



**Khakame v Kimathi & 2 others (Environment & Land Case
E044 of 2022) [2022] KEELC 13434 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E044 OF 2022**

**MD MWANGI, J
OCTOBER 5, 2022**

BETWEEN

CAROLINE KHAKAME PLAINTIFF

AND

FRANKLIN KIMATHI 1ST DEFENDANT

NAIROBI CITY COUNTY 2ND DEFENDANT

NAIROBI METROPOLITAN SERVICES 3RD DEFENDANT

(In respect of the Notice of Motion dated the 22nd June, 2022 seeking to strike out the Plaintiff's suit on the basis of the existence of another suit before the Chief Magistrate's Court)

RULING

Background

1. By a notice of motion application dated the June 22, 2022 brought under section 3A of the [Civil Procedure Act](#), order 2 rule 15 and order 51 of the [Civil Procedure Rules](#), the 1st defendant seeks for orders that;
 - a. The court be pleased to strike out this suit as it amounts to an abuse of the court process.
 - b. The court be pleased to give such further reliefs as may be just in the circumstances.
 - c. Costs of the application be provided for.
2. The application is based on the grounds on the face of it and on the supporting affidavit of Franklin Kimathi deponed on the June 22, 2022. The 1st defendant deposes that he is the duly registered proprietor of Land Title No Nairobi/Block 63/742, the suit property herein, having acquired a certificate of title.



3. The 1st defendant avers that sometime back in 2018, the plaintiff commenced a suit in the Milimani Chief Magistrate's Court being ELC Case No 10760 of 2018 in which the plaintiff lays a claim of ownership over the the suit property, which is the subject matter of this suit as well. The plaint in that case before the magistrate's court was accompanied by an application under certificate of urgency seeking an injunction against the defendants. The court granted the plaintiff *ex parte* orders prohibiting the 1st defendant from evicting him from the suit property.
4. The 1st defendant contends that later on, it emerged that there were other suits which were related to the suit in the Chief Magistrates' Court. All those suits were subsequently consolidated only for the plaintiff herein to file a notice of withdrawal of the consolidated suits. However, the 1st defendant argues that the withdrawal was not sanctioned by the court and was therefore not only irregular and unprocedural but in essence inconsequential.
5. The 1st defendant/applicant therefore argues that the filing of the proceedings in this court is an abuse of the court process since the case before the Magistrate's court is still alive. The applicant contends that a party in litigation is precluded from filing multiple proceedings in different courts against the same party and over the same cause of action. He avers that the matter has pending in the lower court has been pending there for over four years.
6. The applicant's position is that the proper thing for the plaintiff to have done was to seek the transfer of the suit from the lower court to this court. The filing of this suit is one of the plaintiff's many delaying tactics in the determination of the ownership of the suit property. He prays that this court exercises its power under the overriding objective principle and dismiss the suit herein and the parties be directed to prosecute the matter in the lower court.
7. The application is opposed by the plaintiff who filed a replying affidavit deponed on the July 15, 2022.

Replying affidavit

8. The plaintiff in her replying affidavit deposes that pursuant to order 25 rule 1 of the [Civil Procedure Rules](#), a pleading is withdrawn by filing a 'Withdrawal Notice' as long as the matter has not been set down for hearing. Therefore, by filing a notice of withdrawal in the Chief Magistrate's Environment and Land Cause Number 10760 of 2018, the suit therein was effectively withdrawn.
9. The plaintiff/respondent further contends that upon valuation of the suit property by the Nairobi city county, the suit property was valued at Kshs 41,183,000/= which is beyond the Chief Magistrate's Court pecuniary jurisdiction. Accordingly, the plaintiff opines that by virtue of the lack of jurisdiction, the counterclaim by the 1st defendant/applicant in the Chief Magistrate's court is a nullity in law as the suit is incompetent since the court does not have jurisdiction to even transfer such a matter.
10. The plaintiff further states that the erroneous filing of the suit in the lower court was a professional mistake on the part of her advocate and should not therefore be visited upon her as a client. She also argues that transfer of a lower court matter under section 18 of the [Civil Procedure Act](#) cannot be exercised in a matter where the suit was initially filed in a court that lacks jurisdiction. That such a transfer would be irregular.
11. The plaintiff asserts that the suit filed in the lower court is not only an incompetent suit but also a nullity in law hence there is no suit to be transferred. Consequently, the 1st defendant's application should be dismissed with costs.



Court's directions

12. The court directed that the 1st defendant's application be canvassed by way of written submissions. However, neither of the parties complied with said directions. There are no written submissions on record from either of the parties.

Issues for determination

13. I have considered the application and the response by the plaintiff. The main issues for determination are;
 - a. Whether the Magistrate's Court case, CM ELC No 10760 of 2018; Caroline Khakame v Frankline Kimathi as consolidated with CM ELC No 10787 of 2018; David Adem & another v Caroline Khakame was duly withdrawn by the 'notice of withdrawal' filed by the plaintiff.
 - b) Whether this suit should be struck out for violating the provisions of section 6 of the [Civil Procedure Act](#)

Analysis and determination

A. Whether the Magistrate's Court case, CM ELC No 10760 of 2018; Caroline Khakame v Frankline Kimathi as consolidated with CM ELC No 10787 of 2018; David Adem & Another v Caroline Khakame was duly withdrawn by the 'notice of withdrawal' filed by the Plaintiff.

14. It is not in dispute that the plaintiff herein, the suit in the Milimani Chief Magistrates' Court, CMCC No 10760 of 2018 praying for among other orders, a permanent injunction against the 1st defendant. Vide an order issued on the October 13, 2022, the said lower court file, CMCC No 10760 of 2018 was consolidated with CMCC No 10787 of 2018; David Adem & another v Caroline Khakame. The consolidated files were then set down for hearing on the November 24, 2020 and the Plaintiff directed to effect service upon the other parties.
15. When the consolidated matters came up for hearing, the plaintiff changed the advocates representing her from her previous advocates, Ombati Otieno & Opondo Advocates to another law firm. The new advocates sought time to familiarize themselves with the files before proceeding with the hearing. After sometime, the plaintiff once again changed her advocates and appointed her current advocates. It is the current firm of advocates that filed the 'notice of withdrawal' of the suit in the lower court dated the February 2, 2022 seeking to discontinue the suit against the defendants with no orders as to costs.
16. The 1st defendant contends that the institution of the current suit herein is a delaying tactic by the plaintiff to delay the determination of the dispute. He contends that the matter in the lower court was purportedly withdrawn without the approval of the court. The withdrawal therefore was inconsequential. The suit before the Magistrate's court is therefore still alive. The 1st defendant prays that this matter be struck out with costs for being an abuse of the process of court.
17. The plaintiff on her part argues that the withdrawal of the lower court matter was necessitated after a valuation report was conducted on the suit property. That current market value of the suit property is Kshs. 41,183,000/=, thus beyond the pecuniary jurisdiction of the Magistrates' court. The plaintiff further asserts that since the suit was erroneously filed in the wrong court, then the provisions of section 18 of the [Civil Procedure Act](#) which bestows upon the High Court the powers to transfer suits of a civil nature are not applicable contrary to the suggestion by the 1st defendant. The only option available to her then was to withdraw the suit as she did. She argues that she had a right to withdraw the suit without the need for approval from the court.



18. Withdrawal of suit by a plaintiff is provided for in the [Civil Procedure Rules](#). Justice Ibrahim (SCJ) in the case of *John Ochanda vs Telkom Kenya Ltd* (SC APP. No 25 of 2014) observed that;
- “I am also of the view that just like under the Civil Procedure Rules, the right to withdraw or discontinue proceedings or withdraw a notice of appeal respectively ought to be allowed as a matter of right subject to any issue of costs, which can be claimed by the respondents, if any.”
19. The Court of Appeal on the other hand in the case of *Beijing Industrial Designing and Researching Institute vs Lagoon Development Limited* [2015] eKLR set down the three scenarios where suits may be discontinued or withdrawn:
- a. Where the suit has not been set down for hearing. in such an instance, the plaintiff is at liberty, at anytime to discontinue the suit or withdraw the claim or any part thereof. All that the plaintiff is required is to give notice in writing and serve it on all the parties.
 - b. When the suit has been set down for hearing. In such an instance the suit may be discontinued or withdrawn either wholly or in part by all the parties signing and filing a written consent.
 - c. When the suit has been set down for hearing but the parties have not reached a consent on discontinuance or withdrawal of the suit or any part of the claim thereof. The plaintiff must obtain leave of the court. Such leave is granted upon such terms as are just.
20. Evidently, scenario c, (above) obtains in the case before the Magistrate’s Court. It is not in doubt that the matter had been set down for hearing. That being the case, the plaintiff then was bound to seek leave of the court which she didn’t. Therefore the consolidated files in the lower court between the parties herein were not properly withdrawn as the court’s approval was not sought. The notice by the plaintiff has therefore not taken effect. The suits have effectively not been withdrawn.
21. Off course there is the issue of the counter-claim which must be addressed. The withdrawal of the main suit, even if it was proper, would not affect the counter-claim by the 1st defendant. The court in the case of *Beatrice Mumbi Wamuhuu vs Mobil Oil Kenya Limited* (2011) eKLR noted that where there is a counter-claim in a suit, it is treated as a separate suit.
22. This court’s finding is that the Magistrate’s Court case, CM ELC No 10760 of 2018; Caroline Khakame v Frankline Kimathi as consolidated with CM ELC No 10787 of 2018; David Adem & another v Caroline Khakame has not effectively been withdrawn.

B. Whether this suit should be struck out for violating the provisions of section 6 of the [Civil Procedure Act](#)

23. Having made a finding that the suit(s) before the Magistrate’s Court has effectively not been withdrawn, I now proceed to consider whether the plaintiff’s suit in this case should be struck out as prayed for by the 1st defendant.
24. The 1st defendant’s motion is expressed to be brought under order 2 rule 15 of the [Civil Procedure Rules](#) which deals with striking out of pleadings and provides as follows;
- “Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or



- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

25. The 1st defendant’s position is that this suit is sub-judice or rather violates the provisions of section 6 of the [Civil Procedure Act](#). 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, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

26. Addressing the issue of ‘sub-judice’ in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR, the Supreme Court of Kenya stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the court or judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.

A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

27. The plaintiff/respondent counters the 1st defendant/applicant’s position by arguing that the Magistrate’s Court is ‘a court without jurisdiction’ to try the suit filed before it. She states though she is the one that had filed that earlier suit, she only realized that the value of the suit property exceeded the pecuniary jurisdiction of the Magistrate’s Court after a valuation was conducted. She further avers that she could therefore not apply to transfer the lower court suit to this court under section 18 of the [Civil Procedure Act](#) as the suit was a nullity in the first instance. She has annexed the valuation report to her replying affidavit. The plaintiff states that the filing of this suit was necessitated by that reality and after ‘withdrawal’ of that earlier suit.

28. The plaintiff’s position on transfer of a suit filed in a court without jurisdiction is supported by a number of decided cases.



29. In the case of *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another* [2012] eKLR, the Court cited with approval the decision in the case of *Kagenyi v Musiramo & another* (1968) EA 43 in which the court held that;

“where the subordinate court lacks jurisdiction to determine a matter; one court cannot transfer a suit to another court unless the suit had in the first instance been brought to a court which had jurisdiction to try it.”

30. Dealing with the same issue of jurisdiction, J B Ojwang, J (as he then was) in *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR stated as follows:

“Whenever a matter is filed before a court lacking jurisdiction, the professional error there committed is a fundamental one which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other court. It is the duty of the court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other court”.

31. The learned judge further stated that;

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognized by law.”

32. Should the plaintiff’s case then be struck out as sought by the 1st defendant?

33. Striking out of pleadings is a drastic remedy that should only be resorted to sparingly. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR restated the position as follows:

“We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgement seat should be used very sparingly....”

34. The plaintiff in the suit before the magistrate’s court, by filing the notice of withdrawal of the suit was expressing her intention to discontinue the suit. It is her right subject to ‘such terms as are just’. I believe one of the reasons why a plaintiff is required to seek leave of the court is to allow the court to make a determination on the issue of costs payable, if any, to the other party(s). I think the plaintiff was trying to run away from the costs by purporting to withdraw the suit before the magistrate’s court as she did. That position must be regularized accordingly for the notice to have the intended effects.

35. Order 2 rule 15(1), under which this application was brought gives the court the discretion amongst other reliefs to stay the suit. I will exercise that discretion in this case and order a stay of the proceedings herein for a period of three (3) months to allow the plaintiff an opportunity to regularize her intended withdrawal of the suit before the Magistrate’s Court. As I stated earlier, there is a counter-claim as well



by the 1st defendant in that suit. A withdrawal of the main suit will not affect the counter-claim. If the plaintiff is convinced that that court doesn't have the jurisdiction to entertain the counterclaim, she should make an appropriate application before the court to enable the 'court before which such matter is first brought to declare its status as a nullity' (see *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR).

36. If no action is taken within the said period of three (3) months, this suit will stand struck out with costs to the 1st defendant.
37. The court make no orders as to the costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2022

M.D MWANGI

JUDGE

In the presence of:

No appearance by parties.

Court Assistant Hilda

M.D MWANGI

JUDGE

