



**Wanyoike v Saina & 8 others (Miscellaneous Application
E29 of 2023) [2024] KEELC 3962 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
MISCELLANEOUS APPLICATION E29 OF 2023**

MAO ODENY, J

MAY 21, 2024

BETWEEN

JOEL MUTHUNGA WANYOIKE APPLICANT

AND

MUSA SAINA 1ST RESPONDENT

AMOS NGETICH 2ND RESPONDENT

NICHOLAS YEGON 3RD RESPONDENT

SADRA CHERONO 4TH RESPONDENT

WILSON C. KIGET 5TH RESPONDENT

LAND REGISTRAR NAKURU COUNTY 6TH RESPONDENT

JOHN KIBET NGENO 7TH RESPONDENT

YAHIL KIPRONO ROTICH 8TH RESPONDENT

SPEED CAPITAL LIMITED 9TH RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 1st November 2023, by the Applicant seeking the following orders:
 - a. That this Honourable court be pleased to withdraw Molo CM ELC No E027/2023 Joel Muthunga Wanyoike v Musa Saina & 4 others from the Chief Magistrates' court in Molo and transfer it to the Chief Magistrates' court at Nakuru for consolidation with Nakuru CM ELC 355/2018 John Kibet Ngeno v Wilson Cheruiyot Arap Kiget.
 - b. That the costs of this application be provided for.



2. The application was based on the grounds enumerated on the face of the motion and supported by the affidavit of Joel Muthunga Wanyoike, sworn on 24th October, 2023 where he deponed that he is the Plaintiff in Molo CM ELC No 027/2023 and the 1st, 2nd, 3rd, 4th and 5th Respondents are Defendants which is in respect of the ownership of Title Number Nakuru/Sachangwany Settlement Scheme/ 174 whereby he is the registered owner having bought it in a public auction.
3. The Applicant further deponed that the suit property was initially owned by the 7th Respondent who then charged it to the 9th Respondent. That the 7th Respondent defaulted in loan repayment and the 9th Respondent sold the suit property in a public auction through Care Base Investments Auctioneers.
4. He also deponed that he bought the property in a public auction on 5th February, 2021 and at the time of filing Molo CM ELC 027/2023, he was not aware of the existence of Nakuru CM ELC 355/2018 between the 5th Respondent and the 6th, 7th, 8th and 9th Respondents.
5. The 5th Respondent opposed the application vide a replying affidavit dated 17th November, 2023 s where he deponed that the application is filed without any existing substantive cause or proceedings before this Honourable Court and that Molo CM ELC 027/2023 has already been stayed pending the hearing and determination of the Nakuru CM ELC 355/2018 vide a ruling delivered on 7th September, 2023.

Applicant's Submissions

6. Mr. Mutonyi, counsel for the Applicant submitted that the only issue for determination is whether the case should be transferred and consolidated with the suit pending at the Chief Magistrate's court in Nakuru.
7. Counsel submitted that this honourable court has jurisdiction under Section 18 of the *Civil Procedure Act* to withdraw and transfer a suit from one subordinate court to another.
8. Counsel relied on the case of Hangzhou Agrochemicals Industries Limited v Panda Flowers Ltd [2012] eKLR and submitted that the Honourable court has discretion to transfer the suit as prayed and the discretion depends largely on the facts and circumstances of each case.
9. It was counsel's submission that stay of a suit is not a fetter to the jurisdiction and discretion of this court under Section 18 of the *Civil Procedure Act* and this court can on an application or *suo moto* and at any stage transfer a suit and cited the case of *Jimas Corporation Limited v Purity Njeri Kinyajui* [2022] eKLR.
10. Counsel further submitted that the land, the subject matter of the two suits is the same, there are several parties in both suits claiming its ownership, common witnesses in both cases and the convenience in the administration of justice in hearing the case together. He submitted that consolidation would afford a just expeditious, proportionate and affordable disposal of the suits and relied on the case of *Arnold Kipkirui Langat v Afficon Limited & 7 others* [2021] eKLR.

5th Respondent's Submissions

11. Mr. Kiletyen counsel for the 5th Respondent identified the following issues for determination:
 - i) Whether the reliefs claimed arise out of the same transaction or series of transactions and
 - ii) Whether the consolidation of the suits will prejudice the Respondents.



12. Counsel submitted that consolidation would not serve the interests of justice as it would only serve to confuse the issues and prolong the resolution of the disputes and relied on the case of *County Council of Nakuru v Simon Ole Kiminta & 3 others* [2007] eKLR.
13. Counsel further submitted that consolidation of the suits will result in appropriate delays by complicating the case and further prejudice the 5th Respondent. Further that it is unclear who the Plaintiff will be in the event the suits are consolidated and cited the cases of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2004] eKLR and *Korean United Church of Kenya & 3 others v Seng Ha Sang* [2014] eKLR.
14. Counsel submitted that in the present cases should the suits be consolidated, the 5th Respondent will be forced to defend his title against the Applicant and the 7th Respondent which will confer an undue advantage towards the Applicant and the 7th Respondent to the detriment of the 5th Respondent and relied on the case of *Law Society of Kenya v Center for Human Rights & Democracy & 12 others* [2014] eKLR.
15. It was counsel's submission that in the event a final decision is reached in the initial suit, such a decision would operate as res-judicata in the new suit and urged the court to dismiss the application with costs.

Analysis And Determination

16. The issue for determination is whether this court should withdraw Molo CM ELC case No E027/2023 from the Chief Magistrates court in Molo and transfer it to the Chief Magistrates court at Nakuru for consolidation with Nakuru CM ELC case No 355/2018.
17. Section 18 of the *Civil Procedure Act* provides that:
 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



18. In the case of *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* (Civil Suit 97 of 2009) [2012] KEHC 1937 (KLR) (Civ) (8 October 2012), the court relied on the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No 36 of 1995 which stated 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 a 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 purpose of working 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...”

19. From the attached plaint, defence and counter claim together with a copy of the title, it is evident that the two suits are in respect of the same property whose ownership is disputed being Title Number Nakuru/Sachangwany Scheme/174. The essence of consolidation is to ensure just, expeditious, proportionate and affordable resolution of disputes relating to the same subject matter and parties. If such suits are heard differently, it might have two different/ conflicting outcomes, which may embarrass the court.
20. The 5th Respondent in his Replying Affidavit dated 14th November, 2023 deposes that Molo CM ELC case No 027/2023 has already been stayed pending the hearing and determination of the Nakuru CM ELC case No 355/2018, vide a ruling delivered on 7th September, 2023.
21. The stay of proceedings does not bar this court from transferring the matter for consolidation and hearing of the suit. The stay was a judicial pronouncement that took cognizant of the fact that there was a similar suit involving the same parties. The ruling did not strike out the pleadings but stayed them to give way for the hearing of the suit.
22. In Molo CM ELC NO 027/2023, the Applicant herein is seeking the following orders in his plaint dated 15th March, 2023 against the 1st, 2nd, 3rd, 4th and 5th Respondents:
- A declaration that the Plaintiff is the registered owner of Title Number Nakuru/ Sachangwany Settlement Scheme/ 174 and the Defendants are trespassers.
 - Mesne profits and General damages for trespass.
 - A permanent injunction to be issued against the Defendants by themselves, their agents, and/ or proxies or any other persons acting under or on their authority or claiming through or under them from accessing or entering, remaining, using, occupying, ploughing, possessing, evicting, constructing, sub-dividing and/or fencing or in any other manner interfering with the Plaintiff's parcel of land known as Nakuru/Sachangwany Settlement Scheme/174.
 - Costs of this suit.
 - Any other relief that this Honourable Court may deem fit and just to grant.
23. In Nakuru CM ELC case No 355/2018, the 7th Respondent is the Plaintiff and the 5th Respondent herein is the Defendant who filed a defence and counterclaim seeking the following orders:



- a. A declaration that the 1st Defendant irregularly issued a title deed over the Title Number Nakuru/Sachangwany Settlement Scheme/174.
 - b. A declaration that the 1st Defendant irregularly issued a title deed over the Title Number Nakuru/Sachangwany Settlement Scheme/175.
 - c. A declaration that the Plaintiff in the Counterclaim is the rightful owner of Title Number Nakuru/Sachangwany Settlement Scheme/174.
 - d. A declaration that the Plaintiff in the Counterclaim is the rightful owner of Title Number Nakuru/Sachangwany Settlement Scheme/175.
 - e. An order directed at the 1st Defendant to cancel the title deed over Title Number Nakuru/Sachangwany Settlement Scheme/174 in favour of the 2nd Defendant.
 - f. An order directed at the 1st Defendant to cancel the title deed over Title Number Nakuru/Sachangwany Settlement Scheme/174 in favour of the 3rd Defendant.
 - g. Costs of the suit and the Counterclaim.
 - h. Any relief the Court deems fit to grant.
24. I have considered the application and find that the same has merit as the two suits are in respect of the same parcel of land, parties and the dispute is on the ownership of the suit land. I therefore order that Molo CM ELC No E027/2023 is hereby transferred to the Chief Magistrates court Nakuru CM ELC 355/2018 and consolidated for hearing and determination. The issues of the sequence and appearance of the parties to be handled by the receiving court. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF MAY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

