



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE NO. 77 OF 2010(O.S)

JOYCE KAREG MUGAMBIPLAINTIFF

VERSUS

MICHAEL KIREMA MUCHAI DEFENDANT

RULING

This is an application for consolidation of suit No.77 of 2010(OS) with Meru CMCC 110 of 2010 under Order XI Rule 1 and 2 of Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The application is supported by an affidavit sworn by the 1st defendant dated 22nd November, 2010 and supplementary affidavit dated 19th September, 2011. The application is opposed on grounds set in the Replying Affidavit dated 22nd June, 2010 made by 1st plaintiff/respondent.

The facts leading to this litigation show that the subject matter in both suits is L. R. Nyaki/Thuura/292 an agricultural land registered in the name of 1st plaintiff/respondent. The Applicant claims that the first registered proprietor Nahashon Mutabari Muchai(deceased) sold 2 ½ acres out of the disputed land Nyaki/Thuura/292 to George Mugambi(deceased) who was husband to the Applicant. The Applicant claims to have moved to the disputed land in 1981, a fact which is denied by the respondents. The respondents deny the alleged sale of the disputed land as well.

It is admitted that the disputed land was subjected to succession process and land registered in the name of 1st plaintiff/respondent. The Applicant filed HCCC 77 of 2010(OS) on 09/06/2010 over Nyaki/Thuura/292 claiming to have been in adverse possession of 2 ½ acres of Nyaki/Thuura/292. The parties in that suit are the Applicant and 1st plaintiff/respondent.

The 1st plaintiff/Applicant in CMCC 110 of 2010 with three others filed that suit on 12th March, 2010 against 1st Applicant/defendant and another seeking permanent injunction orders to restrain the 1st Applicant/defendant and another from entering into, digging and preparing a tomb/grave and burying the remains of the late George Mugambi or any other person interfering in any way with plaintiff's peaceful, quiet and actual and exclusive possession of L.R. No.Nyaki/Thuura/292.

Mr. Nyenyire Advocate in his arguments for consolidation claimed the subject matter in contention at lower court and the High court is the same, that is to say Nyaki/Thuura/292. That the parties are the same at the lower court and the issues are similar. That if matters are not consolidated there is a chance of different decision being made over the same matter.

Mr. M. Kariuki Advocate opposed the application on grounds that the application is misconceived and based on the repealed Civil Procedure. He observed that there is no pending application for transfer of the suit.The counsel further submitted the cause of action are different and the suits cannot be tried together. The claim before this court is based on adverse possession whereas the claim at the lower court is for injunctive orders.

It was further asserted that the Applicant had sought similar orders by an application dated 6th July, 2010. The application is said to be bad in law as O.XI of Civil Procedure Rules had been done away with. He contended that the consolidation should be done following the procedure laid down under Order 11 of Civil Procedure Rules at the time of conference. He contended the application is therefore premature.

It was further argued that the court is being asked to consolidate a matter before another court before the Applicant seeks transfer of the suit to the High Court. The provision on consolidation relied upon the Applicant has been repealed and I agree with counsel for the respondent that the Applicant should comply with Order 11 of Civil Procedure Rules and thereafter make an application if need be in accordance with Order II Rule 3(I) (h) of Civil Procedure Rules which provides:-

**“ 3(I) with a view of 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”.**

The Applicant has not complied with Order 3 Rule 2 and Order 7 Rule 5 of Civil Procedure Rules which is mandatory by virtue of Order II Rule 7(2) of Civil Procedure Rules. The application is not only premature but an abuse of court process.

Allowing this application would be contrary to the laid down mandatory procedure and would confuse the issues and delay prompt disposal of matters in issue. It would defeat the overriding objective of the Civil Procedure Act and fail to facilitate the just, expeditious, proportionate and affordable resolution of civil dispute governed by Civil Procedure Act.

I therefore dismiss the application with costs to the respondent.

Dated and delivered in court this 17th day of November, 2011

J. A. MAKAU
JUDGE

Delivered in open court in presence of:

- 1. Mr. Munene for the applicant**
- 2. Mwirigi h/b for M. Kariuki**

J. A. MAKAU
JUDGE