



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 48 OF 2017**

**KENYA AGRICULTURAL AND LIVESTOCK**

**RESEARCH ORGANISATION (KALRO).....PLAINTIFF**

**VERSUS**

**MEMBERS OF KIMBIMBI SOCIAL HALL SELF HELP GROUP**

**(Sued through Officials Namely:**

**ENOS NJENGA NDIRANGU - CHAIRMAN**

**CICILY WAMAITHA KANG'ETHE – SECRETARY**

**RICHARD GICHUKI- TREASURER.....1<sup>ST</sup> DEFENDANT**

**TIMOTHY NYAGA NJERU.....2<sup>ND</sup> DEFENDANT**

**GREGORY NYAGA.....3<sup>RD</sup> DEFENDANT**

**THOMAS NJERU NJAGI.....4<sup>TH</sup> DEFENDANT**

**MARY ITUMBI NJERU.....5<sup>TH</sup> DEFENDANT**

**JACINTA WARUGURU.....6<sup>TH</sup> DEFENDANT**

**JOSEPH KARIMI EJIDIO.....7<sup>TH</sup> DEFENDANT**

**DOUGLAS MATHENGE KANANDA.....8<sup>TH</sup> DEFENDANT**

**JAMES MWANGI KARANJA.....9<sup>TH</sup> DEFENDANT**

**TIMOTHY WAMUGUNDA GIKONYO.....10<sup>TH</sup> DEFENDANT**

**RULING**

Apart from this case, there is also **WANGURU SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 30 of 2017** (the Wanguru Case) involving the defendant in this case and some of its members (as plaintiffs) and **JOHN MUNJI KIMANI, JAMES MACHARIA, DAVID NYAGA MUNGAI** and **MANASE MURAGE KABURU** (as defendants). That suit involves ownership of parcels of land identified as plot Nos 1–91 KIMBIMBI which the plaintiffs in the **WANGURU CASE** alleged were allocated to them by the **NATIONAL IRRIGATION BOARD** since 2000 but the defendants being officials of the **KENYA AGRICULTURAL RESEARCH & LIVESTOCK ORGANISATION** have encroached upon.

The **KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION (KALRO)** is itself the plaintiff in this case in which it seeks several orders against members of the **KIMBIMBI SOCIAL HALL SELF HELP GROUP** including an order to restrain the said members from occupying land which is in the possession and use by **KALRO**.

It was not therefore surprising when on 4<sup>th</sup> May 2017, counsels for the parties herein, being aware about the existence of the **WANGURU CASE**, recorded the following order by consent:

***“By consent, it is directed that the WANGURU SPM CC No. 30 of 2017 be stayed and this case do proceed. Further, that the status quo obtaining in the suit land be maintained and counsel for the defendants to advise his clients to desist from moving into the suit land. The parties to comply with Order II Civil Procedure Rules so that this suit can be heard and determined expeditiously. Mention before the Deputy Registrar on 7.6.2017 to confirm compliance”***

I now have before me the defendants’ Notice of Motion dated 31<sup>st</sup> October 2017 in which the following orders are sought:

- 1. That the Honourable Court be pleased to vary, set aside and/or review its orders made on 4<sup>th</sup> May 2017.***
- 2. That Wanguru SPMCC No. 30 of 2017 be transferred to this Honourable Court for consolidation and final disposal with this suit.***
- 3. That the costs of this application be provided for in any event.***

The application which is supported by the affidavit of **ENOS NJENGA NDIRANGU** is grounded on the reasons that on 4<sup>th</sup> May 2017, this Court made an order staying **WANGURU SPMCC No. 30 of 2017** but some of the witnesses in that case are defendants in this case and it is therefore in the interest of justice that these two suits are consolidated.

In opposing the application, **PATRICIA NGUTU** the plaintiff’s Legal officer deponed as follows in her replying affidavit dated 24<sup>th</sup> November 2017:

- That the plaintiff is not a party in the WANGURU CASE and neither are the four defendants in that case parties to this suit.***
- That the 1<sup>st</sup> and 3<sup>rd</sup> defendants in the WANGURU CASE are employees of the plaintiff in this case who upon being served, filed an amended plaint dated 8<sup>th</sup> April 2017 raising among other issues whether the 91 plaintiffs have any cause of action against them.***
- That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have never entered appearance in the WANGURU CASE in which the Court has already made a ruling to the effect that the 1<sup>st</sup> and 3<sup>rd</sup> defendants were improperly enjoined and the application is meant to circumvent that ruling.***
- That the Court never made any orders on 4<sup>th</sup> May 2017 staying further proceedings in the WANGURU CASE and under Section 18 (1) of the Civil Procedure Act, it is mandatory that the application herein be served upon all the parties in the WANGURU CASE***
- That it is more expedient that the plaintiffs withdraw the WANGURU CASE to enable a just, expeditious and affordable resolution of the two suits and that this suit is determined on its merit.***
- That a consolidation of the two suits will embarrass, prejudice and delay the determination of this suit to the detriment of the plaintiff given the fact that there is no interlocutory injunctive order in place.***

The plaintiff also filed grounds of opposition to the application stating that no orders were made on 4<sup>th</sup> May 2017 and further, that there are no lawful grounds for the review of any orders.

The application has been canvassed by way of written submissions filed both by **Mr. G. OMBACHI & CO. ADVOCATE** for the defendants and **OCHIENG & OCHIENG ADVOCATE** for the plaintiff.

I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by counsel.

The defendants by their Notice of Motion are seeking the following main orders:

- 1. That this Court do vary, set aside and/or review its orders dated 4<sup>th</sup> May 2017, and;***
- 2. The transfer of the WANGURU CASE to this Court and its consolidation with this case.***

I shall first consider the prayer for transfer of the **WANGURU CASE** to this Court and its consolidation with this case because if I allow it, then the prayer No. 1 will be allowed as a matter of course. On the other hand, if I disallow it, prayer No. 1 will remain in force.

I must set the record straight that contrary to the averments in paragraph ten (10) of the replying affidavit of **PATRICIA NGUTU** in which she has deponed:

***“That I am informed by MOSES ANGAYA `ADVOCATE, which information I believe to be true that this Court never issued any orders on 4<sup>th</sup> May 2017 staying further proceedings in SPMCCC No. 30 of 2017 – WANGURU”***

this Court’s order of that date and which was recorded in the presence of both **Mr. ANGAYA** advocate for the plaintiff and **Mr. OMBACHI**

advocate for the defendants is very clear in its terms. It has been re-produced above for the avoidance of any doubt. It was a clear consent order and so none of the parties can run away from it unless it was obtained fraudulently or through mis-representation and I have not heard any of the parties say so.

In opposing the application, the plaintiff, as per paragraph twelve (12) of the replying affidavit of **PATRICIA NGUTU**, has also deponed that under **Section 18 (1) of the Civil Procedure Act**, it is mandatory that all the parties are served before such an application is considered and that there is no evidence of service upon the eighty one (81) plaintiffs and the 2<sup>nd</sup> and 4<sup>th</sup> defendants in the **WANGURU CASE** who are not parties in this suit. It is true that **Section 18 (1) of the Civil Procedure Act** provides as follows:

***“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 own stage –***

***a. transfer any suit, appeal or other proceedings 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. ....”***

It is therefore correct that the parties concerned must be notified when any application to transfer a suit is filed so that they can be heard, if they so desire. However, the power to transfer a suit is so wide that the High Court can even do so **“on its own motion without such notice”**. But where a party files such an application, then the other parties must be notified.

Having said so, it is not correct, as deponed by **PATRICIA NGUTU**, that the parties in the **WANGURU CASE** have no notice about this application. The parties in the **WANGURU CASE**, as per the plaint annexed to **PATRICIA NGUTU**'s own replying affidavit are the **KIMBIMBI SOCIAL HALL SELF HELP GROUP PROJECT** (as plaintiff) which is also the defendant in this case while the defendants therein are named as **JOHN MUNJI KIMANI, JAMES MACHARIA, DAVID NYAGA MUNGAI** and **MANASE MURAGE KABURU**. It is also instructive to note that **JOHN MUNJI KIMANI** the 1<sup>st</sup> defendant in the **WANGURU CASE** has filed a witness statement in this case in which he describes himself as the Centre Director of the plaintiff part of whose mandate is to protect and safe guard the assets and property of **KALRO** the plaintiff herein. It must be obvious therefore that the defendants in the **WANGURU CASE** were being sued as representatives of the plaintiff herein. **Mr. G. OMBACHI** who is counsel for the plaintiff in the **WANGURU CASE** also filed a memorandum of appearance on behalf of the 1<sup>st</sup> to 8<sup>th</sup> defendants in this case. Clearly therefore, it cannot be argued that the parties in the **WANGURU CASE** have no notice about this application. They have notice as required by law.

One of the issues that the Court considers during the pre-trial conference is the consolidation of suits. **Order II Rule 3 (1) (h)** reads:

***“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. –***

***b. –***

***c. –***

***d. –***

***e. –***

***f. –***

***g. –***

***h. Consider consolidation of suits”.***

The main objective in the consolidation of suits is to save on costs, time and other resources by avoiding a multiplicity of suits touching largely on the same subject matter. The Court in which the application for consolidation is made will no doubt take into consideration whether the suits sought to be considered relate to the same subject matter, involves the same parties and whether it is desirable to order a consolidation. In **STUMBERG & ANOTHER VS POTGEITER 1970 C.A 323**, the Court observed as follows:

***“Where these are common grounds of law or fact or actions having sufficient important 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”***

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

I have perused the pleadings in the **WANGURU CASE**. They identify the properties in dispute as plots No. 1 to 91 KIMBIMBI situated within the National Irrigation Board land. The 1<sup>st</sup> plaintiff in that case is of course **KIMBIMBI SOCIAL HALL SELF HELP GROUP PROJECT** suing through its officials and 90 other plaintiffs. That group is also the defendant in this case. It is also noteworthy that apart from the **KIMBIMBI SOCIAL HALL SELF HELP GROUP** which is a common party in the **WANGURU CASE** and this suit, there are also other parties common in both suits. These are:

1. **TIMOTHY NYAGA NJERU**
2. **GREGORY NYAGA**
3. **ENOS NJENGA NDIRANGU**
4. **THOMAS NJERU NJAGI**
5. **MARY ITUMBI NJERU**
6. **JOSEPH KARIMI EJIDIO**
7. **DOUGLAS MATHENGE KANANDA and**
8. **TIMOTHY WAMUGUNDA GIKONYO**

It is also instructive to note that a 3<sup>rd</sup> party notice has been issued to the National Irrigation Board which, according to the plaint herein, transferred the land in dispute to the plaintiff. This is the land that the defendants are alleged to have trespassed onto. That is reason enough to warrant the transfer of the **WANGURU CASE** to this Court for purposes of consolidation with this case. The parties are essentially the same parties.

And with regard to whether or not the subject matter is the same, in the **WANGURU CASE**, the land in dispute is identified as plots No. 1–91 KIMBIMBI. In this suit, the land in dispute is only identified in paragraph four (4) of the plaint as:

***“..... all that parcel of land in KIMBIMBI within the wider MWEA IRRIGATION SCHEME measuring approximately 26 hectares a portion thereof measuring about 40 acres of which the defendants jointly and severally have invaded and trespassed on”.***

It is clear therefore that the land in dispute is yet to be registered. I have no doubt in my mind however that the land described in the **WANGURU CASE** as ***“Plots No. 1 to 91 KIMBIMBI”*** and ***“all that parcel of land in KIMBIMBI within the wider MWEA IRRIGATION SCHEME measuring approximately 26 hectares”*** a portion of which the defendants are alleged to have invaded, and which is the subject herein, can only be referring to one and the same parcel of land. That is why when the parties recorded the consent order on 4<sup>th</sup> May 2017, they agreed ***“that the status quo obtaining on the suit land be maintained”*** and ***that the defendants “desist from moving into the suit land”***. That order would not have been necessary if the land in dispute in the **WANGURU CASE** and in this case were two different and distinct parcels of land. It is evident therefore that the **WANGURU CASE** and this case relate to the same subject matter even though differently described in both cases.

It has been deponed in paragraph 14 of the replying affidavit by **PATRICIA NGUTU** that a ***“consolidation of the two suits will embarrass, prejudice and delay the determination of the issues to the detriment of the plaintiff given that there was no interlocutory injunctive orders in place against the Defendants/Applicants”***. It has however not been suggested how a consolidation of the two suits will embarrass, prejudice and delay this dispute. If anything, as far back as 4<sup>th</sup> May 2017, this Court made the following orders:

***“The parties to comply with Order II CPR so that this suit can be heard and determined expeditiously. Mention before the Deputy Registrar on 7.6.17 to confirm compliance”***

Nothing appears to have been done in that regard and from the record, the parties have never appeared before the Deputy Registrar as directed almost one year ago! The plaintiff cannot now complain about delays when it has failed to take advantage of the Court’s order to expedite the trial. And with regard to the issue that there are no injunctive orders in place against the defendants, the parties themselves did on 4<sup>th</sup> May 2017 agree ***“that the status quo obtaining on the suit land be maintained*** and ***“the defendants counsel was to advise his clients to desist from moving into the suit land”***. I am entitled to presume that both counsel advised their parties accordingly about the import of those orders. If there has been any breach, I see no reason why the party in breach should not be cited for contempt thereof.

It has also been submitted by the plaintiff that the application is meant to circumvent a ruling already delivered in the **WANGURU CASE** and that defendants should instead withdraw that suit. The fact that a ruling has already been delivered in one suit is not in itself a bar to its

consolidation with another suit so long as both suits are still alive. Further, a party cannot be forced to withdraw its case unless the Court strikes it out for good reasons.

In the circumstances therefore and having considered all the issues herein, I am persuaded that there is merit in the prayer to transfer the **WANGURU CASE** to this Court for consolidation with this case. The prayer to set aside and/or review the order staying the proceedings in the **WANGURU CASE** will also therefore be allowed as a matter of course to enable that consolidation and trial.

Ultimately therefore, the Court makes the following orders with respect to the defendants Notice of Motion dated 31<sup>st</sup> October 2017:

- 1. The application is allowed.*
- 2. WANGURU SPMCC No. 4 of 2017 be forwarded to this Court forthwith for purposes of consolidation with this file.*
- 3. This file shall be the lead file for purposes of filing pleadings and hearing.*
- 4. Further directions shall be made on 24<sup>th</sup> April 2018 by HON. MUKUNYA J. once the WANGURU CASE file is availed.*
- 5. Costs shall be in the cause.*

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> MARCH, 2018**

Ruling dated, delivered and signed in open Court at Kerugoya this 13<sup>th</sup> day of March 2018

Mr. Wambugu for Mr. Oluoch for the Plaintiff present

Ms Makworo for Mr. Ombachi for the Defendants present.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> MARCH, 2018**