



REPUBLIC OF KENYA



**KENYA LAW**  
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**Balicha & another v Ellen Properties Limited & 12 others (Constitutional Petition 49 of 2021) [2022] KEELC 3309 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3309 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CONSTITUTIONAL PETITION 49 OF 2021**

**LL NAIKUNI, J**

**JULY 21, 2022**

**IN THE MATTER OF: THE REPEALED (FORMER)  
CONSTITUTION.**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF: SECTION 70(A) AND SECTION 77(9) OF  
THE REPEALED CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLES 22, 40 (6) AND ARTICLE 60(1)  
(B) AND ARTICLE 62(1) (A) & (E) AND  
ARTICLES 62(2), 258 AND 159 (2) (D) OF  
THE CONSTITUTION 2010.**

**AND**

**IN THE MATTER OF: A PETITION TO UPHOLD THE SANCTITY  
AND SECURITY OF LAND RIGHTS AS SET  
UNDER ARTICLE 60(1) (B) OF THE  
CONSTITUTION OF KENYA 2010 AND  
UPHOLD THE ABSOLUTE INTEREST I THE  
PLOTS KNOWN AS 264/1/MN, 386/1/MN  
HEARING INTERCHANGEABLY REFERRED  
TO AS MN/1/264, MN/1/386 BEING  
PUBLIC LAND BY VIRTUE OF LAND IN**



**RESPECT OF WHICH NO HEIR CAN BE  
IDENTIFIED BY ANY LEGAL PROCESS  
AND/OR THE SAME BEING PUBLIC LAND  
AS A RESULT OF SURRENDER AND/OR  
BEING PUBLIC LAND BY VIRTUE OF  
OPERATION OF THE LAW.**

**AND**

**IN THE MATTER OF: A PETITION TO UPHOLD THE TRUST  
CREATED IN ARTICLE 62(2) VESTING  
RULING ELC PET. 49 OF 2021 PAGE 1 OF 13 L.L. NAIKUNI (JUDGE)  
PUBLIC LAND AND HOLDING OF THE  
LAND FOR THE PEOPLE RESIDENT IN  
THE COUNTY AND AS THUS PROTECTION  
AND SAFEGUARDING OF THE SAME.**

**AND**

**IN THE MATTER OF: A PETITION CHALLENGING THE  
ISSUANCE OF LAND TITLES NAMELY ALL  
THAT PIECE PLOTS KNOWN AS  
264/1/MN. 386/1/MN (HEARING  
INTERCHANGEABLY REFERRED TO AS  
MN/1/264, MN/1/386) AND/OR THE SAME  
BEING PUBLIC LAND BY VIRTUE OF  
LAND IN RESPECT OF WHICH NO HEIR  
CAN BE IDENTIFIED BY ANY LEGAL  
PROCESS AND/OR BEING PUBLIC LAND  
BY VIRTUE OF SURRENDER AND  
AMALGAMATION WHICH PROCESS  
UPHOLD THE SANCTITY AND SECURITY  
OF LAND RIGHTS AS SET UNDER  
ARTICLE 60(B) KENYA 2010.**

**AND**

**IN THE MATTER OF: A PETITION CHALLENGING THE SUB-  
DIVISION OF ALL THAT PIECE OF LAND  
PLOTS KNOWN AS 264/1/MN. 386/1/MN,**



HEARING INTERCHANGEABLE REFERRED  
TO AS MN/A/264, MN/1/386) AND THE  
REGISTRATION OF THE SAME TO ELLEN  
PROPERTIES LIMITED.

AND

IN THE MATTER OF: A PETITION CHALLENGING THE  
FORGERY ATTENDED TO IN THE  
ACQUISITION OF ALL THAT LAND PLOTS  
KNOWN AS 264/1/MN, 386/1/MN  
(HEARING INTERCHANGEABLY  
REFERRED TO AS MN/1/264, MN/1/386  
AND REGISTRATION OF THE SAME TO  
ELLEN PROPERTIES LIMITED

AND

RULING ELC PET. 49 OF 2021 PAGE 2 OF 13 L.L. NAIKUNI (JUDGE)

IN THE MATTER OF: A PETITION CHALLENGING THE  
EVICTION OF ALL RESIDENTS ALL THAT  
PIECE OF LAND PLOTS KNOWN AS  
264/1/MN, 386/1/MN. (HEARING  
INTERCHANGEABLY REFERRED TO AS  
MN/1/264, MN/A/386) ASSAULT OF THE  
SAME AND THE DEMOLITION OF THERE  
HOUSES.

BETWEEN

DENNIS MAITHA BALICHA ..... 1<sup>ST</sup> PETITIONER  
ETORE AKARAN ..... 2<sup>ND</sup> PETITIONER

AND

ELLEN PROPERTIES LIMITED ..... 1<sup>ST</sup> RESPONDENT  
MARGARET NDUNG'U WAITHAKA ..... 2<sup>ND</sup> RESPONDENT  
LIVINGSTONE NDUNGU WAITHAKA ..... 3<sup>RD</sup> RESPONDENT  
REGISTRAR OF TITLES MOMBASA ..... 4<sup>TH</sup> RESPONDENT  
COMMISISONER FOR LANDS ..... 5<sup>TH</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 6<sup>TH</sup> RESPONDENT



ATTORNEY GENERAL .....	7 <sup>TH</sup> RESPONDENT
COUNTY GOVERNMENT OF MOMBASA .....	8 <sup>TH</sup> RESPONDENT
INSPECTOR GENERAL OF THE POLICE .....	9 <sup>TH</sup> RESPONDENT
O.C.S. BAMBURI POLICE STATION .....	10 <sup>TH</sup> RESPONDENT
COMMANDANT OF THE GENERAL SERVICE UNIT .....	11 <sup>TH</sup> RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATION .....	12 <sup>TH</sup> RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION .....	13 <sup>TH</sup> RESPONDENT

## RULING

### I. Preliminary

1. Before this Honorable Court for its determination is the Notice of Motion application dated 16<sup>th</sup> February, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein. It is brought under the dint of the Provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act. Cap 21 and all the enabling Provisions of the law.
2. From the onset, this Honorable Court taken cognizance that on 9<sup>th</sup> March, 2022 this court made orders to the effect that ELC 49 of 2021, 165 of 2019, and 53 of 2021 be consolidated and have No. 49/2021 as the lead file where all the filings would be taking place from the very onset and face value I see a lot of similarities onto the instant application.

Based on the Proceedings held on the 12<sup>th</sup> July 2022, court noted that the 8<sup>th</sup> Respondent has not been involved in the matter for an apparent good reason. It ordered that they be served hence forthwith.

### II. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents case

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, are seeking for the following orders:-
  - (a) That an order do issue consolidating the instant Petition with ELC. No. 165 of 2019, Etoke John Akaran and Others v Ellen Properties Limited” and ELC. No. 134 of 2018 – Mzee Adam Makinja, Maganga Tsuma and Ali Juma Kabindi v Livingston Ndungu Waitbaka, Elen Properties Limited and OCs bamburi Police Station & Others and ELC No. 111 of 2021 Safari Charo Munga & Others v Margaret Muthoni Ndungu, Elen Properties & Others.
  - (b) That on order to issue bring to ELC Court CMCC No. 1648 of 2019 Washe Mwachimu & Others v Etoke John Akaran, Daniel Odhiambo Amwok, Elen Properties Limited & Others, CMCC (ELC) No. 48 of 2021, Masha Kamaza Ngumbo, Zawadi Karisa Ngaza & Omari Mboga Bechimba v Safari Haro, Catherine Wangari Tom Okech and Margaret Muthoni for purposes of consolidating the suits with the constitution petition no. 498 of 2021.
4. The application is premised on the grounds, testimony and averments of 6 Paragraphed Supporting Affidavit of Margaret Muthoni Ndungu sworn and dated 16<sup>TH</sup> February, 2022 and two (2) annexures marked as “MMN – 1 & 2” annexed thereto. The deponent has stated that she was the 2<sup>nd</sup> Respondent herein and also one of the Directors of the 1<sup>st</sup> Respondent thus competent to swear this affidavit.
5. She posited that there existed Civil Suits Number ELC No. 165 of 2019 & ELC No. 134 of 2018 ELC No. 111 of 2021 of which the said suits were on the same subject matter Plot No. 386/1/MN and 2654/1/MN as per the attached copies of the pleadings marked as MMN-1’.



Further to this, she informed Court that there were other suits over the same subject matter filed and pending hearing and determination before the CM ELC Courts. These were (i) CMCC No. 48 of 2020 *“Masha Kamaza Ngumbo, Zawadi Karisa Ngaza & Omari Mboga Bechimba v Safari Haro, Catherine Wangari Tom Okech and Margaret Muthoni* and CMCC (ELC) No. 1648 of 2019 *Samson Washe Mwachimu & Others v Etoke John Akaran, Daniel Odhiambo Amwok, Elen Properties Limited & Others* as per the attached pleadings marked “MMN-2” she employed that all these two suits above touched on the two suit properties being plots Nos. 386/1/MN and Plot No. 264/1/MN which was the subject matter of the current Petition. She emphasized that it was imperative and important for avoidance of multiplicity of suits that all these case be consolidated with the current constitutional Petition No. 49/2021 to save speed up attainment of Justice for the parties concerned.

### III. The 2<sup>nd</sup> Petitioner/Respondents Grounds of Opposition:

6. on 12<sup>th</sup> July, 2022, the Learned Counsels for the 2<sup>nd</sup> Petitioner, the Law Firm of Messrs. George Egunza & Associates Advocates filed a 4 points undated grounds of opposition, Mr. Egunza Advocate held that: -

- (a) The Application was misconceived, bad in law and an abuse of the court process. It’s a sham, prejudice, frivolous and only intended to waste courts time.
- (b) The application was incompetent and incurable defective for failing to meet the requirement to grant the orders sought.

The grounds relied upon by the Applicants were unsubstantiated, vague unclear and/or general.

- (c) The subject parties in the subject matter were not similar and that the issues of determination for instance ELC (Mbsa) O.S. No. 53 of 2022 – seeks for orders/titles of Land Adverse Possession whereas the current suit seeks to revoke titles in the names of the 2<sup>nd</sup> Respondents.

Hence, based on the grounds they sought for the Notice of Motion application to be dismissed with costs.

### IV. The 1<sup>st</sup> Petitioner’s Replying Affidavit.

7. On 12<sup>th</sup> July, 2022, Mr. Dennis Maitha Balicha the 1<sup>st</sup> Petitioner acting in person filed an 8 Paragraphed Replying Affidavit sworn by himself on the even date opposing the Notice of Motion application. He stated that he was the 1<sup>st</sup> Petitioner herein and hence well versed with the matters herein. He deponed that the Respondents/ Applicants had failed to demonstrate that the parties in the said matters particularly in ELC No. 53 of 2021 were similar to those in the current suit to necessitate the orders of consolidation.

8. He deposed that the current suit sought for the revocation of the title in the names of the 1<sup>st</sup> Respondent on the grounds that the said title was acquired fraudulently and that the procedure of registering the land in the names of the 1<sup>st</sup> Respondent was in total disregard of the occupants of the suit properties. On the contrary he opined that the relief sought in the ELC No. 53 of 2021 was for determination is whether the Respondents right in the property was extinguished in law. This he felt the application was sham prejudicial, frivolous and only intended to waste this Honorable’s time this should be dismissed with costs to the Petitioner.



## V. Analysis and Determination

9. on 9<sup>th</sup> June, 2022 this Honorable Court in the presence of all the parties provided directions as it felt it needful to expedite it and have the matter heard on 21<sup>st</sup> July, 2022 and a site visit on the property conducted on 7<sup>th</sup> October, 2022.

I have carefully considered the Notice of Motion application, dated 16<sup>th</sup> February, 2022 the grounds of opposition by the 2<sup>nd</sup> Petitioner and the Replying Affidavit by the 1<sup>st</sup> Petitioner opposing the Notice of Motion application hereof and the relevant provisions of the Constitution of Kenya and Law.

10. In order to proceed in further and arrive at an informed, just and reasonable decision I have framed the following 3 issues for court's determination. These are:-
- (a) Whether the Notice of Motion dated 16<sup>th</sup> February, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents meets the laid down threshold for granting orders for consolidation of suits.
  - (b) Whether the issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners in opposing the application are justifiable with consideration.
  - (c) Who will bear the costs of the application?

### **ISSUE No. (a): Whether the Notice of Motion dated 16<sup>th</sup> February, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents meets the laid down threshold for granting orders for consolidation of suits.**

11. The Law governing the Principles on consolidation of suits are founded under Section 81(h) of the [Civil Procedure Act](#) Cap 21 the intention for this provision is to bar and/or coy of filing the multiplicity of suits by parties at different courts over the same subject matter. Such a scenario leads to abuse of the court and waste of its precious time.

Further, it may lead to the different providing or rendering conflicting and/or embarrassing decision over the same subject matter. Besides it always encouraged that matter should be expeditiously determined and within a short time possible.

This principle is very much applicable in matters pertaining to land.

In the instant case, what is being disputed or the common denominator are (a) the suit Property - Land Reference No. Plot No. 386/1/MN and Land Reference No. Plot No. 264/1/MN.

Apart from the Case ELC No. 53 of 2021 where the relief sought is for the extinguishing the title deed by law, all the other suits are seeking for – the revocation of the title deed to these parcels by the 1<sup>st</sup> Respondent on the basis of having been acquired through fraudulently means and for Land Adverse Possession

I discern that these are issues which can be comfortably be adjudicated under one single suit.

It will be noted that some of the parties are the same in all these matters. As already pointed at the beginning, on 9<sup>th</sup> March, 2022 this court saw it fit and suitable to consolidate some of the suits being 165/2019 and 53/2021 be consolidated with ELC Const. Pet No. 49 of 2021 for ease of adjudication this case should not be an exception.

For these reasons, I find that the Notice of Motion application has merit and the prayers sought to be allowed.



**ISSUE NO. (b): Whether the issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners in opposing the application are justifiable with consideration.**

12. Under this Sub – heading, this Honorable Court upon considering all the issue raised under the grounds of opposition and the Replying Affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, it holds that they do not bear any merit at all. For that reason, they are all dismissed accordingly. I dare say no more.

**ISSUE NO. (c): Who will bear the costs of the application?**

13. It is trite law that the issue of Costs is the discretion of Court. Costs means the award that is granted to a party after the conclusion of any legal action, process or proceeding in any litigation. The holds that Costs follow the event. In this case events means the results of any legal action, process or proceeding in any litigation.
14. The instant case involves several matters of public interest and therefore it would be fair that each party to bear its own costs.

**VI. Conclusion & Disposition.**

15. In the long run, from the elaborate analysis of the framed issues herein. I find that the Respondents have made out a good case for them to be granted the orders sought. Therefore, the Honorable Court proceeds to grant the following orders: -
- a) That the Notice of Motion application dated 16<sup>th</sup> February, 2022 be and is hereby allowed as it has merit.
  - b) That all the Civil suits known as ELC. No. 165 of 2019, ELC No. 134 of 2018, ELC 111 of 2021, CMCC. 1648 of 2019 and CMC (ELC) No. 48 of 2021 to be consolidated and become one suit.
  - c) That a direction made hereof to the effect that any other matter whatsoever filed thereafter this ruling and/or be pending hearing or filed out there in any other court with a similar subject and matter as this one hereof to be considered and hence automatically consolidated with this suit.
  - d) That pursuant to the Provision of Section 18 of *Civil Procedure Act* have CMCC No. ELC No. 1648 of 2019 and CMCC No. 48 of 2021 be transferred from the CM Court to this court for purposes of consolidation as stated hereon and hearing and determination.
  - e) That the file ELC. No. 49 of 2021 be the lead file and where all the filing and proceedings will take effect.
  - f) That the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein be and are granted 21 days leave from this date to amend and serve their pleadings accordingly.
  - g) That in view of these orders herein the scheduled hearing for today be taken out of today's cause list and re – scheduled to 7<sup>th</sup> October, 2022 in lieu of the slated Site Visit to be re – planned to another appropriate date in the given circumstances thereof.
  - h) That each party to bear their costs.

Its is so ordered accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 21<sup>ST</sup> DAY OF JULY 2022**

**HON. JUSTICE (MR.) L.L.NAIKUNI (JUDGE)**



**ENVIRONMENT & LAND COURT AT MOMBASA.**

In the presence of:

- a. M/s. Yumna Hassan, Court Assistant.
- b. Mr. Maitha, in person the 1<sup>st</sup> Petitioner.
- c. Mr. Magolo holding brief for Mr. Egunza Advocate for the 2<sup>nd</sup> Petitioner.
- d. Mr. Okanga Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.
- e. M/s. Waswa Advocate for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> 10<sup>th</sup>, 11<sup>th</sup> & 12<sup>th</sup> Respondents.
- f. M/s. Kagiri Advocate for the 8<sup>th</sup> Respondent.

