



Makapia v Makapia & another (Environment and Land Miscellaneous Application E011 of 2023) [2024] KEELC 4695 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2023
DO OHUNGO, J
JUNE 13, 2024**

BETWEEN

SHABAN KANDIA MAKAPIA APPLICANT

AND

RASHID OMENDA MAKAPIA 1ST RESPONDENT

ASMAN OSIEKO OKANDA 2ND RESPONDENT

RULING

1. By Notice of Motion dated 30th November 2023, the applicant is seeking the following orders:

A. [Spent]

B. THAT the Honourable Court be pleased to transfer Mumias SPC ELC NO. 29 OF 2022 to itself for further directions to allocate the same to competent court with jurisdiction to hear and determine the same.

C. Costs of the application be in the cause.

D. Such other orders as the court deems fit and just to grant.

2. The application is supported by an affidavit sworn by the applicant. He deposed that the learned magistrate handling the matter delivered a ruling which was later set aside upon an appeal to this court. He added that he has lost confidence in the learned magistrate.

3. The respondents opposed the application through a joint replying affidavit in which they deposed that the appeal was only partially successful, that the Subordinate Court has jurisdiction in the matter before it and that its competence has not been questioned. They added that the applicant has a right of appeal against any decision that the Subordinate Court will ultimately make and that prior to filing the present application, the applicant filed an application dated 17th May 2023 through which he sought



- recusal of the learned magistrate, and that the application was dismissed. They also stated that the application amounts to forum shopping for a lenient judicial officer who will give in to the applicant's demands.
4. The application was canvassed through written submissions. The applicant filed submissions dated 29th December 2023 through which he contended that the application raises plausible grounds and urged the court to allow the application.
 5. In response, the respondents argued that the applicant's application for recusal having been dismissed, the only recourse was for the applicant to appeal against the order dismissing the said application. They relied on the cases of Lubna Ali Sheikh Abdalla Bajaber & another v Chief Magistrate's Court, Mombasa 2 others [2018] eKLR, Patrick Ndegwa Warungu v Republic [2003] eKLR and Teresiah Wairimu Muturi & Another v Director Of Public Prosecutions & Another [2020] EKLK and urged the court to dismiss the application with costs.
 6. I have considered the application, the affidavits, and the submissions. The issues for determination are whether Mumias SPM ELC No. 29 of 2022 should be withdrawn from the said court and transferred to another court for hearing and determination and who pays the costs of the present application.
 7. There is no dispute that Mumias SPM ELC No. 29 of 2022 is a matter between the parties herein and that it is pending before the Subordinate Court at Mumias. The applicant's concern is that he has lost confidence in the Subordinate Court and that he would like the matter to be heard and determined by a different magistrate. While parties are free to decide whether they have confidence in a particular judicial officer, they do not have the liberty to choose who hears their case. They must advance their case as best as they can and then wait for the outcome. If they are dissatisfied with the outcome, they then appeal to the next level.
 8. The suit before the Subordinate Court is pending before the said court pursuant to Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015. Pursuant to Section 16A (1) of the Environment and Land Court Act, 2011, any party dissatisfied with a judgment or ruling of the Subordinate Court has a right of appeal to this court.
 9. While I am aware that this court delivered a judgment on 25th October 2023 in Kakamega ELCA No. E044 of 2022, in which the court partially allowed an appeal by the applicant against a ruling delivered by the Subordinate Court on 15th September 2022, the said appeal was on a different issue and cannot be a valid basis for the applicant's alleged loss of confidence in the Subordinate Court, or even for transfer of the suit to a different court or magistrate.
 10. While confidence in the courts and judicial officers is a thing to be encouraged, unfounded allegations of bias are to be shunned since they undermine the very core of justice and herald the undesirable practice of forum shopping. The Court of Appeal emphasised as much in Galaxy Paints Company Limited vs Falcon Guards Limited [1999] eKLR where it stated:

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.
 11. The reasons advanced by the applicant do not constitute any valid ground for transfer of a suit. I find no merit in Notice of Motion dated 30th November 2023, and I therefore dismiss it with costs to the respondents.



Dated, signed, and delivered at Kakamega this 13th day of June 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Applicant present in person

Mr Wandala for the Respondents

Court Assistant: M Nguyayi

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