



Kithi v The Land Registrar, Kilifi County & 3 others (Environment & Land Case 61 of 2020) [2023] KEELC 17227 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 61 OF 2020**

**EK MAKORI, J
APRIL 26, 2023**

BETWEEN

HUMPHREY KOMBE KITHI PLAINTIFF

AND

THE LAND REGISTRAR, KILIFI COUNTY 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

ASHOK DOSHI 3RD DEFENDANT

ALI TAIB 4TH DEFENDANT

RULING

1. Before the court for determination are two applications; notice of motion dated 29th March 2022 filed by the 4th Defendant (hereinafter the 1st application) for orders:
 - a. That this instant case (hereinafter ‘this suit’) be consolidated with the case registered as Mombasa ELC No 89 of 2008 between Mohamed Ali v Great Lakes Ports Limited and the Attorney General sued for and behalf of the Registrar of Titles Mombasa (hereinafter called ‘the other suit’).
 - b. That the proceedings in this suit be stayed pending the hearing and final determination of the other suit.
 - c. That the costs of this application be provided for.
2. In support of this application were the grounds enumerated on the face of the motion and the affidavit sworn by the 4th Defendant wherein he deposed that there was a pending suit in Mombasa ELC No 89 of 2008 between himself and Great Lakes Ports Limited and the Attorney General involving the parcels Land Reference No 27249 CR No 215 and 11492/466 CR No 216 (hereinafter ‘the Mombasa suit’).



That the dispute in that court was that the two titles registered in his name and one Abdullah Ali were unlawfully revoked by the National Land Commission on 17th July 2017. That the said revocation resulted in the Kadzonzo/Madzimbani Adjudication Scheme and subsequently the existence of the suit property herein, Kadzonzo/Madzimbani/1742.

3. According to the 4th Defendant, it will be in the best interest of justice if the proceedings herein are stayed pending the determination of the suit filed in Mombasa.
4. The second application was a Notice of Motion dated 31st March 2022 filed by the 3rd Defendant (hereinafter the 2nd application) for orders that:
 - a. The amended plaint dated 26th January 2022 and filed on 27th January 2022 be and is hereby struck out and consequently this suit be is hereby dismissed as against the 3rd Defendant.
 - b. Costs of this application and of the suit be paid by the Plaintiff.
5. The basis of this application was the grounds listed on the face of it only as there is no supporting affidavit on record. According to the 3rd Defendant, the amended plaint did not disclose any cause of action against him save for the mere description of the 3rd Defendant, and the amended plaint remains as originally pleaded before the order to join the 3rd Defendant as a party to the suit.
6. The 3rd Defendant also filed grounds of opposition dated 7th October 2022 to the 1st application. He averred that the 4th Defendant had failed to establish the nexus between the suit herein and the Mombasa suit. That the parties and subject matter herein were different from those in the Mombasa suit.
7. On his part, the Plaintiff filed a replying affidavit dated 13th June 2022 in response to the 2nd application. He deposed that it was the court's idea to join the 3rd and 4th Defendants to this suit since they were cited in the National Land Commission Gazette notice No 6862 Vol CXCIX No 97, and therefore their input would aid the court.
8. The 1st and 2nd Defendants did not file any response to the applications. The applications were heard by way of written submissions.

The 4th Defendant's Submissions

9. On the 1st application, counsel submitted that the relevant provisions on consolidation of suits are under Order 11 rule 3 (h) of the *Civil Procedure Rules, 2010*. He also relied on the cases of *Prem Lala Nabata and another v Chandi Prasad Sikaria* [2007] eKLR cited in *Arnold Kipkirui Langat v Atticon Limited and 7 others* [2021] eKLR; *Law Society of Kenya v Center for Human Rights and Democracy and 12 Others* [2014] eKLR; and *Nyati Security Guards and Services Ltd v Municipal Council of Mombasa* [2004] eKLR where the essence and conditions for consolidation of suits were discussed and considered.
10. Counsel submitted that having demonstrated the relationship between the suit property herein and the suit properties in the Mombasa suit, it would be convenient and expedient to try all the suits together.

The 3rd Defendant's submissions

11. Counsel for the 3rd Defendant submitted the Amended Plaint did not disclose any cause of action against the 3rd Defendant and that the same only shows that the Plaintiff was aggrieved by the actions of the 1st Defendant alone.



12. On whether the present suit should be consolidated with the Mombasa suit, counsel reiterated the grounds listed in their grounds of opposition outlined above.

The Plaintiff's submissions

13. Counsel for the Plaintiff submitted that the suit against the 3rd Defendant could not be dismissed since the 3rd Defendant had raised triable issues in his counter claim that ought to be addressed and that the only way to do so would be if he is a party to the suit.
14. On the 1st application, counsel submitted that there was no nexus between the suit property herein and those in the Mombasa suit. That the suit property herein did not appear in the listed parcels of land alleged to be forgeries.

Analysis and Determination

The following issues arise for determination;

1. Whether an order for consolidation of this suit and Mombasa ELC No 89 of 2008 is merited.
2. Whether the claim against the 3rd Defendant should be struck out.

The applicable law on consolidation is found under Order 11 Rule 3 (1) (h) of the [Civil Procedure Rules](#) which states as follows:

3.
 - " (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—
 - (a) ---
 - (h) Consider consolidation of suits;"

Similarly, in [Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others](#) (2014) eKLR the Court laid down principles that guide consolidation of suits as follows:

“The principles of consolidation of suits was re-stated in *Stumberg and another v Potgeiter* 1970 E.A. 323 as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”

In the Indian case of *Brij Kishore V Bir Singh & others* at the High Court of Punjab and Harana (LR 5922 of 2013 Justice Paramjeat Singh quotes the following from the Supreme Court Case of *Prem Lala Nabata & another v Chandi Prasad Sikaria*, (2007) 2, Supreme Court Cases 551 at paragraph 18:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs,



time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

15. The same court further stated as follows:-

“The *Civil Procedure Rules* mandate Courts to consider consolidation of suits and in so doing, to be guided by the following:

1. Do the same question of law or fact arise in both cases?
2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?
3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?”

16. I have perused a copy of the amended plaint dated 28th September 2018, filed in the Mombasa suit, and established that the property in dispute therein is Plot No 27249 Mariakani Town, Title No CR 215 measuring approximately 2.729 Ha. delineated on the land survey plan No 260608 and allegedly registered to the Plaintiff. Further, the Plaintiff’s claim therein was that the Defendant in that suit fraudulently caused two titles LR 16142 and LR 17439 to be issued to the Defendant, titles which overlap the Plaintiff’s land.

17. The dispute in the present case is over land parcel Kadzonzo/Madzimbani/1742. The 4th Defendant wants this court to believe that this suit property came about as a result of the adjudication of the parcels mentioned in the Mombasa suit. I have perused the findings of the National Land Commission annexed to the Plaintiff’s pleadings herein. It is evident that the suit property herein being a section of the Kadzondzo Madzimbani Scheme, on the ground forms part of the parcels mentioned in the Mombasa suit. However, I am not satisfied that the same questions of law and fact arise in both cases or that the reliefs sought arise from the same transaction or series of transactions to warrant an order for consolidation. I say so because the claim in the Mombasa suit involves an alleged fraudulent acquisition of titles while that herein revolves around an adjudication process.

18. On whether the claim against the 3rd Defendant should be struck out, the 3rd Defendant argued that the amended plaint did not disclose any cause of action against him. Order 1 Rule 3 of the *Civil Procedure Rules* provide:

“Who may be joined as defendants

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

Order 2 Rule 15 the relevant part further provides:

1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—



- a. it discloses no reasonable cause of action or defence in law; or...
2. No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.”

19. In *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR the late Madan JA (as he then was) said the following: -

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way.”

The Judge added that:

“A Court of justice should aim at a sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it.”

The Judge concluded as follows: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”

20. Similarly, in *Crescent Construction Co. Ltd v Delphis Bank Ltd* [2007] eKLR, the Court of Appeal stated as follows:

“However, one thing remains clear, and that is the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

21. It is trite therefore that in determining whether or not a pleading discloses a cause of action, the Court cannot go beyond the parties’ own pleadings, in this case, the amended Plaintiff dated 26th January 2022. There is only one mention of the 3rd and 4th Defendants under paragraph 4 therein as follows:

“The 3rd and 4th Defendants are individuals who have been mentioned in the ground report by the National Land Commission in relation to the suit property. Service shall be affected through the Plaintiff’s advocates’ office.”

22. I also note that prior to the 3rd Defendant being made a defendant in this suit, the court had issued directions that the plaintiff be amended to join the 3rd Defendant as an interested party, which was done. On his own application, the 3rd Defendant successfully sought to join the suit as a defendant. This



resulted in the above-amended plaint dated 26th January 2022. Notably again, the 3rd Defendant filed a statement of Defence and Counterclaim dated 31st March 2022. They raise substantial issues regarding the Plaintiff's averments, which cannot be wished away or ignored prematurely. In any case, I do not see any prejudice that will be occasioned to the 3rd Defendant that cannot be compensated by way of costs, if the suit against him is not dismissed. Indeed his participation in these proceedings will assist the court to arrive at a just conclusion. Moreover, any orders issued herein will affect the 3rd Defendant's rights in one way or another.

23. In the circumstances, I see no merit in his application that the suit against him be dismissed.
24. The upshot is that the applications dated 29th March 2022 and 31st March 2022 are unmerited and are hereby dismissed.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 26TH DAY OF APRIL, 2023.

E.K. MAKORI

JUDGE

