



**REPUBLIC OF KENYA**

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

**ELC. CONST. PETITION NO. 13 OF 2018**

**IN THE MATTER OF: ARTICLES 2, 10, 20, 22, 23, 24, 48,**

**165(3) AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF**

**ARTICLES 28, 29, 31, 40, 47, 48 AND 50(1) OF THE**

**CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**(PROTECTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS) RULES, 2013**

**IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012, THE**

**LAND REGISTRATION ACT, NO. 3 OF 2012, THE**

**LIMITATION OF ACTIONS ACT, THE SURVEY ACT**

**BETWEEN**

**AMBROSIAH NDITI MULLI.....PETITIONER**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**MATUNGULU YATTA RANCHING CO. LTD.....5<sup>TH</sup> RESPONDENT**

**PHILIP MULWA NZIOKA.....6<sup>TH</sup> RESPONDENT**

**PATRICK KALELI MUTISO.....7<sup>TH</sup> RESPONDENT**

**JOHNSTONE MWAKA LUMBI.....8<sup>TH</sup> RESPONDENT**

DAVID KIMEU KILONZO.....9<sup>TH</sup> RESPONDENT  
DAMARIS NDUKU JOSEPH.....10<sup>TH</sup> RESPONDENT  
THOMAS MUTUKU NTHUVA.....11<sup>TH</sup> RESPONDENT  
ROSE WAYUA MAINGI.....12<sup>TH</sup> RESPONDENT  
PAUL MUINDI MUTULI.....13<sup>TH</sup> RESPONDENT  
HENRY WAMBUA KINYONGE.....14<sup>TH</sup> RESPONDENT  
CHRISTINA NTAAMBA WAMBUA.....15<sup>TH</sup> RESPONDENT  
LEONARD KIMEU NDAMBUKI.....16<sup>TH</sup> RESPONDENT

**AND**

REGINA MWETHYA KITHUKU.....1<sup>ST</sup> APPLICANT  
DIANA MUSANGA MUIA.....2<sup>ND</sup> APPLICANT  
ALEXANDER G. MUTINDA MWINI.....3<sup>RD</sup> APPLICANT  
PETER MUTUA KIIO.....5<sup>TH</sup> APPLICANT  
MAGDALINE NDUKU MAKAU.....6<sup>TH</sup> APPLICANT  
DOMINIC MUAMBI MUASYA.....7<sup>TH</sup> APPLICANT  
SERA KAMENE WILLIAM.....8<sup>TH</sup> APPLICANT  
JAPHETH SIMON MUSYOKI MBUTHU.....9<sup>TH</sup> APPLICANT

**RULING**

What is before Court for determination are eight Notice of Motion applications dated the 27<sup>th</sup> October, 2021 and 12<sup>th</sup> November, 2021 respectively.

In first Notice of Motion dated the 27<sup>th</sup> October, 2021, the Applicant DIANA MUSANGA MUIA seeks to be enjoined in this Petition as an Interested Party and her supporting affidavit be admitted as her witness statement including evidence. The application is premised on the grounds that in 2006, the Applicant bought land parcel number Ndalani/Ndalani Block 1/156 from one Thomas Mutuku Nthuva, who had bought the same from one Muema Mbau, one of the initial shareholders of Matungulu Yatta Ranching Company Limited, the 5<sup>th</sup> Respondent herein, and had been issued with a Title Deed on 7<sup>th</sup> December, 1992. She explains that subsequent to her purchase, she commenced construction of rentals on the said parcel of land in 2009. Further, that transfer of the said parcel of land in her name is still pending. She avers that the Petitioner's claim for her parcel of land is in total violation of her property rights. The application is supported by the affidavit of Diana Musanga Muia where she reiterates her averments above and claims her construction stopped due to orders from this court. She insists having been in possession of her land for over 12 years, notwithstanding the fact that she bought it from the registered owner, she should be the one legally entitled to claim ownership by adverse possession. She reiterates that the Petitioner and her family are trespassers who are abusing the court process by using it to deprive the bona fide owners land which they own as of right.

The 2<sup>nd</sup> Notice of Motion application dated the 27<sup>th</sup> October, 2021 is brought by REGINA MWETHYA KITHUKU who seeks to be enjoined in this Petition as an Interested Party and that her supporting affidavit be admitted as her witness statement including evidence. The application is premised on the grounds that in 2004, the Applicant bought land parcel number Ndalani/Ndalani Block 1/139 from one PHILIP MULWA NZIOKA, one of the initial directors and shareholders of Matungulu Yatta Ranching Company Limited, the 5<sup>th</sup> Respondent herein. She explains that subsequent to the purchase of the said land, she constructed thereon and has been living on the land since December, 2004 and the only issue pending is the transfer of the said land to her name. The application is supported by the affidavit of Regina Mwethya Kithuku where she reiterates her averments above and insists the Applicant's claim is in violation of her property rights. She contends that having been on her land for over 12 years, notwithstanding she purchased the same from the registered owner, she is entitled to the land by adverse possession. She states that the Applicant and her family are abusing the court process by using it to deprive the bona fide owners, land which they own as of right.

The 3<sup>rd</sup> Notice of Motion application dated the 27<sup>th</sup> October, 2021 is brought by ALEXANDER G. MUTINDA MWINGI who seeks to be enjoined in the Petition as an Interested Party and the supporting affidavit be admitted as his witness statement including evidence in the said

Petition. The application is premised on the summarized grounds that the Applicant purchased land parcel number Ndalani/ Ndalani Block 1/152 in the year 2005 from one Daniel Muthama Wambua, one of the initial shareholders of Matungulu Yatta Ranching Company Limited, the 5<sup>th</sup> Respondent herein. Further, that he has built his matrimonial home on the said land and has been thereon since 2008. He explains that subsequent to the purchase of the said land, he also purchased land parcel number Ndalani/ Ndalani Block 1/150 in the year 2017 from David Mutisya Makumbi who was also a Shareholder of Matungulu Yatta Ranching Company Limited, the 5<sup>th</sup> Respondent herein. Further, Petitioner's claim for compensation for the two parcels of land, is in total violation of his property rights. The application is supported by the affidavit of ALEXANDER G. MUTINDA MWINGI where he reiterates his averments above and contends that he should be the one legally entitled to claim ownership of the land by adverse possession. Further, that he has been in possession of parcel number Ndalani/ Ndalani Block 1/150 since the year 2017 when he bought it, without any interference from any party whatsoever.

In the Notice of Motion dated the 12<sup>th</sup> November, 2021, the Applicant JAPHETH SIMON MUSYOKI MBUTHU, seeks joinder in this Petition and for the supporting affidavit to be admitted as his witness statement including evidence. The application is premised on the grounds that on 15<sup>th</sup> September, 2016, the Applicant acquired land parcel number Ndalani/ Ndalani Block 1/1109 from one David Kimeu Kilonzo, having exchanged the same with parcel number Ndalani/ Ndalani Block 1/562, which the Applicant had purchased. The Applicant contends that the Petitioner's claim over the land is in violation of his property rights. The application is supported by the affidavit of Japheth Simon Musyoki Mbuthu where he reiterates his averments above and states that he has built his matrimonial home on the suit land and has been living thereon in peace. He insists the Petitioner and her family are trespassers who are abusing the court process by using it to deprive the bona fide owners of land which they own.

In another Notice of Motion dated 12<sup>th</sup> November, 2021, the Applicant SERA KAMENE WILLIAM seeks to be enjoined in this Petition as an Interested Party and for her supporting affidavit to be admitted as her witness statement including evidence. The application is premised on the grounds that in 1968, she bought shares from Matungulu Yatta Ranching Company Limited, the 5<sup>th</sup> Respondent herein and was allocated land parcel number Ndalani/ Ndalani Block 1/1114 which was transferred in her name and title deed issued to that effect. Further, the Petitioner is claiming to have adversely possessed the said parcel of land, and this is in violation of her property rights. The application is supported by the affidavit of SERA KAMENE WILLIAM where she reiterates her averments above and explains that in 1969, the 5<sup>th</sup> Respondent bought two parcels of land being LR No. 2303 and 2304 respectively from a white settler. Further, that at the said time the land was vacant except for the VET's house and the D. O s residence. She contends that in 1970, the Petitioner's husband including a few other individuals moved into the suit land and built semi – permanent structures thereon. Further, the 5<sup>th</sup> Respondent through its management confronted them and even filed suits against the said persons, following which they vacated the suit land except the Petitioner's husband and following his demise, the Petitioner including her family have continued to occupy the land to date. She denies that her father in law Chief Munai was allocating land as claimed by the Petitioner. Further, that the Petitioner and her husband were ever allocated land by her father in law. She reiterates that the Petitioner and her husband were trespassers who are abusing the court process by using it to deprive the bona fide owners land which they own.

In another Notice of Motion application dated the 9<sup>th</sup> November, 2021, the Applicant DOMINIC NDUNDA MUTUKU seeks the following orders:

- 1. That the High Court Civil Case No. 2347 of 1978 filed at Nairobi be consolidated with the present Petition.***
- 2. That the present suit be heard physically and not virtually through an online platform.***
- 3. That this Honourable Court does make a site visit of the suit land before setting down this matter for hearing.***
- 4. That the costs of this Application be in the cause.***
- 5. That this Honourable Court does issue any other order that it may deem fit to issue in the circumstances.***

The application is premised on grounds that on 15<sup>th</sup> September, 1978 Matungulu Yatta Ranching Company Limited, the 5<sup>th</sup> Respondent herein, instituted the Nairobi High Court Civil case No. 2347 of 1978 against Ambrush Muli Cathule, the husband of the Petitioner in the present Petition, for trespass on Land Reference Number 2304. In response to the said suit, the Petitioner's husband filed a Defence. The Court made an order for transfer of Nairobi High Court Civil Case No. 2347 of 1978 to Machakos. The said suit relates to the very suit land that is the subject of the present Petition and also involves the very same parties either directly or indirectly. The Nairobi High Court Civil Case No. 2347 of 1978 remains undetermined to date. He explains that the Petitioner, Ambrosiah Nditi Muli has filed the present Petition on her own behalf and on behalf of the Estate of Ambrose Muli, her deceased husband, laying claim on the very suit land which is the subject of the High Court Civil Case No. 2347 of 1978 filed by the 5<sup>th</sup> Respondent as against the Petitioner's husband. Further, it is the very suit land that the Petitioner in the present Petition also claims on behalf of the Estate of her husband, Ambrose Muli. He insists the same questions of law and/or fact arise from the Nairobi High Court Civil Case No. 2347 of 1978 and the present Petition. Further, that there should be a physical hearing of the dispute herein and it is paramount that this Honourable Court conducts a site visit of the suit land before setting it down for hearing. He avers that no prejudice will be occasioned to any party if the orders sought are granted. The application is supported by the affidavit of DOMINIC NDUNDA MUTUKU where he reiterates his averments above.

In response to the aforementioned applications, the Petitioner, Ambrosiah Nditi Muli filed two replying affidavits where she consents to joinder of the 1<sup>st</sup> to 9<sup>th</sup> Applicants as Interested Parties in the present Petition. She opposes the claims of rights and interests in the suit land by the 1<sup>st</sup> to 9<sup>th</sup> Applicants and reiterates her rights and interests in Ndalani/Ndalani Block 1/1324, 1325, 137, 139, 141, 143, 145, 147, 149, 1421, 153, 155, 157, 158, 1519, 857, 160, 159, 154, 152, 150, 148, 146, 144, 142, 140, 138, 136, 134, 1483, 1482, 1481, 1405, 1404, 1402, 1403, 1401, 1111, 1115, 1116, 1114, 1113, 1107 and 545 as well as portions of Ndalani/Ndalani Block 1/1133, 543, 1109, 546 and 1002 which parcels are collectively referred to as "suit land." She contends that the purported interest and rights in the suit land by the 1<sup>st</sup> to 9<sup>th</sup> Applicants are unfounded as the purported sellers being the 6<sup>th</sup> Respondent, 11<sup>th</sup> Respondent, Mwangi Soi, Jennifer Mumbi, Joel Nzioka Ndambuki and Florence Ngina Kimeu are not proprietors of the suit land. Further, that the 6<sup>th</sup> Respondent, 11<sup>th</sup> Respondent, Daniel

Muthama Wambua, Mwangi Soi, Jennifer Mumbi, Joel Nzoka Ndambuki and Florence Ngina Kimeu, not being the proprietors of suit land could not transfer rights and interests in the suit land to the 1<sup>st</sup> to 9<sup>th</sup> Applicants. She avers that neither her late husband nor herself executed a transfer document transferring any of their rights and interests in the suit land to any person including the 5<sup>th</sup> Respondent. Further, that a transfer of any portion of the suit land could not be lawfully conducted without her knowledge and consent. She explains that in 1993 when she was accused by members of the 5<sup>th</sup> Respondent of trespassing on the suit land, vide a Ruling by Oguk J. delivered on 23<sup>rd</sup> March, 1993 in Criminal Appeal No. 570 of 1991, the High Court dismissed the charges and cleared her of the said trespass charges. She insists the purported sale and transfer of portions of the suit land to the 1<sup>st</sup> to the 9<sup>th</sup> Applicants are illustrative of the arbitrary, consistent and continuous interference of the suit land by the 5<sup>th</sup> to 16<sup>th</sup> Respondents and now by other parties including the 1<sup>st</sup> to the 9<sup>th</sup> Applicants. She denies ever allowing either the 4<sup>th</sup> to the 16<sup>th</sup> Respondents or the 1<sup>st</sup> to the 9<sup>th</sup> Applicants to stay and build on the suit land. Further, that she has consistently resisted the illegal and irregular dispossession from the suit land by anyone who has tried to encroach thereon, including the 5<sup>th</sup> to the 16<sup>th</sup> Respondents and the 1<sup>st</sup> to the 9<sup>th</sup> Applicants. She claims in 2009, she filed Civil Case No. 78 of 2009, Ambrose Muli vs. Mutinda Kisoi & Others (2009) in respect to the continuing interference of the suit land. She disputes the claim for adverse possession. In response to the prayer for consolidation of the present Petition with High Court Civil Case No. 2347 of 1978, she refers to paragraphs 37, 38, and 39 of the Ruling delivered on 24<sup>th</sup> April, 2020 where the Court found that the issues raised in the present Petition cannot be said to be the same issues raised in the previous suits including High Court Civil Case No. 2347 of 1978. Further, that suits that raise different issues cannot be consolidated. She reiterates that owing to her age, being more than 90 years old, the court should first take her evidence before considering a site visit to the suit land.

DOMINIC NDUNDA MUTUKU, filed a further affidavit reiterating his averments above and insisting the Chief Magistrate at Machakos in CMCC No. 1114 of 2011 granted orders restraining the Petitioner from burying her husband's remains on the suit land but they still proceeded to do so. Further, that the Petitioner and her family have always had their own land parcel number 1187 which is in Kithimani/Kithimani 'A' belonging to Ambrose Muli Wambua, (Petitioner's husband) and they should be directed to settle thereon.

The applications were canvassed by way of written submissions which were highlighted by the respective Counsels.

### **Analysis and Determination**

Upon consideration of the aforementioned applications including the respective affidavits and rivaling submissions, at this juncture, since the Petitioner does not object to joinder of the 1<sup>st</sup> to 9<sup>th</sup> Applicants to the Petition, the only issue for determination is whether this suit should be consolidated with High Court Civil Case No. 2347 of 1978.

The Respondents in their submissions state that the Petitioner consented to joinders of 1<sup>st</sup> – 9<sup>th</sup> Applicants'/Proposed Interested Parties to this Petition. Further, that the Petitioner only objected to their claim of rights and interests to the suit land and consolidation. They contend that the Petitioner admitted that the 5<sup>th</sup> Respondent instituted HCCC No. 2347 of 1978 on 25<sup>th</sup> September, 1978 against her husband Ambrose Muli Kathuli in relation to trespass on L.R. No. 2304 wherein the late husband filed a Defence. Further, that the matter was transferred from Nairobi to Machakos pursuant to an order of the court. They submit that the said suit which is yet to be determined relates to the same subject matter in the present Petition and involves same parties. Further, in the present Petition, Ambrosiah Nditu Muli has filed the Petition on her own behalf and on behalf of her late husband's estate wherein she lays claim over the same subject matter. In the two matters the same questions of law and facts are similar as they rotate around issues of ownership of suit land. They reiterate that the Application meets the threshold for consolidation. They dispute the Petitioner's claims that issue of consolidation was already determined as in the Ruling dated 24<sup>th</sup> April, 2020, the court was dealing with issue of *res judicata* and not consolidation. Further, that Consolidation is only determined before matter is heard and during Case Management stage. They aver that the High Court matter and Petition have not been heard, hence the issue of *res judicata* cannot arise. To support their arguments, they relied on the following decisions including: **Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others (2014) eKLR**, **Selecta Kenya Gmbh & Co. KG V Chase Bank Limited & 2 others (2018) eKLR** and **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR**.

The Petitioner in her submissions admits to joinder of Proposed Applicants/Interested Parties. However, on the issue of consolidation, she sought for the said prayer to be dismissed and referred to the Ruling of the court dated the 24<sup>th</sup> April, 2020 in respect to a Preliminary objection dated 10<sup>th</sup> September, 2018. She insists the Application for consolidation is *res judicata* in terms of Section 7 of Civil Procedure Act as the Court became *functus officio* in terms of the decision it had made earlier. She averred that it is more than 40 years when Nairobi HCCC No. 2437 of 1978 was filed. She referred to Order 11 Rule 3(1) (b) of the Civil Procedure Rules and contended that an Application for consolidation should have been filed within 30 days after close of pleadings, and in this instance the Applicants are out of time. She relied on the doctrine of Laches. To buttress her averments, she relied on various decisions including: **Qayrat Foods Limited vs. Safiya Ahmed Mohamed (2020) eKLR**; **Walter Otiso Osoro vs. Mwaura Karuga (2019) eKLR**; **Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others (2014) eKLR**.

On the issue of consolidating this suit with High Court Civil Case No. 2347 of 1978, I wish to make reference to Order 11 Rule 3 (1) (h) of the Civil Procedure Rules which 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 and 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.*

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 scenario, the Applicant has sought for consolidation of this suit with High Court Civil Case No. 2347 of 1978 which fact has been vehemently opposed by the Petitioner who insists the application has been filed out of time in contravention to the provisions of Order 11 of the Civil Procedure Rules. Further, that the ruling dated the 24<sup>th</sup> April, 2020 already dealt with issues of consolidation. I note the High Court Civil Case No. 2347 of 1978 is yet to be determined. Further, all the parties admit that the suit land which is the fulcrum of the dispute herein forms the basis of the said High Court Civil Case No. 2347 of 1978. I have had a chance to peruse the said Ruling dated 24<sup>th</sup> April, 2020 and find that the application therein was not in respect to consolidation and neither did the Court make a determination of the same. The Petitioner contends that she is advanced in age and needs to have her evidence taken. Since the suit land is the fulcrum of the dispute in both suits and in order to save judicial time and insofar as the said application was filed 30 days after close of pleadings, noting that this suit had not been set down for pre trial directions, I am of the considered view that it meets the criteria for consolidation as the same questions of law and facts are similar as it rotates around issues of ownership of suit land. Further, I wish to distinguish the decision of **Walter Otiso Osoro** (supra) and note that in the said decision, the Applicant had sought consolidation of his suit with an already determined suit, which is not the position in this instance. 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 will be necessary, save judicial time and no party will be disadvantaged.

*It is against the foregoing that I find all the applications successful and will allow joinder of all the applicants as Interested Parties and direct that the instant Petition be consolidated with High Court Civil Case No. 2347 of 1978. I further direct that the hearing of the consolidated matter be expedited.*

*Costs will be in the cause.*

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF APRIL, 2022**

**CHRISTINE OCHIENG**

**JUDGE**