



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 215 OF 2015**

**MARCO OBITA MORUMBWA.....PLAINTIFF**

**VERSUS**

**DORCAS MUTONO MUKUNZU.....DEFENDANT**

**AND**

**THOMAS OSEA CHANGAMU.....1<sup>ST</sup> INTENDED INTERESTED PARTY**

**SABINA MUENI CHARLES.....2<sup>ND</sup> INTENDED INTERESTED PARTY**

**BENECLIFF MUTHIANI.....3<sup>RD</sup> INTENDED INTERESTED PARTY**

**BERNARD WAMBUA MUKUNZU & EMMAH NZULA MUKUNZU**

*(Sued in their capacity as the personal representatives & administrators*

*of the Estate of the late GEORGE MUKUNZU*

**NDILI – deceased).....4<sup>TH</sup> INTENDED INTERESTED PARTY**

**ROLEX WAITA MUKUNZU.....5<sup>TH</sup> INTENDED INTERESTED PARTY**

**THE COUNTY LAND REGISTRAR,**

**MACHAKOS.....6<sup>TH</sup> INTENDED INTERESTED PARTY**

**RULING**

What is before Court for determination is the Applicants' Notice of Motion application dated the 15<sup>th</sup> September, 2021 brought pursuant to Article 165 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Orders 1 Rule 6, 10(2) and (4), 3 Rule 11 (h & g), and Order 51 Rule 1 of the Civil Procedure Rules. The Applicants seeks the following orders:

***a. Spent***

***b. That pending the hearing and the determination of this Application, and the Applicants' Application for injunction filed herein and dated 30<sup>th</sup> July, 2021, this Honorable Court be pleased to direct that the Intended Interested Parties be joined and participate in these proceedings.***

***c. That this Honourable Court be pleased to join the Intended Interested Parties as necessary parties to these proceedings i.e. as Plaintiffs and Defendants as the case may be.***

***d. That this Honourable Court be pleased to direct that these proceedings be consolidated with Machakos ELC Case No. 216 of 2015, Machakos ELC Case No. 80 of 2019 and Machakos ELC Case No. 81 of 2019 which arise out of the same cause of action.***

***e. That in the alternative to (4) above, this Honourable Court be pleased to make such other order as the Court thinks fit for the***

*effective disposal of this Suit or until further orders.*

***f. That the costs and incidentals of this Application be provided for.***

The application is premised on the grounds on the face of it and the supporting affidavit of MARCO OBITA MURUMBWA, the Plaintiff herein where he deposes that they have joint and several causes of action against the Respondents which arose out of the same transactions surreptitiously orchestrated and/or perpetrated by the Respondents. He confirms that they previously severally filed proceedings against the abovementioned Defendant, but new causes of action have since jointly and severally arisen against the Respondents as demonstrated in his application for injunction dated 30<sup>th</sup> July, 2021. He explains that the Intended Interested Parties have a stake in and will directly be affected by the orders or decisions emanating from these proceedings. Further, they are crucial and necessary parties to these proceedings. He avers that no prejudice will be occasioned if the Intended Interested Parties are joined as proper parties in these proceedings. He contends that irrespective of the aforementioned suits being filed by different Plaintiffs, a common cause of action in the said proceedings arises out of the same facts. Further, the right to relief in respect of the same transaction or series of transactions will arise for determination. He reiterates that consolidation of suits will be ordered where common questions of law or fact arise so as to form a complete nexus and make the whole matter one.

The application is opposed by one of the proposed 4<sup>th</sup> Intended Interested Parties EMMA NZULA MUKUNZI who deposes that the instant application is frivolous, vexatious and an abuse of the court process. She contends that the 4<sup>th</sup> Intended Interested Party cannot be enjoined in these proceedings to the exclusion of all administrators of the estate of the late George Mukunzi Ndili. She avers that it is mutually agreed that the Applicants did not purchase the properties from either the deceased or his estate. Further, the Applicants have not attached a Draft Amended Plaint to show both the Court and the 4<sup>th</sup> Respondent the alleged cause of action and the prayers they would wish to claim against the estate of her late husband. She insists the Applicants have not deposed by way of Affidavit the reason they want her to be enjoined as an administrator of the estate of the late George Mukunzi Ndili. Further, the application does not specify whether they want her to be enjoined as a Plaintiff or Defendant. She states that the issues being raised by the Applicants were dealt with by a court of competent jurisdiction being the High Court at Machakos in HCP & A 205 of 1996 and a ruling delivered. Further, the Defendant was not an administrator of the deceased estate at the time of the alleged purchases by the Applicants and had not been distributed to land parcel numbers Mavoko Town Block 3/3180. She reiterates that the titles were cancelled by a Court of Competent jurisdiction and the same reverted back to the estate. Further, that she is not a necessary party to these proceedings nor a party to the other suits by the Applicants. She explains that there is a suit between herself against some of the Intended Interested Parties herein being Machakos MCELC No. 66 of 2021 which the Applicants have failed to disclose to court. Further, that the alleged transfers of the properties to the Defendants was done without Letters of Administration and without authorization of the court, in clear breach of orders of court dated the 17<sup>th</sup> January, 2002. She further avers that Mavoko Town Block 3/88755 was closed on subdivision thus nonexistent and the court cannot issue orders sought as the same would affect third parties who are not parties to this suit. Further, this court lacks jurisdiction to interfere with the distribution of the estate of George Mukunzu Ndili amongst its beneficiaries. She further reiterates that she is the registered proprietor of land parcel number Mavoko Town Block 3/ 89465 which was given to her as the wife and beneficiary of the estate of George Mukunzu Ndili.

The Defendant DORCAS MUTONO MUKUNZU opposed the application and filed a replying affidavit where she deposes that the application is incompetent, fatally defective, an abuse of the court process and lacks merit. Further, the application is brought to defeat her response in respect to application dated the 30<sup>th</sup> July, 2021. She insists the Plaintiff has no claim over the estate of George Mukunzu Ndili – deceased, and the succession court ruled so vide its Ruling dated 17<sup>th</sup> June, 2021. She explains that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties have filed their independent suits as admitted being Machakos ELC 216 of 2015, 80 of 2019 and 81 of 2019 and there is no reason why they seek to be joined in this suit. She explains that the purported contract of sale has its own terms and it should be interpreted as such. She contends that some of the suits are affected by limitation of time and they want to seek joinder so as to defeat the Defence by the Defendant. She reiterates that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties can only seek consolidation which is opposed due to the limitation of time pleaded. Further, the 4<sup>th</sup> and 5<sup>th</sup> Intended Interested Parties have no interest in this matter since they are beneficiaries of the estate and they never sold any land to the Plaintiff nor the 1<sup>st</sup> to 3<sup>rd</sup> Intended Interested Parties.

The Plaintiff filed a further affidavit where he reiterates his averments and insists he was given authority by the 1<sup>st</sup> to 3<sup>rd</sup> Intended Interested Parties to seek the orders sought herein. He avers that the Respondents have subsequently dealt with the suit property by conducting subsequent amalgamations and subdivisions thereon, hence the difference in the title numbers to the suit property. Further, the suit property no longer belongs to the deceased estate but has been distributed and transferred to the names of Dorcas Mutono Mukunzu, Emma Nzula Mukunzu and Rolex Waita Mukunzu. He explains that whereas it is the Defendant who sold the suit property to the Applicants for valuable consideration after Grant of Letters of Administration had been issued to Bernard Wambua Mukunzu, with the property subsequently being distributed to the Defendant herein, the Applicants propose to join all administrators of the said estate as the said administrators have intentionally used their position including the succession proceedings to deprive them of their *bona fide* right to the suit property. Further, that all the Respondents are hence necessary parties to these proceedings.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 15<sup>th</sup> September, 2021 including the respective affidavits, annexures and rivaling submissions, the following are the issues for determination:

- ***Whether the Intended Interested Parties should be joined in these proceedings either as Plaintiffs or Defendants.***
- ***Whether these proceedings should be consolidated with Machakos ELC Case No. 216 of 2015, Machakos ELC Case No. 80 of 2019 and Machakos ELC Case No. 81 of 2019.***

The Applicants in their submissions reiterate their averments as per the respective affidavits and insist the Intended Interested Parties should be joined in these proceedings as they are necessary parties so as to explain the proceedings in the succession cause. To buttress their averments, they relied on the following decision: *JMK vs. MWM & Another (2015) eKLR*.

The Defendant in her submissions insist the application for joinder has no merit as the Intended Interested Parties have no stake in this matter since they have their own independent cases. Further, they have no evidence or extra materials that can be used assist the court in determining the issues herein. To support her arguments, she has relied on the following decisions: *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others V Attorney General & 4 Others (2017) eKLR and Communications Commission of Kenya & 4 Others V Royal Media Services Limited & 7 Others (2014) eKLR*.

The 4<sup>th</sup> Intended Interested Parties in their submissions reiterated their averments as per the replying affidavit and insist they cannot be joined in the proceedings herein to the exclusion of the other administrators of the deceased estate. To support their averments, they have relied on the following decisions: *Simon Kamau Muhindi suing as the Administrator of the Estate of Esther Nyokabi Muhindi v Monica Wambui Ngugi & Another (2014) eKLR and Republic V Karisa Chengo & 2 Others (2017) eKLR*.

On the question as to whether the Interested Parties should be joined in this suit. I will make reference to Order 1 Rule 10 of the Civil Procedure Rules which stipulates as follows:

***“(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”***

In the case of *Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002] eKLR* Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit and stated that:

***“When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”***

In the current scenario, I note the Applicants claims to have purchased the suit property from the Defendant. They contend that the Intended Interested Parties have a stake in and will directly be affected by the orders or decisions emanating from these proceedings. Further, they are crucial and necessary parties to these proceedings. They aver that no prejudice will be occasioned if the Intended Interested Parties are joined as proper parties in these proceedings. The Defendant insists the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties have filed their independent suits as admitted being Machakos ELC 216 of 2015, 80 of 2019 and 81 of 2019 and there is no reason why they seek to be joined in this suit. Further, the purported contract of sale has its own terms and should be interpreted as such. She claims some of the suits are affected by limitation of time. Further, the 4<sup>th</sup> and 5<sup>th</sup> Intended Interested Parties have no interest in this matter since they are beneficiaries of the deceased estate and they never sold any land to the Plaintiff nor the 1<sup>st</sup> to 3<sup>rd</sup> Intended Interested Parties.

In relying on the facts as presented, Order 1 Rule 10 of the Civil Procedure Rules and associating myself with the decisions I have cited, it is my considered view that since the 4<sup>th</sup> and 5<sup>th</sup> Intended Interested Parties are administrators and beneficiaries of the deceased estate where the suit property emanated from, they indeed meet the criteria set of an interested party and their involvement will be necessary to enable the court effectually and completely adjudicate upon this matter. Further that the ultimate orders and decree made in the suit herein will not be enforced without their presence in the matter. I further find that the 6<sup>th</sup> Intended Interested Party being the Land Registrar is a key party in these proceedings that touch on title to land. However, I am of the view that the 1<sup>st</sup> to 3<sup>rd</sup> Intended Interested Parties do not meet the criteria of an Interested Party and will decline to join them in this suit. I further find that no prejudice will be suffered by the Defendant if the 4<sup>th</sup> and 5<sup>th</sup> Intended Interested Parties are joined in these proceedings. In the circumstance, I will direct that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Intended Interested Parties be joined in these proceedings as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.

On the issue of consolidating this suit with Machakos ELC Case No. 216 of 2015, Machakos ELC Case No. 80 of 2019 and Machakos ELC Case No. 81 of 2019.

On consolidation of suits, Order 11 Rule 3(1) (h) of the Civil Procedure Rules provides that:

***“(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—***

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

In the case of *Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR* the learned Judge explicitly described the criteria for consolidation of suits 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.”***

Further in the case of ***Law Society of Kenya Vs The Centre for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 of 2013***, the Supreme Court of Kenya had this to say about 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.”***

In the current case, the Applicants have sought for consolidation of this suit with Machakos ELC Case No. 216 of 2015, Machakos ELC Case No. 80 of 2019 and Machakos ELC Case No. 81 of 2019 which fact has been vehemently opposed by the Respondents who insist the claims are time barred due to the limitation of time pleaded. Further, the 4<sup>th</sup> and 5<sup>th</sup> Interested Parties have no interest in this matter since they are beneficiaries of the estate and they never sold any land to the Plaintiff nor the 1<sup>st</sup> to 3<sup>rd</sup> Intended Interested Parties. I note the 1<sup>st</sup> to 3<sup>rd</sup> Applicants each have separate suits they have instituted against the Defendant. Based on the facts as presented while relying on the legal provisions, I have quoted and associating myself with the cited decisions, at this juncture, I opine that consolidation of these suits is unnecessary and will amount to delay in their determination. It is my considered view that these suits though related should be heard concurrently and will make an order to that effect.

It is against the foregoing that I find the instant application partially successful and will only allow prayers No. 3, 4 and 5 to the extent of joining the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Intended Interested Parties as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, respectively, in this suit.

I will disallow the rest of the prayers as sought.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

**JUDGE**