



**Nginyo v Zahlten & 4 others (Environment & Land Case 61 of 2011)
[2024] KEELC 5908 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 61 OF 2011
FM NJOROGE, J
SEPTEMBER 18, 2024**

BETWEEN

EDWARD CHARLES NGINYO PLAINTIFF

AND

HANS JURGEN ZAHLTEN 1ST DEFENDANT

MELE NEKESA MASIKA 2ND DEFENDANT

FARID AHMED SWALEH 3RD DEFENDANT

HILAA ABDULLA AMINI 4TH DEFENDANT

LAND REGISTRAR, KILIFI COUNTY 5TH DEFENDANT

RULING

1. For determination is the application by the Plaintiff dated 19/12/2024 brought under Order 51 Rule 1 and 4 of the Civil Procedure Rules, Article 159 (2), 162 2(b), 165 (3) (a), (b), (c), and (d) of the Constitution and Sections 1A, 1B,3, 3A of the Civil Procedure Act. It seeks the following orders: -
 1.Spent;
 2. This Honourable Court be pleased to open the proceedings and the Plaintiff be granted leave to execute his suit before the court that has competent jurisdiction;
 3. This Honourable Court be pleased to transfer this matter from the Environment and Land Court to the Civil Commercial Court for trial and determination which court has competent jurisdiction.;
 4. Costs be in the cause.



2. The application is supported by the grounds on the face of the application as well as an affidavit sworn by the Plaintiff on even date. In his affidavit, the plaintiff states that he filed this suit at the Civil Commercial Registry of the High Court which was initially registered under the reference Malindi – Civil Suit No. 61 of 2011; that the file was before Hon. Lady Justices H. A Omondi and C. Meoli of the Malindi High Court on various dates.
3. He deposed that on 14.12.2012, the matter was transferred to the Environment and Land Court where the Hon. Justice O. Angote tried and determined the suit. According to him, the subject of his suit was a debt between himself and the 1st Defendant and not a land dispute and as such, the Land and Environment Court lacked jurisdiction to try his case.
4. He also deposed that he had borrowed Kshs. 3,000,000/- from the 1st Defendant who charged his property known as LR. Kilifi/ Mtwapa/79 as security for the debt and that upon paying Kshs. 300,000/- the 1st Defendant sold the said property. Further, that the 1st Defendant’s successful efforts to transfer the suit from the Commercial Division to the Environment and Land Court occasioned miscarriage of justice on his part.

Disposition.

5. I have perused the proceedings in this matter and I note that this matter was filed in this court vide a Plaint on 3rd June, 2011 and that this matter was heard and determined to conclusion by my brother Justice O. A. Angote. Judgment was delivered on the 26th September, 2014.
6. The Plaintiff/Applicant now desires that this court reopens proceedings and that this court transfer this matter to the Civil Commercial Court for trial and determination.
7. The gist of the application before me is that the applicant is now challenging the jurisdiction of this court that heard and determined this suit. In my view, such an application challenging a court’s jurisdiction ought to be brought at the earliest opportunity. This matter was filed way back in 2011. It later proceeded to full hearing with the unreserved participation of the plaintiff, who testified as PW1 and judgment was delivered.
8. In the case of the *Owners of the Motor Vessel 'Lillian S' V Caltex Oil (Kenya) Ltd* [1989] EKLR, the Court of Appeal stated clearly that absent jurisdiction a court must down its tools. In that case, the Court rendered itself as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
9. I have had the opportunity to look up the provisions of the law that this application has been brought under. The applicant cites Order 51 Rules 1 and 4 of the *Civil Procedure Rules*, Articles 159, 162 and 165 of the *Constitution* as well as the provisions of Section 1A, 1B, 3, 3A and 12 of the *Civil Procedure Act*.
10. I find that the provisions of Section 1A provides that the overriding objective of the *Civil Procedure Act* and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by *the Act*.



11. Sections 1B, 3, 3A and 12 of the Civil Procedure Act are meant to facilitate the realization of the overriding objective in Section 1A of the Act.
12. No specific sub-clauses of Articles 159 and 165 are set out as being relied on in the application. This court cannot therefore guess what the applicant intended to rely on in those Articles. However, the obvious provisions of Article 162 that relate to this court are obvious. The proper clause of that article which is Article 162(2) (b) grants this court the jurisdiction to hear and determine disputes regarding the environment and use and occupation of and title to, land.
13. The true position appears to be that that before and during the hearing of this case, the plaintiff either acquiesced or conceded that this court was seized of the proper jurisdiction to hear and determine this matter otherwise he ought to have made an application seeking the orders he now seeks, prior to the hearing. It is this court's opinion that judgment having been delivered in this matter, and that after participation of the plaintiff and other parties, this suit is concluded with finality; this court is functus officio and there is no basis upon which this court can order the transfer of the suit to any court. The provisions of the law and the Constitution cited by the applicant can not avail him of any relief in so far as they do not envisage the transfer of a suit where judgment has already been delivered, or automatic reopening of the proceedings on application. the general principles engendered in those provisions are only meant for the sustenance, expedition and proportionate determination of live suits.
14. Besides, a perusal of the plaint in this matter discloses that it sought inter alia an order that the plaintiff be declared the bona fide registered proprietor of the suit land and that all the titles issued to third parties in respect thereof be declared irregular, fraudulent and /or illegal. The plaint averred that the suit property was fraudulently registered in the names of the 2nd 3rd and 4th defendants. The 4th defendant filed a defence and averred that she is a bona fide purchaser of the suit property having purchased it from the 3rd defendant.
15. Article 162 (2) (b) of the Constitution provides that this court shall hear and determine disputes regarding the environment and use and occupation of and title to, land. In view of the contents of the pleading as analyzed above, notwithstanding the manner in which the suit was transferred from the High Court to this court and which manner the plaintiff states he does not understand, the suit finally landed in the proper court seized of jurisdiction to hear and determine it. In this court's view, an issue of jurisdiction would have arisen if the suit had remained in the court in which it was first filed.
16. In the circumstances above, an order for transfer as has been sought by the applicant is not available. The applicant has approached this court for transfer orders too late in the day. He has also failed to specify in which manner or to what extent he desires the suit to be reopened; neither has he specifically applied for setting aside of judgment. It is thus unclear what the order of transfer if granted would achieve. The application dated 19/12/2023 is in this court's view unmeritorious, baseless and an abuse of the process of this court and the same is hereby dismissed. As the application was unopposed, there shall be no orders as to costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 18TH DAY OF SEPTEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

