



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**MISC APP NO. 8 OF 2020**

**MARY SYEVUTHA PETER.....APPLICANT**

**VERSUS**

**ALFRED AGUNGA**

**NAFTALI OWINO**

**HARRISON CHARO SHUTU**

**FRANCIS XAVIER ONGORO.....RESPONDENTS**

**RULING**

1. By this Notice of Motion application dated 19<sup>th</sup> June 2020 and filed herein on 29<sup>th</sup> June 2020, Mary Syevutha Peter (the Applicant) prays for orders:

***2. That Malindi CMCC (Land Case) No. 34 of 2020; Mary Syevutha Peter –vs- Alfred Agunga & 3 others be transferred to the Environment and Lands Court in Malindi for hearing and determination of the Application dated 16<sup>th</sup> June 2020;***

***3. That Malindi CMCC (Land Case) No. 34 of 2020; Mary Syevutha Peter –vs- Alfred Agunga & 3 Others be transferred to the Environment & Land Court for final determination of the suit;***

***4. That upon being transferred to the Environment & Land Court in Malindi, Malindi CMCC (land Case) No. 34 of 2020; Mary Syevutha Peter –vs- Alfred Agunga & 3 Others be consolidated with Malindi ELC No. 39 of 2020; Kache Harrison Shutu & 3 Others –vs- Harrison Charo Wa Shutu & 4 Others; and***

***5. That the costs of the application be provided for.***

2. The application which is supported by an Affidavit sworn by the Applicant is premised on the grounds:

***i) That the Applicant is the beneficial owner of Land Portion No. 8897 situated at the junction of Ngala Road and Malindi-Mombasa Highway;***

***ii) That the Applicant purchased the said property from the 3<sup>rd</sup> Respondent vide a sale agreement executed on 1<sup>st</sup> July 2011;***

***iii) That on 13<sup>th</sup> and 14<sup>th</sup> June 2020, the Applicant woke up to find that her entire perimeter wall in Portion No. 8897 had been demolished by the Respondents;***

***iv) That consequently on 17<sup>th</sup> June 2020, the Applicant filed the said CMCC No. 34 of 2020 seeking orders of injunction against the Respondents but after filing the same, the Applicant was served with pleadings and the orders of the Court made in Malindi ELC No. 39 of 2020.***

***v) That from a perusal of the pleadings, the application and order, the Applicant realized that the Plaintiffs in Malindi ELC No. 39 of 2020 are seeking declarations that the suit property was held in trust of their behalf by the 3<sup>rd</sup> Respondent herein and the 1<sup>st</sup> Defendant in that suit;***

*vi) That the 1<sup>st</sup> Plaintiff in the ELC Case Kache Harrison Shutu is a wife to the 3<sup>rd</sup> Respondent and claims interest on the subject property on the basis that the sale was done without her spousal consent;*

*vii) That it emerges that the question of the special damages are not quantified from the ELC Case and the loss of the value of land accruing to the Applicant has now been estimated and exceeds the jurisdiction of the lower Court; and*

*viii) That save for two individuals, the Defendants in both cases are the same and it will be prudent to avoid a multiplicity of suits and decisions that the cases be heard and determined together upon consolidation.*

3. The application is opposed. In Grounds of Opposition dated 17<sup>th</sup> July 2020 and filed herein on 20<sup>th</sup> July 2020, Alfred Agunga, Naftali Owino, Harrison Charo Shutu and Francis Xavier Ongoro (the Respondents) object to the application on the grounds that:

*1. The application is bad in law, vexatious and an abuse of the Court process;*

*2. The Applicant has left out other parties involved in ELC No. 39 of 2020 coming up for submissions on the 28<sup>th</sup> July 2020 in which the Applicant is a party; and*

*3. The Applicant filed CMCC No. 34 of 2020 while she was aware of ELC No. 39 of 2020 in which she has appeared, hence the current application is an abuse of the Court process.*

4. In further response to the application, the Respondent through a Replying Affidavit sworn on their behalf by Francis Xavier Ongoro (the 4<sup>th</sup> Respondent) aver that the application is an abuse of the Court process as a number of parties in ELC No. 39 of 2020 who are likely to be affected by the orders issued herein have not been enjoined.

5. The Respondents further aver that the Applicants suit is based on her encroachment on a road reserve which is not part of the subject in ELC No. 39 of 2020 and it will therefore not help the Court as it is a matter that can be decided on its merit. It is further their case that the Applicant has admitted that she filed the suit *CMCC No. 34 of 2020* in a Court lacking jurisdiction and therefore it cannot be transferred to give it life as it was dead on arrival.

6. I have perused and considered the application for transfer and the response thereto. Section 18 of the Civil Procedure Act gives this Court the power of transfer a suit in the following manner:

*“(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 proceedings pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same.*

*b) Withdraw any suit or other proceedings 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) Re transfer the same for trial or disposal to the Court from which it was withdrawn.*

7. Discussing similar provisions in the Ugandan case of *David Kabungu –vs- Zikarenga & 4 Others, Kampala HCCC No. 36 of 1995*, Okello J observed as follows

*“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. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground though it is relevant consideration. 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 a 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, the 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 a 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 the transfer is sought has no jurisdiction to try the case, transfer would be refused...”*

8. Echoing similar sentiments in *Hangzhou Agrochemicals Industries Ltd –vs- Panda Flowers Ltd (2012) eKLR*, the Honourable Justice Odunga addressed himself to the issue thus:

*“.....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 maintaining witnesses, the 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 the circumstances it is proper to order a 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.”*

9. In the matter before me, the Applicant avers that she is the beneficial owner of Land Portion No. 8897 situated at the junction of Ngala Road and the Malindi-Mombasa Highway in Malindi. It is the Applicants case that she purchased the property from the 3<sup>rd</sup> Respondent herein on 1<sup>st</sup> July 2011 and that she has had a perimeter wall thereon. On 14<sup>th</sup> June 2020, she woke up to find that the Respondents cited herein had demolished the said wall.

10. The applicant avers that in order to stop the Respondents, she proceeded on 17<sup>th</sup> June 2020 to file **Malindi CMCC (Land Case) No. 34 of 2020** craving orders of injunction to restrain the Respondents from any further trespass onto the property. After filing the said suit however, the Applicant avers that she was served with pleadings and an order from **Malindi ELC Case No. 39 of 2020**. Upon perusal of those documents, she realized that the Plaintiffs therein who include the wife of the 3<sup>rd</sup> Respondent who sold the land to her, were seeking declarations that the suit property was held in trust on their behalf by the 3<sup>rd</sup> Respondent.

11. The Respondents are opposed to transfer of the suit on account that the Applicant has left out other parties who have been sued in **Malindi ELC No. 39 of 2020** and that the same is an abuse of the Court process as the Applicant was aware of the existence of the said **ELC No. 39 of 2020** before she proceeded to file **Malindi CMCC No. 34 of 2020** in the lower Court.

12. As it were, the Respondents did not provide any evidence before this Court that could demonstrate that the Applicant was aware of the existence of **Malindi ELC Case No. 39 of 2020** before she filed the other suit in the subordinate Court. I did not also think the other Defendants in **Malindi ELC No. 39 of 2020** would be prejudiced in any way by any orders sought herein as the Applicant merely seeks to have the case heard together with the matter already pending before the Environment and Land Court.

13. Indeed, while the Applicant alluded to the fact that the value of the suit property could on quantification exceed the jurisdiction of the lower Court, there was nothing placed before me by either party to demonstrate that the value of the suit property exceeded the jurisdiction of that Court. If that were so, this Court would certainly have no jurisdiction to transfer the suit for as the Respondents properly submitted, there would be nothing capable of being transferred, that case having been dead on arrival.

14. It was otherwise clear to me that the parties in the two suits are largely the same and that the subject matter of the dispute is the very same Land Portion No. 8897, Malindi. That being the case, and taking into account the nature of the relief or remedy sought, the interest of all litigants as well as the more convenient mode of administration of justice, I am persuaded that a transfer of the suit in the lower Court to this Court would be more in line with the overriding objectives of the Civil Procedure Act which require this Court to ensure a timely, efficient and just disposal of proceedings at a cost affordable to the parties.

15. I am further persuaded that given that there are clearly some common questions of law or facts arising in both cases and that the rights or reliefs claimed in both arise out of the same transaction, there is need to consolidate the two suits. As the Supreme Court of Kenya stated in **Law Society of Kenya –vs- The Centre for Human Rights and Democracy, SCOK, Petition No. 14 of 2013**:

*“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.*

16. The upshot of all said is that I find merit in the Motion dated 19<sup>th</sup> June 2020 as filed herein on 29<sup>th</sup> June 2020. I allow the same in terms of Prayers 2, 3 and 4 with costs in the cause.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of November, 2020.**

**J.O. OLOLA**

**JUDGE**