLICATION BY GIDEON MOCHERE
MOTUKA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

AND

IN THE MATTER OF KEROKA ELC NO. 15 OF 2021

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

**IN THE MATTER OF LAND PARCEL NUMBER
EAST KITUTU MWAMANGERA/1907 AND 4557**

BETWEEN

GIDEON MOCHERE MOTUKA APPLICANT

AND

HENRY ABUGA COUNTY SURVEYOR, NYAMIRA ... 1ST INTERESTED PARTY

WILDFRED GEKONGE NGERESA 2ND INTERESTED PARTY

**PRINCIPAL MAGISTRATE, KEROKA LAW COURTS 3RD INTERESTED
PARTY**

ATTORNEY GENERAL 4TH INTERESTED PARTY



RULING

1. After I made a Ruling in Keroka Principal Magistrate's Court in CMCC ELC No. 15 of 2021 to the effect that the Consent recorded in Court on 26/07/2022 was indeed tainted with procedural impropriety which makes it illegal and irrational and that the same was also punctuated by non-observance of one of the Rules of Natural Justice by condemning the Applicant unheard after craftily trying to remove him from the suit and then deciding to reduce the size of his property and I also observed that the *Ex-parte* Applicant was negatively affected by the Consent Order recorded in Court on 26/07/2022 and should have been heard on why part of his property was taken away this Court opined that even in the absence of express procedural requirements in the *Civil Procedure Rules* that the Applicant should have been heard on the withdrawal of the suit against him under Order 25 Rule 1 of the *Civil Procedure Rule*, fairness still dictated that he ought to have been given prior Notice of the Consent recorded by the parties as long as the said Order touched on his interests. The Court then did make the following orders:
 1. An Order of Certiorari be and is hereby issued to remove into this Court for purposes of being quashed the Order of Keroka Principal Magistrate dated 26/07/2022 in Keroka PMCC ELC, Case No. 15 of 2021.
 2. The Notice of withdrawal dated 07/07/20 by the 2nd Interested Parties in Keroka PMCC ELC Case No. 15 of 2021 is hereby set aside.
 3. This case shall be taken back to Keroka Principal Magistrate's Court to be heard afresh to its conclusion before another Court/Magistrate.
 4. The *Ex-parte* Applicant is hereby granted the costs of this Judicial Review against all the Interested Parties jointly and severally.
2. The *Ex parte* Applicant has come back to this Court seeking Orders that:
 1. The Honourable Court may be pleased to order that the Keroka Principal Magistrate Court File No. ELC No. 15 of 2021 be withdrawn and transferred to Nyamira ELC for Hearing and disposal.
 2. Any other Order may be given as deemed fit.
3. The Grounds upon which he has sought the said Orders are that:
 1. The Applicant being the Defendant in Keroka ELC 15/2021 is not likely to get a fair hearing within Keroka Law Courts because the Court has always been biased against the Applicant and therefore change of Court/Magistrate within Keroka Law Courts may not be of help as the previous Court is likely to influence the other Court/Magistrate hence the hearing at Keroka Law Courts is not free.
 2. There is conflict of interest in the matter for example a Secretary to the Principal Magistrate, Keroka Law Courts is a biological sister to one Vincent Mochama Nyaberi and who is pushing the Plaintiff (Wilfred Gekonga Ngeresa) from behind the scene to falsely claim a road of access through the Applicant's Plot No. Mwamangera/1907 and the said Court Secretary is likely to influence the hearing of the suit in favour of the Plaintiff. The said Secretary is an interested party and also residing next to Plot no. 4557 and she is also interested in the road of access being created.



3. The Area Chief (Keroka Town) has an interest in the matter and is a frequenter of Keroka Law Courts and always siding with the Plaintiff and purchasers against the Applicant and thus a greater likelihood of interference with the fair hearing. The Area Chief at one time asked the Applicant to surrender his title deed for parcel Number 1907 for amendment so that the said road of access could be established and When the Applicant declined, there developed bad blood between the Chief and the Applicant to date. Again on 14/6/2022 during the site visit by the Court the said Chief attended without invitation and at some point loudly made a remark in front of the parties and the Magistrate that he would bring bulldozers to dig the road through the Applicants land with or without a Court Order and such remark bordered on contempt of Court but no action was taken by Court.
 4. That another Court outside Keroka is neutral environment to all the parties in the suit.
 5. The Application is made in good faith.
4. He also went ahead to depone under paragraphs 5,6,7, 8 and 9 of the Affidavit in support of his Application as follows: -
5. That I strongly believe that the entire Keroka Law Court is not neutral ground because one of the Secretary to the Principal Magistrate, Keroka Law Courts is a biological sister to one Vincent Mochama Nyaberi who is using the Plaintiff to get a road of access by hook or by crook through the parcel number 1907 hence the said Secretary who also lives next to the land parcel 4557 is equally interested in creation of road through my land and this shall develop conflict of interest and in the case and the Court is not likely to give a fair hearing.
 6. That I know of my own knowledge that the Keroka Town Chief, the Plaintiff and several purchasers of land are pushing for the creation of a road through my land by crafting a false scheme and because they are living within the proximity of Keroka Law Courts they are likely to influence the hearing of the case as they are always seen within the Keroka Law Courts and for example on 14/6/2022 during the Court visit to the site the Chief Publicly declared in the presence of the Magistrate that if the Court was unable to Order the road opening he would create the road atone by bringing a bulldozer to bring down part of the Applicant's building to create a road.
 7. That I know of my own knowledge that the hearing of the suit should be done outside Keroka Law Courts for fair hearing to be achieved.
 8. That I therefore pray for the transfer of the Keroka ELC File No. 15 of 2021 to the ELC at Nyamira for hearing and disposal.
 9. That the transfer of the suit to Nyamira ELC is not Prejudicial to the Respondent.
5. I have not seen any Response from any of the Interested Parties and when invited to make submissions, the *Ex Parte* Applicant opted to rely upon his Application and Supporting Affidavit. The Interested Parties did not appear in Court.
 6. To begin with, this Application does not fall under Judicial Review and can therefore not be entertained in this Suit.
 7. On the issue of whether this Court ought to withdraw the case from Keroka to Nyamira or any other Court station, under the Title "Power of High Court to withdraw and transfer case instituted in subordinate court, Section 18 of the [Civil Procedure Act](#) 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.”

8. In the case of *John Mwangi Karanja V Alfred Ndiangui* [2011] eKLR the Court held that:

.....With the enactment of sections 1A and 1B of the *Civil Procedure Act*, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These sections provide as follows: -

“1A

 - (1) The overriding objective of this *Act* and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the *Act*.
 - (2) The Court shall, in the exercise of its powers under this *Act* or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the *Act* and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.

1B.

 - (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;



- (d) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and
- e) the use of suitable technology.”

It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).

The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.....”

9. In the Ugandan case of *David Kabungu Vs Zikarenga* HCCC NO. 36 of 1995 which was relied upon by Lady Justice F. Muchemi in Nyeri High Court Civil Misc. No. E20 of 2020 *GKK Versus ANK & SKK* it was held that:

Section 18 (1) (b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it 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...”



10. The Judge went on to quote the case of *Hangzhou Agrochemicals Industries Ltd. Vs Panda flowers Ltd* [2012] eKLR where it was held that: -

..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. 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. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”

11. The Ex Parte Applicant has complained of the likelihood of bias against him by the Keroka Principal Magistrate’s Court and that he is likely to suffer prejudice if the case remains at Keroka.
12. Under Section 7 of the *Civil Procedure Act*, a case ought to be filed either where the Defendant resides or where the cause of action arose. Section 18 empowers the High Court to withdraw and transfer a case instituted in a subordinate court on application of any of the parties or on its own motion. For the court to grant an order of transfer the Applicant must satisfy the court as to the reasons for such orders. It is not in doubt that the Principal Magistrate’s Court at Keroka is competent enough to hear and determine the issues herein. But the *Ex Parte* Applicant’s apprehension is that the change of the Trial Magistrate by this Court would not assure him of fairness as long as the matter is being heard in Keroka Court Station. He argues that the previous trial Magistrate would influence the incoming one. I disagree with this position. Every Court acts independently of every other Court as it discharges judicial matters. The only time a Judge/ Magistrate has some authority over another is in administrative matters. This is not the case here. In the absence of grounds of misconduct on the part of the trial court or a likelihood of the same, I would hesitate to grant the orders sought by the Applicant. Even where the bias is real the same should first be raised before the Trial Magistrate. I would only deal with Appeals from such Applications. Otherwise, what the Applicant is engaging in is forum shopping which this Court would not entertain.
13. The upshot of the above is that the Application dated 12/5/2023 is hereby dismissed with costs and I also do not see any other Order I may deem fit to grant as prayed for in Number 2 of the *Ex parte* Applicant’s prayers.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 6TH DAY OF JULY 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Applicant: Mr. Mong’are holding brief for Mr. Rono

Respondents: N/A

