



**Gaman v Musau (Environment & Land Case 123 of 2022)
[2023] KEELC 19221 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 123 OF 2022**

**LL NAIKUNI, J
JULY 19, 2023**

BETWEEN

MURAD GAMAN PLAINTIFF

AND

BEATRICE WANZA MUSAU DEFENDANT

RULING

I. Introduction

1. Before this Honorable Court for its determination of the Notice of Motion application dated March 6, 2023. The application was moved by the Defendant/Applicant – herein “Beatrice Wanza Musau. It was brought under the provisions of Order 51 Rule 1 Order 11 Rule 3 (a) (b) of the [Civil Procedure Rules](#) 2010, Sections 1A, 1B and 3A of the [Civil Procedure Rules](#) 2010 and Article 159 (2) (d) of the [Constitution](#) of Kenya 2010.
2. Upon service of the said application, its instructive to note that the Plaintiff/Respondent failed to file their Replies. But be that as it may, subsequently, the Honorable Court provided direction to have this application disposed off by way of written submissions accordingly.

II. The Defendant/Applicants case.

3. The Defendant/Applicants sought to be granted the following orders.
 - a. That this Honorable Court be pleased to order consolidation of the current suit to Chief Magistrate Court Mombasa Civil Suit No. E591 of 2022 Beatrice Wanza Musau v Russell Mills in order and Chief Magistrate Mombasa CMCC No. E121 of 2022 Beatrice Wanza Musau v Hydro Luxurious Apartment Ltd., Murad Gaman & Russell Mills.



- b. That the Honorable Court be pleased to order for stay of proceedings in Chief Magistrate Court Mombasa Civil Suit No. E591 of 2022 Beatrice Wanza Musau v Russell Mills in order and Chief Magistrate Mombasa CMCC No. E121 of 2022 Beatrice Wanza Musau v Hydro Luxurious Apartment Ltd., Murad Gaman & Russell Mills.
 - c. That pending hearing and determination, the Defendant's application seeks orders restraining the Plaintiff from evicting the Defendant from the Property known as Apartment 434 on the 4th Floor of the Hydro Luxurious Apartment along first Avenue in Nyali constituency.
 - d. That pending hearing and determination of the suit the Defendant's application seeks orders restraining the Plaintiff from evicting the Defendant from the property known as Apartment 434 on the 4th Floor of the Hydro Luxurious Apartment along First Avenue in Nyali Constituency.
 - e. That costs of the application.
4. The application was based on the grounds, testimonial facts and the averments founded under the ten (10) paragraphed Supporting Affidavit of Beatrice Wanza Musau sworn and dated 6th March, 2023, together with three (3) annexures marked as "BWM – 1 to 2" annexed thereto.
 5. She averred as follows: -
 - a. She was an adult female of sound mind and the Applicant herein well versed with the facts of the case and duly authorized to swear this application.
 - b. She filed two Civil Suits before the lower Court at Mombasa being CMCC No. 591 of 2022 – Beatrice Wanza Musau v Russell Mills and ELC No. 121 of 2022 Beatrice Wanza Musau v Hydro Luxurious Apartment Limited Murad Gaman and Russell Mills seeking protection of this Honorable Court from being evicted from the suit property.
 - c. However, later on the Plaintiff herein instituted the current suit which was slated for mention on 8th March, 2023.
 - d. The Deponent wished that the afore stated two Civil Suits CMCC No. 591 of 2022; and CMCC ELC. No. 121 of 2022 be consolidated with the current suit as both of them were slated for mention before the lower court on 27th March, 2023 and 15th May, 2023 respectively.
 - e. Accordingly, the facts in these suits were substantially similar and revolved around the known as Apartment 434 on the 4th Floor of the Hydro Luxurious Apartments along First Avenue in Nyali Constituency (Hereinafter referred to as "The Suit Property").
 - f. The parties between the current suit and the two (2) suits were substantially similar and share the same interest.
 - g. Consolidating the current suit with the two (2) suits afore stated would save the Honorable Court time and resources and further would expedite the hearing and determination of the said suits and lead to a common decision which would embrace the judicial process and it would be better if the three (3) suits were heard and determined separately.



III. The Responses by the Plaintiff

6. From the records the Honorable Court, as indicated above, it has been noticed that the Plaintiff/ Respondent never filed any responses nor submissions. Hence in essence the Notice of Motion application was not opposed. Nonetheless, the Honorable Court will proceed to make a final determination on the application on merit and provide its directions in due course.

IV. The Submissions

7. On 9th March, 2023, while all the parties were in court, the Honorable Court directed that the Notice of Motion application dated 6th March, 2023 be canvassed by way of written submissions. Pursuant to this, only the Defendant/Applicant filed her written submissions accordingly and court reserved 18th July, 2023 as the date to deliver its Ruling accordingly.

A. The written submissions by the Defendant/Applicant

8. On 13th June, 2023 the Learned Counsel for the Defendant/Applicant through the Law firm of Messrs. Khaminwa and Khaminwa Advocates filed their written submissions. Mr. Yose Advocates commenced the suit by informing court that the Defendant/Applicant filed two suits in the lower court being CMCC No. 591 of 2022 and CMCC ELC. 121 of 2022 seeking certain orders thereof. Later on the Plaintiff instituted the current suit against her. Due to similarities of these suits in terms of the parties and the subject matter the Learned Counsel was of the view that for the sake of good order and interest of justice three (3) suits be consolidated. To him they were substantially similar and resolved around the suit property. In so doing it would save the Honorable Courts time and resources. Furthermore, the Learned Counsel argued the consolidation of these suits and determination and lead to a common decision which would embrace the judicial process than if the 3 suits were to have been heard separately.
9. To support his argument, the Learned Counsel relied on the provisions of Order 11 Rule 3 of the Civil Procedure Rules and the case of *Prem Lala Nachala & another v Chandi Prased F Sikaria* (2007 2 Supreme Court 551. India Supreme Court held: -

“it cannot be disputed that the court has power to consolidate suits in appropriate cases....

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 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 or relief claimed in the suits are in respect or arise out of the same transaction or series of transactions or that for some other reasons it is desirable to make an order consolidating the suit”

10. The Learned Counsel argued that the court has a wide discretion in ordering consolidation – consolidation would be ordered if there was a common question of law of fact in the suits, the reliefs or rights sought arose from the same or a series of transaction or for any other reason such as for convenience avoiding multiplicity of suits, expeditious and in order to meet the overriding objective set out in the Civil Procedure Act Cap 21 of Laws of Kenya.

He averred that it would be convenient and expedient to try all the suits together as it would obviate the multiplicity of suits and would lead to the determination of all the issues arising in all the suits at the same trial. It would be less costly and would save the court precious judicial time.



The Learned Counsel informed court none of the two (2) CMCC No. 591/2022 and 121/2022 had been heard as the hearing was set for 19th June, 2023. To buttress his point on consolidation even a part heard matter he cited the case of *Benson G Mutahi v Raphael Gichore Munene Kabutu & 4 others* 2014 eKLR”

In conclusion he urged court to allow the application as prayed.

V. Analysis and Determination

11. I have keenly considered all the issues raised from the filed Notice of Motion application dated 6th March, 2023 by the Defendant/Applicant, her written submission and cited authorities, the relevant positions of the *Constitution* of Kenya, 2010 and the statutes.
12. In order to reach an informed, just and fair decision the Honorable court has condensed the salient issues for determination into the following 3 categories.
 - a. Whether the Notice of Motion application dated 6th March, 2023 by the Defendant/Applicant has merit
 - b. Whether the parties are entitled to the relief sought.
 - c. Who will bear the costs of the application?

Issue No. (a): Whether the Notice of Motion application dated 6th March, 2023 by the Defendant/Applicant has merit.

13. Under this sub heading, the main substratum of the application is two prong - the stay of proceedings and the consolidation of the two (2) CMCC No. 591/2022 and CMCC ELC. 121/2022 before the lower court awaiting hearing and determination with the current suit before this Court. Essentially, from the issues and the relief founded from the filed application herein, this Honorable Court is confronted on a riddle to resolve pertaining to the legality, efficacy and the legitimacy of consolidation of suits. To respond to that, the Court will spend a little bit of time to deliberate on the concept of consolidation of suits. I have noted that Courts through myriad of cases and indeed the Learned Counsel have indeed expended some valuable time and rightfully so on the same issue and hence the Court will not be re – inventing the wheel at all on it.

To begin with consolidation of suits are governed by the Rules Committee founded under Section 81 (b) of the *Civil Procedure Rules*. As cited by the Learned Counsel in the two cases of “*Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* (2014) eKLR, where the Supreme Court of Kenya held:-

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties consolidation was never intended to confer any undue advantage upon the party that seeks it nor was it intended to occasion any disadvantage towards the party who opposes it”

14. Further, the case relied on of “*Nyote Security Guards and Services Limited v Municipal Council of Mombasa* (2000) eKLR where the guidelines for consolidation were clearly set out as follows: -

“The situation in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where; -

- (i) Some common questions of law or fact arises in both or all of them.



- (ii) The rights or reliefs claimed in them are in respect of the same transactions
- (iii) For some other reasons, it is desirable to make an order for consolidating them.

15. As a matter of right this court fully concurs with the Learned Counsel on the rational and justification of the three suits into one of the reasons already adduced. Be that as it may, the only hitch this court finds itself in is on the matters of jurisdiction. Each court out to respect the jurisdiction of all courts and avoid causing interference with matters filed in other courts. I am guided by the legal ratio founded in the famous case of “*The Owners of the Motor Vessel “Lillian S” v Caltex Oil (K) Limited* (1989)” eKLR where Justice Nyarangi held:-

“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 obligated 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 the proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction”

Therefore, in this case this Court will not wish to interfere with the proceedings in the lower court. It is incumbent that it conducts intensive interrogation of all the fundamental issues and inferences surround these two (2) cases filed before the lower Court before making any decisions whatsoever. That is the dictum of the law.

16. However, all said and done, although none of the parties herein have formally moved this Court on the transfer of the cases from the lower court to this Court, the Court feels it’s the most pragmatic thing to do in the given circumstances. In saying so, this Court holds that it has supervisory powers under the provisions of Article 165 (6) and (7) of the Constitution of Kenya 2010 and Section 18 (1) (b) (i) (ii) and (iii) of the Civil Procedure Rules. These provisions hold:

Article 165 (6) – The High Court has supervisory jurisdiction over the Subordinate Courts and over any persons, body or authority exercising a judicial or quasi-judicial function but not over a superior court.

Article 165 (7) for the purpose of clauses (6) the High Court may call for the record of any proceedings before any sub-ordinate court or person, body or authority referred to in Clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”.

While Section 18 (1) provides: -

“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 if its own motion without such notice, the High Court may at any stage.

- (b) withdraw any suit or other proceedings pending in any court sub-ordinate to it and thereafter
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court or subordinate to it and competent to try or dispose of the same.



- (iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.
- (2) where any suit or proceedings has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may subject to any special direction in the case of an order of transfer either retry it or proceed from the point at which it was transferred or withdrawn.

Further to this, the Court seeks solace from the provision of Section 1A of the *Civil Procedure Act*, 2010 which provides for the Overriding objective (also known as the double O (OO) or the oxygen principle comes out and urges Courts to deal with a view to meeting out the ends of Justice. It is anchored under the provision of Article 159 (1) and (2) of the *Constitution* of Kenya, 2010 and Section 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Sections 3 and 13 of the *Environment & Land Act*, No. 19 of 2011. These provisions make the rules to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the *Act*. See the case of “*Abdirahman Abdi also Abdi v Safi Petroleum Products Limited & 6 others*, Civil Application No. Nai. 173 of 2020 where the Court held:

“The Overriding Objectives in Civil litigation is a policy issue which the Court invokes to oblivate hardship, expenses, delay and to focus on substantive justice.....”

Hence, based on these legal principles this court holds that the notice of motion application by the Defendant/Applicant herein has merit.

Issue No. (b): - Whether the parties are entitled to the relief sought

- 17. Under this Sub - heading Court is guided by the principles on the prayers sought. Ideally the issues of the stay of the proceedings of the lower court cases is the most viable for now.

As regards consolidation the court can only do so if the matters are of the same court. Its unfortunate that the parties herein placed very scanty material before it for it to arrive at a firm decision. In the given circumstances, it is imperative that these files from the lower Court are placed before the court based on the principles under Article 165 (6) and (7) of *Constitution* of Kenya and Section 18 (1) (b) of *Civil Procedure Act*, 2010 for its direction prior to granting the orders of consolidation. As stated these provisions give this Court the general powers 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. See the decisions of “*AO Basid Limited v ASL Credit Limited* (2019) eKLR where in approval of the case of *David Kabungu v Zikarengu & 4 Others*, Kampala HCCS No. 36 of 1995; “*Kithita Ngeana v Mwaniki Kisume* (2018) eKLR; . Its only logical that this court calls for the record for further assessment before making the orders for the consolidation of the three (3) matters. Thus, in the meantime, there will be need to cause stay of proceedings of the cases from the lower court awaiting the outcome of this Court hereof. The threshold for stay of proceedings is well explained in *Halsbury’s Laws of England, 4th Edition Vol. 37 Pages 330 and 332*. Indeed, the Court makes reference to the case of “*Global Tours and Travels Limited Nairobi HC Winding Up Cause No. 43 of 2000*”. For these reasons, therefore, to this extend the application by the 1st Defendant/Applicant succeeds.

ISSUE No. c): Who will bear the costs of the application

- 18. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award granted to a party at the conclusion of the legal action and proceedings of litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. By events it means the results of the legal action and proceedings.



19. In the instant case taking that these proceedings are still going on it will be fair, just and reasonable that each party bear their own costs.

VI. Conclusion and Findings _

20. In the long run, having caused such an elaborate analysis to the framed issues, the Honorable Court on preponderances of probabilities arrive at the following conclusion and specifically order:

1. That the Notice of Motion application dated 6th March, 2023 be and is hereby allowed but strictly subject to the following pre-conditions:-
 - a. There be stay of proceedings onto the lower court matters being Civil Cases CMCC No. E591 of 2022 – Beatrice Wanza Musau v Russell Mills and CMCC ELC. No. E121/2022 Beatrice Wanza Musau v Hydro Luxurious Apartment Limited, Musad Gaman and Russell Mills pending and further directions from this Court.
 - b. The Chief Magistrate in Charge and/or Officer in Charge of Civil matters at Mombasa directed to ensure that two (2) files on the afore stated cases be transferred and placed before this court under the Provisions of Article 165 (6) and (7) of the Constitution of Kenya 2010 and Section 18 (1) (b), (i), (ii) and (iii) and (2) of the Civil Procedure Act 2011 within the next two (14) weeks from the date of the delivery of this Ruling.
 - c. Upon the transfer the court will consider the legal viability of causing a consolidation of the three (3) files into one matter based on the Provisions of Section 81 (h) of the Civil Procedure Act Cap. 21 and the Rules Committee and Precedents.
2. That this matter to be mention on 16th October, 2023 for further direction based on the direction and orders of this Ruling.
3. That each party to bear their own costs.

21 IT is ordered accordingly

RULING DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....19THDAY OFJULY.....2023.

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HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. M/s. Juma Advocate for the Plaintiff/Respondent.
- c. Mr. Yose Advocate for the Defendant/Applicant.

