



Ole Nadukila & 19 others v Ole Meshuko & 25 others (Environment & Land Case 46 of 2017) [2024] KEELC 14056 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 46 OF 2017
CG MBOGO, J
DECEMBER 18, 2024**

BETWEEN

OLE NADUKILA & 19 OTHERS PLAINTIFF

AND

OLE MESHUKO & 25 OTHERS DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 16th August, 2024 filed by the 3rd plaintiff/applicant and it is expressed to be brought under Sections 1A, 1B, 3, 3A and 3B, Sections 18 of the *Civil Procedure Act* and Order 8 of the Civil Procedure Rules, Section 13 of the *Environment and Land Court Act* and Articles 48 and 165 (3) of *the Constitution* of Kenya seeking the following orders: -
 1. Spent.
 2. That CMELC (Narok) No. E024 of 2021 Kepue Ole Ngweta vs Nalaku Ene Meshuko & 2 Others be transferred to this honourable court for hearing and determination of the application dated 5th August 2024.
 3. That CMELC (Narok) No. E024 of 2021 Kepue Ole Nweta vs Nalaku Ene Meshuko & 2 Others be transferred to this honourable court due to the issue of land parcel Cis-Mara/ Kipise/ 487 and 1257 being subject of litigation in this matter, for final determination of the suit.
 4. Spent.
 5. The costs of this application be in this cause.
2. The application is premised on the grounds inter alia that on 22nd May 2024, Nalaka Ene Meshuko obtained orders by misleading material facts to the lower court, and that led to the 3rd plaintiff/ applicant to give instruction of the instant application. The application is supported by the affidavit of Kepue Ole Ngweta, the 3rd plaintiff/ applicant sworn on even date. The 3rd plaintiff/ applicant deposed



- that there are two files over the same subject matter i.e. this matter and MCELC No. E024 of 2021 before the subordinate court. He deposed that both files share the same parties and the same subject matter in parcel no. Cis-Mara/ Kipise/ 487 and Cis-Mara/ Kipise/ 1257. That upon perusal of the file before this court the subject matter is formed by parcel no. Cis-Mara/ Kipise/ 356, 362, 459, 460, 461, 462, 463, 487, 491, 492, 493, 1175, 1178, 1180, 1231, 1232, 1176, 1245, 1246 and 1257.
3. The 3rd plaintiff/ applicant further deposed that the defendants/ respondents in the matter before this court posit that they do not recognize parcel 487, which is a subject matter that is before both courts. He went on to depose that the orders being sought before the subordinate court are parcel no. 1257 whose title was obtained while proceedings of this court had not been concluded to be cancelled, and a proper and inclusive survey be carried out to establish the extent which parcel no. 487 has been encroached on. He deposed that it is prejudicial for them to deal with two files over the same subject matter in two different courts.
 4. The application was opposed by the replying affidavit of Nalaku Ene Meshuko sworn on 27th September, 2024. The respondent deposed that she has no interest in this suit despite being served with the application. She further deposed that she is the registered proprietor of parcel no. 1251 which is the subject matter in MCELC No. E024 of 2021. She deposed that she is aware that the 3rd plaintiff/ applicant is not the registered owner of parcel no. 487 but one Tante Ole Meshuko.
 5. The respondent further deposed that the 3rd plaintiff/ applicant is misguided and is misleading the court as there is no evidence in support of the alleged fraud, and further, that a challenge of a court order issued by a subordinate court can only be contested via appeal. She deposed that it is an abuse of the court process for the applicant to file a similar application in both the subordinate court, and this court simultaneously to contest the ruling. The respondent deposed that if the 3rd plaintiff/ applicant was desirous to transfer the matter from the subordinate court to this court, he ought to have filed an appropriate application.
 6. The respondent deposed that the law firm of George Wakahiu and Njenga is not licensed to practice law in the year 2024 as the advocate George Wakahiu Njenga does not have the license for the year 2024. She deposed that parcel no. 1251 is not one of the subject matters in the suit before this court, and that even if there is duplicity, the court is invited to take judicial notice that both suits were in fact filed by the applicant himself who cannot now seek to benefit from his own mischief. She further deposed that in the event the 3rd plaintiff/ applicant is constrained by the multiple suits he has brought to court; he can as well withdraw the same.
 7. The respondent deposed that it is manifest abuse of court process for the 3rd plaintiff/ applicant to prefer two applications on the same issues simultaneously in this court and in the subordinate court, and as such the application ought to be dismissed with costs.
 8. In reply thereto, the 3rd plaintiff/ applicant filed his supplementary affidavit sworn on 14th November, 2024. While reiterating the contents of his supporting affidavit, he deposed that parcel no. 1251 was registered in the name of Karino Meshuko who is the husband of the respondent and the 10th defendant, and that she cannot therefore claim not to be aware of the parcel being part of the fraudulent transfer of the said parcel to her names. He deposed that the respondent has not come to court with clean hands as she obtained the title fraudulently, and further, that parcel no. 1251 forms part and parcel of the suit in this matter.
 9. The 3rd plaintiff/ applicant further deposed that the 1st defendant acquired title to parcel no. 487 fraudulently during the pendency of this suit, and that the same is the subject of adjudication in this matter. He deposed that the firm of George Wakahiu & Njenga advocates is another fishing expedition



- whose results are to waste the court's time. He deposed that Mr. Peter Karanja Njau a partner in the law firm has engaged Mr. Mogaka Cyrus Nyandenge, advocate who has conduct of this matter, and that both advocates have the license to practice in the year 2024.
10. He deposed that the application is proper and of substance, and that the lower court file ought to be transferred to this court. Further, he deposed that the two applications are brought under different rules and seek different orders, and it is thus not an abuse of the court process but an attempt by the counsel to protect the rights of his client.
 11. The application was canvassed by way of written submissions. The 3rd plaintiff/ applicant filed his written submissions dated 14th November 2024 where he raised four issues for determination as listed below: -
 - a. Whether the applicants have made up a case for transfer and consolidation of the two files herein.
 - b. Whether this court has jurisdiction to hear and determine the issues raised in the lower court file.
 - c. Whether representation of applicants is lawful.
 - d. Who should bear the costs of this application.
 12. On the first issue, the 3rd plaintiff/ applicant submitted that it will be unconstitutional to conduct two files in the same judicial system sharing the same jurisdiction for the reason that both courts may issue contradicting orders that should not occur. Further, he submitted that what needs to be considered is whether the subject matter is the same, and that it is not an issue of the parties as raised by the respondent in her objection to the transfer and consolidation. To buttress on this submission, the 3rd plaintiff/ applicant relied on the cases of Jimas Corporation Limited vs Purity Njeri Kinyanjui [2022] eKLR, Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd [2012] eKLR and EAN Kenya Limited v John Sawers & 4 others [2007] eKLR.
 13. The 3rd plaintiff/ applicant submitted that the only difference between the two suits is the description of the respondent. While further relying on the case of [*Heinz Isbrecht v Charles Ochieng Ndiga \(Msa\) Misc. Application No. 20 of 1997*](#), the 3rd plaintiff/ applicant submitted that the non-transfer of the matter will be prejudicial to them and will further lead to an injustice on their part.
 14. On the second issue, the 3rd plaintiff/ applicant submitted that for an application for the transfer of a suit to succeed, the court from which the suit is being transferred must in the first place have jurisdiction to try that matter. That in this case, this court has jurisdiction and ought to transfer the matter to itself. Reliance was placed in the case of Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another [2012] eKLR.
 15. On the third issue, the 3rd plaintiff/ applicant submitted that the advocate on record is qualified, and meets all the requirements set down in Section 9 of the [*Advocates Act*](#), Cap 16, and thus can represent clients. He relied on the case of National Bank of Kenya v Wilson Ndolo Ayah Civil Appeal No. 119 of 2002, and further submitted that the firm of George Wakahiu & Njenga advocates is duly registered and authorized to conduct and provide legal services as a business. It was also submitted that the practicing certificate of Cyrus Mogaka Nyandenge is not suspended in accordance to Section 27 or by an order under Section 60 (4) of the [*Advocates Act*](#).



16. On the fourth issue, the 3rd plaintiff/ applicant submitted that from the facts pleaded and evidence tabled, it is the actions of the respondents which invoked all the events giving rise to the application and that costs have been incurred which he prays that the respondent be condemned to pay.
17. The respondent filed her written submissions dated 6th December, 2024 where she raised four issues for determination namely: -
 1. Whether the application is merited.
 2. Whether MCELC E024 of 2021 ought to be transferred and consolidated in 46/2017.
 3. Whether the applicant's application amounts to abuse of court process.
 4. Capacity to bring suit.
18. On the first issue, the respondent submitted that it is trite that when a person is aggrieved by a court's decision, the aggrieved party should appeal but not seek a transfer of case to a higher court, and that the 3rd plaintiff/ applicant is insincere for not indicating to this court that he had filed a similar application in the subordinate court seeking to set aside the orders of 14th June, 2024.
19. On the second issue, the respondent submitted that the claim in the lower court is about boundary and alleged encroachment, and that encroachment cannot be determined unless boundary positions are established. She submitted that the order issued by the subordinate court on 22nd May, 2024, directs the District Land Registrar to visit and establish the correct boundary positions between 487 and 1251. This way, it can be determined if at all 1251 is encroaching and to what extent.
20. On the third issue, the respondent submitted that the applicant's first prayer calls for this court to stay orders made on 14th June, 2024 requiring the District Land Registrar to visit the ground and determine the boundary of the two parcels. She urged this court to resist the invitation to sanitize the mischief of filing multiple suits, and dictating where and the speed at which they can be determined.
21. On the fourth issue, the respondent submitted that in the LSK advocates portal, George Wakahiu has no practice certificate for the year 2024, and the last five years. She also submitted that the same has been admitted by the 3rd plaintiff/ applicant in the supplementary affidavit, and that for this reason, all material filed in the name of George Wakahiu law firm ought to be struck out owing to the confirmation by the applicant that Mr. George Wakahiu did not authorize the use of his dormant law firm, and that he is not in actual practice of law in Kenya.
22. In conclusion, the respondent submitted that the issues raised by the applicant can only be adequately addressed in the substantive hearing of the suit in the lower court.
23. I have considered the application, replies thereof and the written submissions filed by the 3rd plaintiff/ applicant and the respondent. In my view, the issues for determination are as follows: -
 - i. Whether this court ought to transfer the suit filed before the magistrates' court i.e. CM ELC No. E024 of 2021 to this court; and
 - ii. Whether the law firm of George Wakahiu & Njenga Advocates is properly on record for the plaintiffs/ applicants.
 - iii. Who is to bear the costs of the application.
24. On the first issue, the 3rd plaintiff/ applicant deposed that Nalaka Ene Meshuko, the respondent herein, obtained orders by misleading material facts to the lower court that led to the filing of the instant application. One of the grounds of the application is that they realized that there were two files over



the same subject matter both in this file and in MCELC No. E024 of 2021. It was also the 3rd plaintiff/ applicant's deposition that both files share the same parties. Interestingly, in their submissions, the position seems to have changed where the difference between the two suits arises from the description of the respondent. In support of the application, the 3rd plaintiff/ applicant annexed a copy of the orders dated 14th June, 2024 and 5th August 2024 respectively.

25. Whereas the 3rd plaintiff/ applicant heavily deponed to issues which are contained in the lower court file, he did not see the necessity of supplying this court with the evidence, and instead this court has had to call for the file to establish the claims made by the 3rd plaintiff/ applicant.

26. 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.”

27. From the above provision of the law, this court has jurisdiction to transfer any suit filed at the subordinate court to itself, and vice versa. Transfer of any suit can be made except that such jurisdiction has to be found necessary to issue such an order. I have perused the matter filed in MC ELC No. E024 of 2021. The 3rd plaintiff/ applicant is the plaintiff and the respondent, the district land registrar and the district surveyor are the 1st defendant, 2nd and 3rd defendants. I have also read a ruling delivered on 15th June 2021, by Hon. G. N. Wakahiu where in determining the two applications before him, he addressed the issue of the suit before this court. It was his opinion that parties should apply to have the two cases consolidated or to have one of the cases dismissed rather than to vacate the orders he had issued.

28. It appears that none of the parties took the subordinate court's advice, and it is only when the orders were issued that the 3rd plaintiff/ applicant who clearly is the one affected by the orders that he now realizes that there are two suits over the same subject matter. As a matter of fact, he is the one who filed the suit at the subordinate court which means he is responsible for the mess, if any, that he has gotten himself into.

29. I would agree with the respondent that the 3rd plaintiff/ applicant if he feels constrained by the multiplicity of the suits, he should withdraw either. But the question is would justice be served if that was the case? In my view, that would not be the route to take. In a bid to ensure expeditious disposal of the case, it would be appropriate that the two matters are consolidated.

30. I further note that the respondent herein is not a party to the proceedings before this court save the mention of the 10th defendant who is said to be her late husband. She contended that she has no interest in this suit and that the 3rd plaintiff/ applicant is not the owner of parcel no. 487. Having perused the



file before me, I realize that parcel no. 487 is mentioned as one of the parcels of land in contention. It would thus be proper and to avoid embarrassing this court that the issues raised in both files be determined once and for all.

31. On the second issue, the respondent contended that the firm of George Wakahiu and Njenga advocates is not licensed to practice law in the year 2024. I will not dwell much on this for the reason the learned counsel on record for the 3rd plaintiff/ applicant is properly before the court as can be seen from the practicing certificate for the year 2024 dated 1st January, 2024. The firm of George Wakahiu & Njenga is also registered as per the certificate of registration issued on 31st March, 2006.
32. On the issue of costs, the 3rd plaintiff/ applicant is to blame owing to the filing of an almost similar suit before the subordinate court. He has to bear the costs of this application. Having stated the above, I find merit in the notice of motion dated 16th August, 2024, and I proceed to grant the following orders: -
 - i. CMELC (Narok) No. E024 of 2021 Kepue Ole Nweta vs Nalaku Ene Meshuko & 2 Others be transferred to this honourable court for final determination of the suit.
 - ii. CMELC (Narok) No. E024 of 2021 is hereby consolidated with this file i.e. ELC Case No. 46 of 2017. For the avoidance of doubt, ELC Case no. 46 of 2017 shall be the lead file.
 - iii. The respondent is entitled to the costs of this application. The same is to be borne solely by the 3rd plaintiff/ applicant.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL on this 18TH day of DECEMBER, 2024.

HON. MBOGO C.G.

JUDGE

18/12/2024.

In the presence of:

Mr. Meyoki Pere – C.A

