



REPUBLIC OF KENYA



**KENYA LAW**  
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**Simiyu & 3 others v Ongoro & 4 others (Environment and Land Appeal E027 of 2024) [2024] KEELC 7567 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7567 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**  
**ENVIRONMENT AND LAND APPEAL E027 OF 2024**  
**EC CHERONO, J**  
**NOVEMBER 14, 2024**

**BETWEEN**

**ANERIKO MASIKA SIMIYU ..... 1<sup>ST</sup> APPELLANT**  
**HASSAN SHABRAM ..... 2<sup>ND</sup> APPELLANT**  
**ERASTUS WASWA ..... 3<sup>RD</sup> APPELLANT**  
**BUNGOMA LAND REGISTRAR ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MOSES ONGORO ..... 1<sup>ST</sup> RESPONDENT**  
**JARE NYUKULI ..... 2<sup>ND</sup> RESPONDENT**  
**ABDI SAMAT OMAR ..... 3<sup>RD</sup> RESPONDENT**  
**ROSALINE AKOTH ..... 4<sup>TH</sup> RESPONDENT**  
**CONSTATINE SIMATI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me for determination is a Notice of Motion application dated 29<sup>th</sup> May, 2024 brought under Section 3 & 3A of the *Civil Procedure Act*, Order 42 Rule 1,3 & 6 of the Civil Procedure Rules seeking the following orders;
  - a. Spent.
  - b. Spent
  - c. That the entire proceedings be ordered stayed and the suit be transferred to this honourable court for final disposal.



- d. The substantive order of survey and opening of road access made before trial of the suit be set aside.
  - e. The costs be provided for.
2. The application is based on grounds on the face of the application supported by the affidavit of Aneriko Masika Simiyu -the 1<sup>st</sup> Applicant sworn on even date.
  3. It was the Applicants/Applicants' case that the main suit before the trial court has never been heard yet substantive orders were issued at an interlocutory stage with the trial court having ordered for the imprisonment of the land registrar. It was argued that the dispute in respect of the suit property was previously determined by this court and the Court of appeal hence the trial magistrate lacks jurisdiction to vary and/or vacate them and that by issuing conflicting orders, the trial magistrate was usurping the jurisdiction of the superior courts.
  4. In response to the application, the Respondents filed a replying affidavit sworn by Moses Ongoro, the 1<sup>st</sup> Respondent herein on 28/06/2024. The said Moses Ongoro deposed that the Respondents herein filed the original Bungoma CMC ELC Case No. 98 of 2023 and a Notice of Motion dated 07/09/2023 which application was subsequently allowed. It was argued that since no appeal was preferred, contempt proceedings were subsequently lodged. That the appellant later filed an application dated 29/012024 seeking to discharge, set aside and/or vacate the said orders which application was dismissed vide a ruling dated 28/02/2024 and never preferred an appeal nor a review. It was argued that these orders were therefore binding upon the parties and the refusal to obey the said orders by the Land Registrar Bungoma prompted him to file an application 28/03/2024 which was allowed on 23/05/2024 which decision is the subject of this appeal.
  5. When the application came for directions, Parties agreed to canvass the same by written submissions. The Applicants filed their submissions dated 11/06/2024 while the Respondents filed their on 23/07/2024.
  6. I have carefully considered the application, the replying affidavit in opposition thereto and the parties' respective submissions and in my view, the sole issue for determination is whether the Applicants are entitled to the orders sought.
  7. From my review of the evidence in the affidavits submitted both in support of and in opposition to the application, it appears that the 1st Appellant and one Redemptor Sitati were involved in HCCA No. 94 of 1999, where on 13/09/2004, orders were issued for the restoration of land from title No. E.Bukusu/S.Kanduyi/8051 to title No. E.Bukusu/S.Kanduyi/15. These orders led to an appeal before the Court of Appeal in Kisumu being Civil Appeal No. 227 of 2004, which was dismissed.
  8. The Respondents subsequently filed an application dated 07/09/2023, resulting in orders summarized as: an injunction was issued against the Land Registrar to prevent any sub-division or boundary demarcation contrary to the orders of 13/09/2004; compliance with the orders of that date was mandated based on a report dated 23/11/2004; the Bungoma County Surveyor and Land Registrar were instructed to revisit and establish the boundaries of LR No. E.Bukusu/S.Kanduyi/20243, 20245, 20246, and 20249, including an access road; and the respondents were restrained from interfering with the implementation of these orders, with a directive to remove any encroachments or obstructions that impede full access of the Respondents to the mentioned parcels of land.
  9. The Appellant herein filed an application seeking to discharge the above orders but the application was disallowed. The Respondents further filed an application to compel the Bungoma Land Registrar



to comply with the above orders and the same was allowed. It is this application that is the subject of the present appeal.

10. The Appellant now seeks to have the suit before the subordinate court transferred to this court for further determination and the substantive orders of survey and opening of a road access made in the said court be set aside. From the abovementioned prayers and noting that there is already a filed memorandum of appeal seeking to challenge the subordinate court's order issued on 23/05/2024, this court is at pains to comprehend what the applicant really wants as the prayers of this application and the appeal are at cross-purposes.
11. In the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995, the Court had the following to say on the circumstances under which the order to transfer suits may be granted-

“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 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 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. 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.....”

12. The order for stay and transfer of the suit before the lower court to this court has not been substantiated. It is trite that courts must act upon reason(s) and not whimsically.
13. As for the request to set aside the substantive orders for a survey and the opening of road access, the same does not align with the primary issues the appeal aims to address. It is noteworthy that the above orders were issued as a result of a previous application and the applicant did not seek to review or appeal the same and they are therefore estopped from seeking to set aside the said orders in the current appeal. Moreover, if these orders were issued at this stage, the appeal would be rendered nugatory, as it is the non-compliance with these orders that led to the further application and orders appealed against. In my view, the Appellants herein are trying to sneak the issue of these orders into this appeal yet they had the option to appeal against the same and chose not to.
14. The upshot of my finding is that the application dated 29/05/2024 lacks merit and the same is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Sichangi for the Appellants/Applicants.
2. Mr. Kowinoh for the Respondents.
3. Bett C/A.

