



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamia v Ziro; Gupta (Interested Party) (Environment & Land Case  
280 of 2015) [2022] KEELC 3167 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3167 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 280 OF 2015**

**M SILA, J**

**JUNE 8, 2022**

**BETWEEN**

**JOHN MUTHINI KAMIA ..... PLAINTIFF**

**AND**

**MWARIDZO JUMA ZIRO ..... DEFENDANT**

**AND**

**NASSORO OMAR GUPTA ..... INTERESTED PARTY**

**RULING**

1. The application before me is that dated 26 April 2022 filed by the defendant. It seeks the following orders (slightly paraphrased) :-
  - i. Spent (certification of urgency)
  - ii. That further proceedings in this suit be stayed.
  - iii. That this file be transferred to Kwale Environment and Land Court and the same be consolidated with Kwale ELC Case No. 002 of 2022 *Nassoro Omar Mguta vs John Muthini Kamia & 3 Others*.
  - iv. That in the result the two suits be heard together.
  - v. That costs of this application be in the cause.
2. The application is opposed.
3. To put matters into context, this suit was commenced through a plaint filed on 2 November 2015 against Mwaridzo Juma Ziro as the sole defendant. The plaintiff pleaded to be the proprietor of the land parcel Kwale/Diani Beach Block/1576 having purchased it from one Ali Salim Mwakufairwa in



the year 2015. He pleaded that the defendant had trespassed into his land and partially constructed some structures. In the suit, he wished to have orders to have the defendant evicted from the suit land, demolition of the structures, and for the defendant to be permanently restrained from the land. The defendant filed defence where he pleaded that the suit property was purchased by his brother Nassoro Omar Mguta from Ali Salim Mwakufairwa and Rukia Salim Mwakufairwa, and that the developments therein were constructed by his said brother. He pleaded that he was caretaker of his brother's property. There was however no effort by the defendant to apply to have Nassoro Omar Muguta joined to this suit as a party.

4. The matter proceeded for hearing on 26 February 2020 in absence of the defendant, who despite being duly served, failed to appear. At the hearing, the plaintiff testified and called Mr. Ali Salim Mwakufairwah (the seller of the land) and one Hamisi Ramadhan Chibendo (the land agent) as his witnesses. This hearing resulted in a judgment in favour of the plaintiff delivered on 10 March 2020. Through an application dated 31 August 2020 and filed on 3 September 2020, the defendant applied to set aside this judgment. Within that application, he also sought to change counsel from M/s S.M Otunga & Company Advocates, to M/s Tindi & Company Advocates. The gist of his application was that though his counsel on record was served, he was never informed. I heard the application and allowed it in a ruling delivered on 19 November 2020. I set aside the judgment and allowed the defendant to change counsel from M/s S.M Otunga & Company Advocates to M/s Tindi & Company Advcoates.
5. In the meantime, an application dated 1 October 2020 was filed by Nassoro Omar Mguta, through M/s Tindi & Company Advocates, seeking to be joined as defendant and for the plaint to be amended. That application was not opposed and on 9 March 2021 I allowed it and directed that Nassoro Omar Mguta be joined as interested party, for the moment, and I gave him 21 days to file his documents. He did not file any documents though he continued being represented by M/s Tindi & Company Advocates, also representing the defendant.
6. It will be recalled that I had set aside the earlier judgment and a fresh hearing commenced on 23 September 2021. We proceeded further on 25 October 2021. The plaintiff testified and again called Ali Salim Mwakufairwa and Hamisi Ramadhan Chibendo as his witnesses. Defence hearing commenced on 19 January 2022 when the defendant and Nassoro Omar Mguta testified. The evidence of Mr. Mguta is that he purchased the land from Rukiya Mwakufairwa and Ali Mwakufairwa. After they had testified, I marked the hearing of the matter as closed and invited counsel to file written submissions. Both Mr. Mutugi, learned counsel for the plaintiff, and Mr. Tindi, learned counsel for the defendant and interested party, filed their submissions and the matter was mentioned on 27 April 2022 to take a date for judgment. It was then brought to my attention that this application has been filed and directed that it be heard first.
7. It will be observed that the application seeks the stay of this suit, and that it be transferred to the Environment and Land Court at Kwale, and it be consolidated with the case Kwale ELC NO. 002 of 2022. The application is based on grounds inter alia that the Kwale case arises from the same subject matter and consolidating the two suits will save the court's time. The supporting affidavit is sworn by the defendant who deposed inter alia that this suit was brought against him deliberately when the plaintiff knew that it ought to have been against Nassoro Omar Mguta. He deposed that Mr. Mguta has filed the other suit in Kwale through a plaint dated 20 January 2022, against the plaintiff herein and Ali Salim Mwakufairwa and Rukia Salim Mwakufairwa. He has annexed a copy of the plaint. He has deposed that a defence has been filed and that the said case is pending directions. He had deposed that he wants this case to be stayed pending hearing and determination of the case in Kwale.



8. The plaintiff filed a replying affidavit to oppose the motion. He deposes that this application is brought in bad faith as the present suit has been fully heard and parties have filed their final submissions. He points out that the Kwale case was filed on 24 January 2022 after the close of the hearing of this matter. He deposes that he has filed an application to have it struck out for being sub judice. A copy of the said application is annexed. He avers that he does not see why this court should stay this suit which was filed in the year 2015 or transfer it to be consolidated with a matter filed in the year 2022. He deposes that this would be a disservice to justice and contrary to the provisions of the [Civil Procedure Act](#).
9. Both counsel filed written submissions which I have considered.
10. I will be brief in my delivery for I have no doubt in my mind on the best orders that need to be made in the circumstances that have panned out herein.
11. At the outset, I take note that the plaintiff in the suit Kwale ELC No. 002 of 2022 is the interested party in this case. He has been aware of this dispute for quite some time, and certainly by 1 October 2020, when he filed his application to be joined to this case. He had opportunity to file his case much earlier if at all he intended to pursue a claim of ownership of the disputed land. He didn't do so but waited until this case herein was fully heard, with himself also fully participating in it and even giving evidence. He participated in this suit without raising any complaint. It is after the full hearing of this case that he has now filed the case in Kwale. The defendant now wants this case stayed so that the interested party's case in Kwale can first be heard.
12. I do not see on what basis I should stay this suit, which has been in court for the last 7 years, so that the interested party can be heard in a different court on a matter that he has filed in 2022. I am in fact finding it curious that Mr. Mguta proceeded to Kwale, a different court from this one, when he knew very well that this court is seized with the same case and has been proceeding with it for the last 7 years, and that all that is pending is writing the judgment. Why didn't Mr. Mguta file his case here in Mombasa? The very fact that the land is in Kwale, in the circumstances of this case, is no excuse for not filing his case in Mombasa. Kwale ELC was constituted last year, and hitherto all cases emanating from Kwale were being heard in Mombasa, and that is how this case has been here in Mombasa. Given that this suit has been here for all that time, you would expect that Mr. Mguta would file his case here in Mombasa, and not in Kwale, then ask for a consolidation of the two suits, if he wished to also present a claim over the same land. I also wonder why the applicant has not sought that the suit in Kwale be stayed, instead of this one, yet he is aware that this suit has already been heard.
13. This court has already taken evidence from the plaintiff and Mr. Mguta, who both claim to have bought the disputed land. They are the protagonists in the dispute. Their witnesses have also testified. It will not save judicial time to have this matter stayed so that these persons can go again to Kwale to rehash their evidence afresh. Indeed, the very fact that there is another case in another court invites a possible conflict of decisions, which should not be allowed, as it can lead to embarrassment of the judicial process. For example, in this application, the defendant wants this case to be stayed so that the Kwale case can be heard. I have seen the application filed by the plaintiff herein in the Kwale court. He wants the case in Kwale to be stayed pending determination of this case. Now, let us assume that I allow this application, and stay this suit. What if the Judge in Kwale also allows the plaintiff's application and stays the suit in Kwale? That would present a stalemate in the matter. The two suits need to be in one court, not in two, and I have taken time to demonstrate that the right thing that the plaintiff in the Kwale case ought to have done was to file his suit before this court, and not in Kwale, given the fact this court has already taken the evidence, more or less, of all parties in the dispute.
14. This suit has already been heard and only awaits judgment. It will not be in the interests of justice to interfere with it at this stage or transfer it to another court for it to be consolidated with another freshly



filed suit. That will only lead to an injustice and further delay of the resolution of the dispute herein. It will in fact not save judicial time at all. It is that freshly filed suit which should be brought before this court for the court to give directions on whether it should be consolidated with this case or be heard separately.

15. In those circumstances, the best order to make is to order for the transfer of the file in Kwale to this court. That is the only way to save judicial time and avoid the judicial process being put into embarrassment. Once the file is brought, I can give directions on consolidation, and the parties can also state whether they wish to rely on the evidence that they have presented before this court, or whether they wish to add anything in the new suit.
16. Given the above, I order as follows :-
  - i. That the file Kwale ELC No. 002 of 2022 be transferred from Kwale ELC to the ELC at Mombasa.
  - ii. That further directions will be given once the file in Kwale is brought before this court.
17. Orders accordingly.

**DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF JUNE 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

