



REPUBLIC OF KENYA



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Shihemi (Suing as the Administrator of the Estate of Shihemi Stanley Reuben) & another v Livondo (Environment & Land Miscellaneous Case E021 of 2025) [2025] KEELC 3973 (KLR) (7 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3973 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E021 OF 2025

A NYUKURI, J

APRIL 7, 2025

BETWEEN

HENRY LUMUMBA SHIHEMI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SHIHEMI STANLEY REUBEN) 1ST PLAINTIFF

JACOB AMUKAKA (SUING AS AN ADMINISTRATOR FO THE ESTATE OF SHIHEMI STANLEY REUBEN) 2ND PLAINTIFF

AND

JOSEPH M LIVONDO DEFENDANT

RULING

Introduction

1. The applicants moved this court under the provisions of Order 50 Rule 1 of the Civil Procedure Rules, and sections 3A and 63 (e) of the *Civil Procedure Act* vide a Notice of Motion dated 24th March, 2025 seeking the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this application inter partes, the hounourable court be pleased to stay proceedings in the Kakamega Chief Magistrates Court Misc. ELC No. E037 of 2023 (Joseph M. Livondo –vs- County Director of Survey and District Land Registrar).
 - c. That upon granting prayer 2 above, Kakamega Misc. ELC no. E037 of 2023 (Joseph Livondo – vs- County Director of Survey and District Land Registrar be consolidated with the Kakamega ELC No. E240 of 2024 (Henry Lumumba Shihemi, Jacob Amukaka –vs- Joseph M. Livondo.
 - d. That the costs of this application be provided for.



2. The application is predicated on the grounds on its face and the affidavit of Henry Shihemi Lumumba. The applicants' case is that they are the owners of the parcel of land known as Kakamega/Shikulu/1434 measuring 1.1. acres and Kakamega/Shikulu/1437 respectively. That the respondent, a self declared untouchable man, intentionally and unlawfully denied the applicants access road to their respective parcels and is unwilling to listen to the area chief and county commissioner in settling the matter.
3. They also stated that the County Office requested for survey work and guidance from the County Surveyor's office in settling the dispute, and that the report from the survey office reflected the respondent's illegal acts. Further that before implementation of that report, the respondent rushed to the subordinate court vide Kakamega CMC ELC Misc. Application No. E037 of 2023 Joseph M. Livondo –vs- County Director of Survey and District Land Registrar and intentionally leaving out other applicants for obvious reasons.
4. The applicants stated that their attempt to be joined in Kakamega CMC ELC Misc. 37 of 2023 was unsuccessful as their application was dismissed. They complained that joinder was necessary as they are affected by the proceedings therein. That having been denied joinder they filed a substantive suit vide Kakamega CMC ELC No. 240 of 2024 wherein they sought for a County Surveyor's report and that the matter comes up for ruling on 25th April, 2025.
5. They lamented that the respondent clandestinely had his costs taxed regarding the applications dismissed by court for the sum of Kshs. 315,250/= yet those were only applications and not suits. That around Christmas last year the respondent sought to execute against the applicants in regard to costs of Kshs. 315,250/= and Kshs. 104,600/= for auctioneer's fees but that the execution was stayed and that the application dated 14th November, 2024 is still pending determination. They stated that they were now surprised that the said application is now not in the court file.
6. According to the applicants, the respondent had now scheduled a site visit on the suit property for 28th March, 2025, which site visit does not involve the applicant, which is against the principles of natural justice. They wondered why the respondent prosecuted his case for a site visit where there is no opponent and accused the respondent of stealing a match on them. They further stated that the respondent was using the police to intimidate villagers on the ground.
7. They stated that if the respondent had filed Kakamega CMC ELC Misc. Application No. 37 of 2023 with clean hands, he would not have opposed the applicants' application for joinder and the pending application in ELC 240 of 2024, neither would he do a site visit clandestinely on 28th March, 2025 as the miscellaneous application is not a substantive suit. They urged this court to grant orders sought to avoid a scenario of conflicting orders. They urged the court to exercise its supervisory powers in granting orders sought.
8. They attached a grant of letters of administration; photographs; county surveyor's report; ruling dismissing application for joinder application; plaint in ELC 240 of 2024; order of stay of execution and a copy of an OB.
9. The application is opposed. Joseph M. Livondo, the respondent filed a replying affidavit sworn on 27th March, 2025. He stated that the photographs attached to the supporting affidavit are not admissible in evidence. He stated that the surveyor's report presented by the applicants was not properly undertaken and that that was the reason he filed Kakamega CMC ELC Misc. 37 of 2023. He further stated that the applicant's application for joinder was dismissed on legal grounds and that to date no appeal has been filed preferred against orders of dismissal. He stated that the issues in the two suits are different and that there is nothing strange in a party filing their bill of costs.



10. The application was disposed by both oral and written submissions. While the applicants solely made oral submissions, the respondent relied on both oral and written submissions dated 24th March, 2025.

Applicants' submissions

11. Mr. Simiyu, counsel for the applicant submitted that there is need to consolidate Kakamega CMC ELC Misc. 37 of 2023 with Kakamega CMC ELC 240 of 2024 both filed before Kakamega Chief Magistrate's court as the applicants attempt to be joined to the earlier suit were in vain as their applications were dismissed. They argued that they did not appeal because it was a decision in a miscellaneous application.
12. It was further submitted that in Kakamega CMC ELC No. 240 of 2024, a ruling was delivered on 25th March, 2025 requiring a survey report in 90 days while in Kakamega CMC ELC Misc. 37 of 2023, the court ordered a site visit. Counsel argued that there is a possibility of conflicting decisions and that substantive orders cannot be issued in a Miscellaneous application yet the applicants seek an access road. Counsel also argued that a survey report was ordered and before implementation of the same the respondent filed Kakamega CMC ELC Misc. 37 of 2023. Counsel argued that the applicants are not invited in Kakamega CMC ELC Misc. 37 of 2023 yet they are being told to attend the site visit.
13. Counsel urged the court to exercise its supervisory powers in ordering the consolidation of the two suits. Counsel also informed court that the magistrate hearing Kakamega CMC ELC Misc. 37 of 2023 was not made aware that there is Kakamega CMC ELC 240 of 2024 while the magistrate hearing the latter suit has a hint of the former suit.

Respondent's submissions

14. In response, Ms. Kadenyi, counsel for the respondent submitted that two prayers were made namely for stay and consolidation and submitted that the applicants had not met the threshold for both. She urged the court to assess the language used by the applicants in their application. She also argued that there is no appeal against the decision on joinder in Misc. 37 of 2023. Counsel observed that when the applicant lost the battle in the said suit they filed Kakamega CMC ELC 240 of 2024.
15. On whether this court should exercise supervisory jurisdiction, counsel submitted that no order was attached to the application against which the court should exercise supervisory jurisdiction and argued that where a party is aggrieved with a court's decision, they ought to follow the legal process in challenging the same.
16. In the respondents written submissions, counsel submitted that the ruling of 8th April 2024 dismissing the applicants application for joinder and another ruling regarding the applicants' application of 12th April 2024 seeking to set aside the ruling of 8th April 2024 were made on merit and that the ruling of 2nd September 2024 was not appealed against. That the applicants are therefore supposed to pay costs in regard thereto. That in seeking stay in Kakamega CMC ELC Misc. 37 of 2023, they are in effect seeking to stay the ruling on their application dated 14th November, 2024.
17. On whether the application for stay of proceedings is merited, counsel relied on the case of William Odhiambo Ramogi & 2 Others v Hon. Attorney General & 3 Others (2019) EKLRL and submitted that orders for stay of proceedings are grave orders which can only be made in exceptional circumstances. Counsel also referred to the case of Turbo Highway Eldoret Ltd -vs- Muniu (2022) e KLR on stay of proceedings.
18. Counsel further submitted that as the applicants are not parties in Misc. 37 of 2023 consolidating the two suits will cause confusion. Reliance was placed on the case of County Council of Nakuru -vs-



Simon Ole Kimathi & 3 Others (2007)EKLr for the proposition that where parties and prayers are different, consolidating suits may cause confusion and prolong conclusion of the matter.

Analysis and determination

19. The court has carefully considered the application, response and submissions of the parties. As the prayer for stay of proceedings in Kakamega Misc. Application No. 37 of 2023 was sought pending inter partes hearing of the instant application, it is my view that the same is spent. Therefore, the two issues arising for this court's determination is whether in the circumstances of this case, this court ought to exercise its supervisory jurisdiction and whether the court should grant an order consolidating Kakamega CMCC MISC. 37 of 2023 with Kakamega CMC ELC 240 of 2024.
20. In this case, it is clear that there is a dispute between the applicants and the respondent regarding an alleged access road. In view of that dispute, the Director of Survey prepared a report in August 2023, regarding a road opening parcels Nos. Idakho/Shikulu/3930; 3931; 1434; 1436 and 1437. The respondent, unhappy with that report, filed Kakamega CM Miscellaneous Application No. 37 of 2023, where he sued the Director of Surveys and the Land Registrar. The applicants did not attach a copy of the pleadings in that case hence this court has no advantage of knowing the nature of reliefs sought therein. The applicants argued that what is sought in that application affects them as their parcel of land is affected, but that the respondent excluded them from the suit forcing them to seek joinder. They complained that their two applications for joinder were dismissed. They attached a ruling in respect of the respondent's preliminary objection dated 23rd October 2023 against their application dated 28th August 2023 whereof their aforesaid application was dismissed because they did not have grant of letters of administration to file suit in regard to the parcels of land in question.
21. Upon being denied joinder, they filed Kakamega CMC ELC 240 of 2024 seeking an injunction to restrain the respondents from denying them the use of the alleged access road. They also sought for orders to compel the Land Registrar and Surveyor to establish the road that give access to parcels of land Idakho/Shikuku/ 3930; 3931; 1434; 1436; and 1437. They attached a plaint in regard to Kakamega CMC ELC Case No. 240 of 2024. The applicants urged the court to exercise its supervisory jurisdiction to consolidate Kakamega CMC Misc Application No. 37 of 2023 and Kakamega CMC ELC Case No. 240 of 2024.
22. Supervisory jurisdiction ought to be differentiated from appellate and judicial review jurisdiction. As was held in the case of Republic v Chief Magistrates Court at Milimani Law Courts; Director of Public Prosecutions & 2 Others (Interested Parties); Ex Parte Applicant Pravin Galot [2020] e KLR, supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts for purposes of keeping the latter within their prescribed sphere and prevent usurpation.
23. Article 165 (6) of *the Constitution* grants the High court supervisory jurisdiction over subordinate courts and other bodies exercising judicial and quasi-judicial functions. In the exercise of supervisory jurisdiction, the High court has power to call for the record of any proceedings before any subordinate court or body exercising judicial and quasi-judicial function and make orders or give appropriate directions to ensure fair administration of justice.
24. As Article 165 (5) of *the Constitution* provides that the High court has no jurisdiction in respect of matters falling within the jurisdiction of the ELC and the ELRC, it follows that the High court cannot exercise supervisory jurisdiction over the subordinate courts when they exercise jurisdiction regarding Environment and Land disputes, and therefore such subordinate courts are under the supervisory jurisdiction of the ELC.



25. Therefore, where it is clear that proceedings before a subordinate court exercising the jurisdiction of the ELC are manifestly unjust and further proceedings will lead to nothing but more injustice, this court can intervene, call for the lower court file and make orders or give directions as the fair administration of justice may demand. However, supervisory jurisdiction is not a jurisdiction that is exercised as a matter of course, it is sparingly exercised only in exceptional cases where failure to intervene by this court would lead to obvious injustice.
26. In this case, the applicants have not sought for this court to call for the records in Kakamega CMC ELC Misc Appl. 37 of 2023 or Kakamega CMC ELC 240 of 2024. They have sought for this court to exercise supervisory jurisdiction by consolidating the two cases because their application for joinder in Misc. 37 of 2023 was denied. They have complained that the trial court was wrong not to join them when they will be affected by the decision of that court. They attached the decision which they were unhappy with, which is a ruling of the trial court in regard to the preliminary objection dated 23rd October 2023 where the learned trial magistrate dismissed the applicants' application dated 28th August 2023 on the basis that the applicants lacked the requisite capacity to participate in those proceedings, because they had no grant of letters of administration in respect of the deceased registered proprietors of the land they sought to protect.
27. The applicants, who seem quite aggrieved by the said decision, have not shown me which part of that decision demonstrate that the trial court has acted with manifest injustice so as to warrant this court's intervention to ensure the fair administration of justice. They have not faulted the trial court's finding on lack of capacity or even alleged to have had grant of letters of administration. Even if the trial magistrate were to be said to be wrong on that question, that would be a case for appeal and not for the exercise of supervisory jurisdiction as no exceptional circumstances exist to warrant this court's exercise of supervisory jurisdiction.
28. A subordinate court's decision on joinder is appealable as of right as provided for, under Order 43 Rule 1 (a) of the Civil Procedure Rules, and therefore the applicants' complaint that they were wrongly denied joinder, coupled with their failure to appeal the decision, is a clear manifestation that the applicants are either not candid or they do not know what they need to do in the circumstances of this case, which is unfortunate. In any event, joinder and consolidation are two different things. It is one thing to be joined to a suit and another thing altogether for the same suit to be consolidated with another suit. In short, the subordinate court's refusal to join the applicants to Kakamega CMC ELC Misc Appl. 37 of 2023 has no nexus with the prayer in the instant application for consolidation of that suit with Kakamega CMC ELC No. 240 of 2024. In the premises, and for the above reasons, the court finds no special or exceptional circumstances to warrant the court's exercise of its supervisory jurisdiction and therefore this court declines the applicants' invitation to exercise supervisory jurisdiction in this matter.
29. Regarding consolidation of the two suits stated herein, the court is cognizant of the overriding objective of the *Civil Procedure Act* and Rules thereunder which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The court endeavours to give effect to that overriding objective while exercising its powers under the Act or interpreting the Act, as provided for in section 1A (1) and (2) of the *Civil Procedure Act*. Section 1B of the *Civil Procedure Act* obligates the court, in the furtherance of the overriding objective to attain the just determination of proceedings; efficient disposal of the court business; efficient use of available judicial and administrative resources; timely disposal of proceedings at an affordable cost and the use of suitable technology.
30. Order 11 Rule 3 (d) of the Civil Procedure Rules provides that the purpose of case management conference is to determine any other matter relating to the management, hearing or disposal of a case.



One of the matters that relate to the hearing and disposal of a case that may be determined during a case management conference is the question of consolidation.

31. It is trite that where two or more matters are pending in the same court where the same question of law or fact arise in both cases; where the reliefs sought in both cases arise out of the same transaction or series of transactions and where the consolidation will not confer undue advantage to one party, consolidation of two or more suits may be ordered by the trial court so as to facilitate efficient and expeditious disposal of disputes at an affordable cost to the parties.
32. In the case of *Law Society of Kenya v The Centre for Human Rights and Democracy*, Supreme Court of Kenya, Petition No. 14 of 2013, the Supreme Court held as follows;

“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 intended to occasion any disadvantage towards the party that opposes it.”
33. Similarly, in the case of *Joseph Okoyo v Edwin Dickson Wasuna (2014) e KLR* the court cited with approval the case of *Korean United Church of Kenya & 3 Others v Seng Ha Sang (2014)e KLR*, where it was stated as follows;

“Consolidation of suits is done for the purpose of achieving the overriding objective of the *Civil Procedure Act*, that is for the expeditious disposal of civil disputes. The main purpose of consolidation of suit is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”
34. Therefore, at case management stage, where there are two or more matters raising the same factual or legal questions arising from the same transaction or a series of transactions, in order to facilitate expeditious disposal of such dispute, the trial court may consider consolidating such matters.
35. Having considered the thread running through the established jurisprudence on consolidation of suits, it is my view that consolidation orders ought to be made by the court where the matter sought to be consolidated with another, is filed. The court trying the dispute is the one with the jurisdiction to determine the consolidation application. Once the application for consolidation is determined by the trial court and one of the parties is aggrieved with the decision on consolidation, that is when they may consider appealing such decision or seek that the court exercises its supervisory jurisdiction, depending on the circumstances of the case. A superior court cannot be moved for consolidation of matters not pending before it, but pending before the subordinate courts.
36. In this case, the applicants have not sought for consolidation of the two suits before any of the subordinate courts where the two matters have been filed. In fact, in *Kakamega CMC ELC 240 of 2024* at paragraph 16 of the plaint, the applicants are categorical that there exists no suit between the parties herein touching on the same subject matter.
37. I take the view that the court where a suit is filed is the one with jurisdiction to consider and determine the question of consolidation of such suit with another suit. A superior court can neither direct a subordinate court to consolidate matters in which the parties have not sought nor been denied an order of consolidation nor order consolidation of matters pending before the subordinate court when consolidation has not been sought in the subordinate court by any of the parties. In doing so, the superior court will be conducting case management of cases that are not pending before it which is not envisaged under the *Civil Procedure Act* and Rules thereunder. This court can only determine the question of consolidation of suits pending before the subordinate courts after such question has been



determined by the subordinate court and one of the parties is aggrieved with such determination and has moved this court accordingly. Making an order for consolidation without there having been an application for consolidation before the subordinate court would amount to an overreach on the part of this court.

38. In view of the circumstances obtaining in this case, I think that it is important that parties herein introspect and reflect on the steps taken in their attempt to resolve their dispute. Although the applicants complained that the respondent was wrongly using a miscellaneous application to seek substantive reliefs, as the applicant did not attach a copy of pleadings in that matter, this court is not in a position to appreciate the nature of reliefs sought and therefore cannot conclude that the Miscellaneous application sought substantive prayers.
39. In the instant application, this court has interacted with phrases like “kaboom” and “scad (sic) missile” among other unnecessary phrases, which in the court’s assessment, did not add value to these proceedings. My view is that it is bad practice for parties to use miscellaneous applications in seeking substantive reliefs; or to exclude from suits persons who may be detrimentally affected by orders that may ultimately be issued by court or where parties file new suits, to fail to disclose the existence of pending similar cases and indicate why it was necessary for them to file the new suit despite existence of similar suits. However, it is important that parties calmly and objectively interrogate why a court did not agree with their proposition, before embarking on their next step, to avoid falling from the frying pan into the fire. Staying calm, assessing the import of each available option in the face of adverse orders and focusing on the real issues while taking into account key matters in litigation, including, but not limited to; jurisdiction and capacity of parties, is important for parties when approaching the court whether in its original, appellate, judicial review or supervisory jurisdiction. Wearing emotions on one’s sleeves, may only obscure the real issues in a matter.
40. Having said that, and in view of the fact that there has never been an application for consolidation in Kakamega CMC ELC No. 240 of 2024 or in Kakamega CMC Misc Application No. 37 of 2023, which suits are both pending before the Chief Magistrates Court at Kakamega, this court finds that it lacks jurisdiction to hear and determine the application dated 24th March, 2025 and the same is hereby struck out with costs to the respondent.
41. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THIS 7TH DAY OF APRIL, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Simiyu for the applicants

Ms. Kadenyi for the respondent

Court Assistant: M. Nguyai

