



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 293 of 2010

RISPAH WANGARI GITHUKU..... PLAINTIFF

VERSUS

JOSPHAT KIMANI.....1ST DEFENDANT

EMBAKASI RANCHING CO. LIMITED.....2ND DEFENDANT

RULING

The application for determination before this court is a Chamber Summons dated 15th March 2010 brought by the Plaintiff under Order XI Rule 1 of the repealed Civil Procedure Rules and section 3A of the Civil Procedure Act. The application is seeking orders that the suit herein be consolidated with Misc. Appl. No. 548 of 2009, and is supported by the Plaintiff's affidavit sworn on 15th December 2010.

The grounds for the application are that both suits are pending before this court and yet to be disposed of. Further, that both suits involve the same property and the parties are the same, and that the claim for adverse possession could only be filed by way of an originating summons, hence the need to file this second suit. The Plaintiff states that she instituted a suit against the 1st and 2nd Defendants in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts CMCC No. 5453 of 2008 which has since been transferred to the High Court at Nairobi as Misc. Appl. No. 548 of 2009 to enable her include a prayer for adverse possession.

The Plaintiff further stated that the orders she is seeking from this Court and against the Defendants/Respondents are the same in both suits, and that that the suit properties are plot numbers S109 and S110 she bought from Embakasi Ranching Company Ltd in 1976. She averred that an order of consolidation will assist the court to expeditiously dispose of both matters before it and will not prejudice any party to the suit.

The Defendants have opposed the application and filed grounds of opposition dated 18th March 2011. The Defendants aver that the Plaintiff did not properly invoke the jurisdiction of the Court when filing the original suit in the subordinate court, and that it is unsustainable for a matter originated by Plaintiff to co-exist with that originated by Originating Summons. Further, that the filing of the Originating Summons by the Plaintiff has the effect of ousting the jurisdiction of the Court in Miscellaneous Application No. 548 of 2009, and that this application is an abuse of the process of court

The parties canvassed the application by way of written submissions. The Plaintiff's counsel filed submissions dated 7th February 2012 wherein he gave a detailed background of the proceedings in the two suits sought to be consolidated. He contended that the current suit was filed because a prayer of adverse possession cannot be filed by way of plaint. Further, that the suits relate to the same parties and

same subject matter and can therefore be consolidated. He cited various judicial authorities in support of his argument.

The Defendants' counsel in submissions dated 8th November 2011 argued that Misc. Appl. No. 548 of 2009 was spent upon its transfer to the High Court and cannot be consolidated with this suit. Further, that the Plaintiff must elect to either pursue CMCC No. 5453 of 2008 or its successor in the High Court, or the suit herein as the two suits cannot exist. The Defendants submitted that the Plaintiff having elected to proceed by way of Originating Summons in this suit, CMCC No. 5453 of 2008 must be withdrawn or struck out.

I have considered the pleadings and submission made by the parties. The application herein was brought under the provisions of Order XI Rule 1 of the repealed Civil Procedure Rules which allowed for consolidation of suits involving the same or similar questions of law or fact. Consolidation of cases is now considered as part of the pretrial procedures under Order 11 Rule 3 of the Civil Procedure Rules with the aim of furthering expeditious disposal of cases and case management.

I agree with the Defendants' submission that Misc. Appl. No. 548 of 2009 has been spent as its main purpose was to effect the transfer of CMCC No. 5453 of 2008 to the High Court. I have perused the Plaintiff filed in CMCC No. 5453 of 2008 dated 1st September 2008 and note that the suit was filed against the 1st Defendant in the suit herein seeking orders that the suit properties belong to the Plaintiff. The originating summons filed herein dated 16th June 2010 seek orders of adverse possession against the 1st and 2nd Defendant with respect to the same suit properties and that the Plaintiff be registered as proprietor of the same.

It is my finding that the consolidation of suits should now be determined in light of the overriding objective of the Civil Procedure Act and Rules to ensure just, expeditious, proportionate and affordable resolution of the civil disputes as is mandated under sections 1A and 1B of the Civil Procedure Act and Order 11 of the Civil Procedure Rules. I do not find any merit in the arguments by the Defendants that the Plaintiff and Originating Summons filed by the Plaintiff cannot be heard and disposed of together, and no provision of the law was cited for this position. No evidence of the prejudice that will be suffered by the Defendants if the two suits are consolidated was shown, and on the contrary I find that consolidation will result in a saving of both the parties and judicial time and costs.

Arising from these reasons I therefore hereby order as follows:

1. That the suits in Nairobi CMCC No. 5453 of 2008, and ELC 293 of 2010(OS) at Nairobi High Court be and are hereby consolidated for purposes of hearing and determination together.
2. That Nairobi CMCC No. 5453 of 2008 shall be given a new case number in the Environment and Land Division of the High Court of Nairobi.
3. That the lead file for purposes of description of parties, filing of pleadings and recording of proceedings shall be that of ELC 293 OF 2010(OS) at Nairobi High Court.
4. The costs of the Chamber Summons dated 15th March 2010 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____17th____ day of ____April____, 2013.

P. NYAMWEYA
JUDGE