



Aradi v Moraa & 3 others (Environment and Land Miscellaneous Application E32 of 2023) [2024] KEELC 3578 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E32 OF 2023
LA OMOLLO, J
APRIL 11, 2024**

BETWEEN

BRIAN ARADI APPLICANT

AND

HEBBISIBAH MORAA 1ST RESPONDENT

CHARLES CHAHYA ARADI 2ND RESPONDENT

MARY IRENE ATIENO 3RD RESPONDENT

STEVE BIKO ARADI 4TH RESPONDENT

RULING

1. This ruling is in respect of the Applicant’s Notice of Motion application dated 14th June 2023. The said application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 11, 18, 1A, 1B and 3A of the *Civil Procedure Act*.
2. The Applicant seeks the following orders;
 - a. That this honorable court be pleased to allow for the continuity of Nakuru CMELC No. 160 of 2022 Brian Aradi versus Hebby Moraa & 3 others be heard and determined in Nakuru noting that the respondents are actively participating Estate of Manoah Kisame Aradi Nakuru Succession 422 of 2006 where they have subjected themselves to the jurisdiction of the court and the asset in question forms part of the deceased asset. (Sic)
 - b. That in the alternative this honorable court be pleased to allow for the transfer of Nakuru CM ELC No. 160 of 2022 Brian Aradi versus Hebby Moraa & 3 Others to Kakamega Environment and Land Court for the same to be heard and determined conclusively.
 - c. That costs of this application be in the cause.



3. The application is based on the grounds on its face and the supporting affidavit of one Brian Aradi sworn on 14th June, 2023.

Factual Background.

4. The application under consideration first came up for hearing on 20th June, 2023 when the court directed that it be served upon the Respondents.
5. The application was subsequently mentioned on 4th October, 2023 when the court gave directions that it shall be heard by way of written submissions.

Applicant's Contention.

6. It is the Applicant's contention that he has filed a suit against the legal representatives of the estate of Manoah Kisame Aradi.
7. It is also his contention that the suit is Nakuru CMELC No. 160 of 2022 and adds that his claim against them is for breach of their fiduciary duties.
8. It is further his contention that the Respondents are residents of Nakuru and had filed Nakuru Succession Cause No. 422 of 2006 in the matter of Estate of Manoah Kisame Aradi.
9. The Applicant contends that there is a risk that the trial magistrate in Nakuru CMELC No. 160 of 2022 lacks jurisdiction to hear and determine the matter as per the Respondent's Preliminary Objection.
10. The Applicant also contends that the suit in the subordinate court was coming up for mention on 30th June 2023.
11. The Applicant further contends that the matter should be allowed to proceed in Nakuru and in the event the court arrives at the conclusion that it does not have jurisdiction, then it should be transferred to the Kakamega Environment and Land Court which also has the jurisdiction to hear and determine it.
12. It is the Applicant's contention that it is in the interest of justice that where a court finds that it lacks jurisdiction, then it should forward the suit to the right court.
13. It is also the Applicant's contention that the interest of justice will be better served by allowing the orders sought in the application.
14. It is further the Applicant's contention that the Respondents will not suffer any prejudice if the application is allowed as this court is vested with the appropriate jurisdiction to transfer or issue directions in the matter.
15. The Applicant ends his deposition by stating that it is in the interest of justice that the parties be heard by the appropriate court and the real issues in controversy be identified, tried and adjudged.
16. No response was filed to the application.

Issues for determination.

17. The Applicant filed his submissions on 30th October, 2023 on while the 3rd and 4th Respondents filed their submissions dated 26th October, 2023 on 30th October 2023.



18. The Applicant reiterates the averments in his supporting affidavit and submits that a matter is filed in a particular place upon considering where the course of action arose, where the Defendant resides and the geographical location of the parcel of land.
19. It is the Applicant's submissions that the course of action arose in Nakuru when the Respondents who are the administrators of the estate of Manoah Kisame Aradi as per the grant issued in Nakuru Succession Cause No. 422 of 2006 allowed for the transfer of the suit property which was an asset of the deceased to third parties following the signing of transmission forms that eventually led to the loss of the property.
20. It is also the Applicant's submissions that no affidavit has been filed by the Respondents to deny their residence in Nakuru and in the event the court finds that the court lacks jurisdiction, then it should transfer it to the suitable court.
21. The 3rd and 4th Respondents on the other hand submit that the subject matter of the suit is known as Lubao/Isukha/1024 which is situated in Kakamega county.
22. They also submit that the Applicant has not explained why he filed the said suit in Nakuru. The Respondents identify the following issues for determination;
 - a. Whether Nakuru CMELC No. 160 of 2022 is res judicata?
 - b. Whether this Honorable court should allow the continuity of CMELC No. 160 of 2022 to be heard and determined in Nakuru?
 - c. Whether Nakuru CMELC No. 160 of 2022 should be transferred to Kakamega?
23. On the first issue, the 3rd and 4th Respondents submit that the Applicant is aware of the existence of CM ELC (Kakamega) 209 of 2018 Hebisiba Moraa Ondieki versus Elphas Abasi Ndusi that was brought by his mother to pursue similar claims over the suit property which suit was dismissed. That the appeal that was filed thereafter was also dismissed.
24. It is the 3rd and 4th Respondents submissions that the suit property has never formed part of the estate of the deceased.
25. The 3rd and 4th Respondents rely on Articles 162(2)(b) and 165 of *the Constitution* and submit that this court cannot exercise appellate or review jurisdiction over the decision made in ELC Appeal No. E024 of 2021 Hebisiba Moraa Ondieki versus Elphas Abasi Ndusi and if the Applicant was aggrieved by the said decision then he ought to have appealed to the Supreme Court.
26. The 3rd and 4th Respondents rely on the judicial decision of Greenfield Investments Limited & another vs State of the Republic of Kenya & 3 Others [2013]eKLR and Section 7 of the *Civil Procedure Act* and submit that there must be an end to litigation.
27. The 3rd and 4th Respondents also rely on The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR and submit that the Applicant has commenced various proceedings that include CMELC No. 106 of 2022 Brian Aradi vs Hebisibah Moraa and 4 others, Misc. Cause No. E337 of 2022 Steve Biko Aradi and another v Brian Aradi and CM ELC E160 of 2022 Brian Aradi vs Hebisibah Moraa and 3 others over the suit property which has never formed part of the estate of the deceased.
28. It is the 3rd and 4th Respondents submissions that the Applicant has filed the present application in bad faith since he has not disclosed that this court already rendered a judgement over the same matter.



29. On the second issue, the 3rd and 4th Respondents submit that the Applicant admits that there are competent courts in Kakamega and yet he filed the present suit before the Chief Magistrate's Court in Nakuru which amounts to bad faith.
30. The 3rd and 4th Respondents rely on the judicial decision of Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & another [2012] eKLR and submit that CM ELC No. 160 of 2022, as filed, is defective and a nullity and cannot therefore be transferred to another court.
31. The 3rd and 4th Respondents also rely on Section 18 of the *Civil Procedure Act*, the judicial decision of Boniface Waweru Mbiyu vs Mary Njeri & another (citation not given) and submit that a court can only transfer a cause whose existence is recognized by law.
32. They also rely on The Owners of Motor Vessel "Vessel S" vs Caltex Oil Kenya Limited (1989) KLR 1 and Wamathu Gichonya vs Mary Wainoi Magu [2015]eKLR and seek that the application be allowed as prayed.

Analysis and Determination.

33. I have considered the application, the affidavit in support of the application and the submissions filed.
34. In my view, the questions that arise for determination are;
 - a. Whether the orders sought in the Applicant's application should be granted.
 - b. Who should bear the costs of the application.

A. Whether the orders sought in the Applicant's application should be granted.

35. 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."



36. The Applicant filed Nakuru CMELC No. 160 of 2022 Brian Aradi versus Hebby Moraa and others vide the Complaint filed on 21st October, 2022. The suit property in the suit is described as land parcel No. Isukha/Lubao/1024.
37. In response, the Respondents filed a Preliminary Objection to the suit under Section 15 of the *Civil Procedure Act* on among other grounds the ground that the suit property is located in Kakamega County and therefore outside the geographical jurisdiction of the court.
38. From the documents annexed to the Applicant's supporting affidavit it is not clear whether the said Preliminary Objection was heard and determined by the magistrate in Nakuru CMELC No. 160 of 2022.
39. It is on the basis of the said preliminary objection that the Applicant filed the application under consideration seeking that the court either allows CMELC No. 160 of 2022 to be heard and determined in Nakuru or in the alternative have it transferred to the Environment and Land Court in Kakamega.
40. It is not disputed that land parcel No. Isukha/Lubao/1024 is located in Kakamega County. The Applicant argues that he filed CMELC No. 160 of 2022 in Nakuru because the Respondents are residents of Nakuru while the 3rd and 4th Respondents argue that since the suit property is in Kakamega, the said suit ought to have been filed in Kakamega.
41. The court in *Oceanic Towers Limited v Hussein Builders Limited* [2021] eKLR cited with approval the decision in *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995 where the court held as follows;
- “Section 18(1) 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 motu 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 or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on 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. (Emphasis Mine) There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication 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 could be refused...”
42. Section 1A of the *Civil Procedure Act* provides that the overriding objective of the Act and the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



43. Section 1B of the *Civil Procedure Act* provides as follows;

“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.”

44. My view is that since the suit property is located in Kakamega County. The order sought by the Applicant is that CMELC No. 160 of 2022 be transferred to Kakamega. The Applicant states that it is in the interest of justice that the said suit be transferred to the Environment and Land Court at Kakamega for hearing and determination.

45. The 3rd and 4th Respondents did not file any response to the application. I decline to take into consideration their submissions. The submissions delve into questions of fact that have not been placed before the court, as would, in affidavit evidence.

46. I note, however, that the transfer of the suit causes no prejudice to the Respondents.

B. Who should bear the costs of the application.

47. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

48. Consequently, the application dated 14th of June 2023 is hereby allowed in the following terms:

- a. The suit Nakuru CM ELC No. 160 of 2022; Brian Aradi -vs- Hebby Moraa & 3 Others is hereby transferred to Kakamega Environment and Land Court for hearing and determination.
- b. The cost of the application shall be in the cause.

49. It is so ordered.

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

L. A. OMOLLO

JUDGE

In the presence of: -

No Appearance for the Applicant.

No Appearance for the Respondents.

Court Assistant; Joseph Makori.

