



Kirao & 106 others v Kassamjee (Environmental and Land Originating Summons 55 of 2020) [2023] KEELC 22521 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 55 OF 2020**

EK MAKORI, J

DECEMBER 13, 2023

**IN THE MATTER OF: PLOT NO. 220-MALINDI LT 37, FOLIO
225, FILE 3403**

AND

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION
THAT THE PLAINTIFFS/APPLICANTS HAVE
OBTAINED OWNERSHIP OF FIFTY
DECIMAL ZERO SEVEN (50.07) ACRES OF
THEREABOUTS OF THE ABOVE-
MENTIONED PARCEL OF LAND BY WAY
OF ADVERSE POSSESSION**

BETWEEN

DOMINIC JUMA KIRAO & 106 OTHERS PLAINTIFF

AND

SHABBIR KASSAMJEE DEFENDANT

RULING

1. The application dated 2nd August 2023 seeks to have this suit consolidated with Malindi ELC No. 27 of 2022 (O.S). The application is opposed
2. From the record the applicants herein filed Malindi ELC No. 55 of 2020 (O.S). Out of their motion, the applicants on 20th January 2023 withdrew the matter leaving behind a counterclaim that had been filed by the defendant /respondent.



3. The Court directed the motion be canvassed by way of written submissions. The parties complied.
4. The applicants averred that it is true that they filed Malindi ELC No. 55 of 2020 (O.S) and withdrew the same on 20th January 2023 leaving behind a counterclaim that had been filed by the defendant/respondent. It is argued by the applicants that the withdrawal did not bar them from filing another suit. They said, in any event, that is why they seek that this suit be consolidated with the previous one because both deal with the same subject matter – Plot No. 220, Malindi LT:37. Folio:225, File 3403. The applicants cited the following cases to support the consolidation – Benson G. Mutahi v Raphael Gichovi Munene Kabutu [2014] eKLR, *Abdalla v Hassan & 15 others* (Civil Suit 210 of 2021) [2022] KEELC 13582 (KLR) (5 October 2022) (Ruling) and *Law Society of Kenya v The Centre for Human Rights and Democracy* [2014] eKLR – all highlighting the principles to be considered by the Court before consolidation is ordered.
5. The respondent in a rejoinder stated that since ELC No. 55 of 2020 (O.S) is pending and due for the hearing of a counterclaim, the applicants having withdrawn their suit against the respondents, they are estopped from bringing a similar fresh suit and turning around to seek for consolidation. That will amount to an abuse of the Court process. It will also offend the sub judice rule as enunciated in Section 6 of the *Civil Procedure Act*. The respondent relied on the decisions in Joseph Ndungu Njoroge v Lilian Atieno Siwolo [2015] eKLR (on the sub judice rule and Section 1A and 1B on the Oxygen - O2 principles), *748 Air Service Ltd v Theuri Munyi* [2017] eKLR, and Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Ltd [2007] eKLR (on estoppel).
6. The issue for the determination of this Court is whether the Court should order for Joinder.
7. The principles governing joinder are as elaborated in the case of Benson G. Mutahi v Raphael Gichovi Munene Kabutu [2014] eKLR:

“The principles of consolidation of suits was re-stated in Stumberg and another vs 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”
8. In the case of *Law Society of Kenya v The Centre for Human Rights and Democracy* [2014] eKLR the Supreme Court of Kenya had this to say about the consolidation of suits:

“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 meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it”
9. Those authorities are germane and settle on the issue as to what this Court ought to consider before consolidation.
10. But the contrary is applicable here. What this suit seeks and No. ELC 27/2022 is similar in script. This matter commenced in earnest starting with an application for an injunction. A ruling was delivered by Olola J. on 10th February 2022. The applicants withdrew their claim on 20th January 2023. The defendants elected to proceed with the counterclaim. The hearing is scheduled for 22nd April 2023. Meanwhile the originating of another suit No. ELC 27/2022, leaving behind this suit offends both



the doctrine of sub judice and estoppel. Why withdraw a suit knowing very well that there were issues left in a counterclaim and then turn around and file a fresh and congruent suit with the former one, spin around like in the legendary musical chairs, and apply for consolidation? This is classical abuse of the Court process which the decision in *Joseph Ndungu Njoroge v Lilian Atieno Siwolo* [2015] eKLR frowned upon in this manner:

“In Barclays Bank of Kenya Limited Vs Elizabeth Agidza & 2 Others [2012] eKLR Mabeya J held that: - “The mischief sought to be avoided by Section 6 of the *Civil Procedure Act* is likelihood of two different Court’s adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions that will be embarrassing to the judicial process.”

In that case, the Court found that the suit contravened Section 6 of the *Civil Procedure Act* and on being asked by the Defendant to strike out the suit under order 2 rule 15 (1) (d) of the Civil Procedure Rules that the suit was an abuse of the process of the Court, on that point the Court held that “although Section 6 provided a remedy for stay of suit,” the plaintiff may be correct but with the enactment of Sections 1A and 1B of the *Civil Procedure Act* the position had changed. There is pressure on the Courts to conclusively expeditiously and proportionately determine civil disputes. What will the stay of the proceedings achieve if the issues herein can be subsumed and be determined in the Kisumu suit?”

Hon Mabeya J proceeded and struck out the suit with costs to the defendant.

There is nothing in this record of appeal to show whether the other suit had been set down for hearing although there is evidence that a defence had been filed by the defendant/respondent. That being the case, assuming pleadings had closed, then the appellant herein could only have sought for discontinuance of the suit or part of it withdrawn with consent signed by all the parties to the suit or with leave of Court as contemplated in order 25 rule 4 of the *Civil Procedure Rules*.

The above provisions also mandate the party withdrawing suit to ensure that costs for the discontinued suit are paid to the party before proceeding with the subsequent or latter suit (See High Court Civil 319/2009. Mudhihiri Mohamed & 2 Others Per Nambuye J (as she then was).”

11. There is also the issue of estoppel. The question that should be posed to the applicants is, by withdrawing their suit and bringing a similar suit, what was the Court to do with the pending Counterclaim? What were the reasons for withdrawal and filing a congruent and similar suit if that is not an abuse of the Court process what will it be called? The doctrine of estoppel as enunciated in *Rolling Mills Ltd v Jubilee Insurance Co. Ltd* [2007] eKLR, the Court distills the issue raised herein as follows:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

12. Based on the two doctrines, sub judice and estoppel as discussed in the authorities I have cited, the applicants cannot be allowed to originate a fresh suit - No. ELC 27/2022, turn around after withdrawal of the claim herein and seek that there be a consolidation. In my view that will offend the O2 principles on the affordable, timeous, and inexpensive determination of suits. The fact that this was the first suit



in time filed, and no reasons have been stated why the withdrawal was done, therefore to avoid wasting time, this suit will proceed as scheduled. If the applicants will wish to be back they formally do so.

13. Application for consolidation dated 2nd August 2023 is at this moment dismissed with cost as being an abuse of the Court process with costs to the respondents in any event.

14. This matter will proceed to the hearing as scheduled.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF DECEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kimani for Applicants

Ms. Oloo for the Respondents

Court Clerk: Happy

