



REPUBLIC OF KENYA



KENYA LAW
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Azzuri Limited & another v Ziro (Sued as the administrator of the Estate of Lawrence Kadenge Ziro (deceased) & 5 others (Land Case 217 of 2014) [2022] KEELC 4740 (KLR) (30 August 2022) (Ruling)

Neutral citation: [2022] KEELC 4740 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 217 OF 2014
MAO ODENY, J
AUGUST 30, 2022

BETWEEN

AZZURI LIMITED PLAINTIFF

AND

MAYUNGU REAL ESTATES LIMITED APPLICANT

AND

GEORGE KADENGE ZIRO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF LAWRENCE KADENGE ZIRO (DECEASED) 1ST DEFENDANT

KAMBI KADENGE ZIRO 2ND DEFENDANT

VALERIO BUCIARELLI 3RD DEFENDANT

KADZIRO BEACH LIMITED 4TH DEFENDANT

LAND SETTLEMENT FUND BOARD OF TRUSTEE (SFT) 5TH DEFENDANT

KILIFI COUNTY REGISTRAR 6TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 5th November 2021 by the applicant seeking the following orders:
 1. Mayungu Real Estates Limited be joined in this suit as the 7th defendant
 2. An order does issue consolidating the instant suit with Civil Suit No E018 of 2021 at the Environment and Land Court at Malindi between Mayungu Real Estates Limited V Azzuri,



the Director of Adjudication and settlement, the Hon. Attorney General, the Chief Land Registrar and the Chief Land Registration Officer, Kilifi

3. Upon consolidation, parties be granted leave to amend their pleadings
 4. The honourable court do make such other orders as it may deem fit, necessary and expedient in the interest of justice
 5. Costs of this application be in the cause.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Applicant's Submissions

3. Counsel gave a brief background to the case and relied on the grounds on the face of the application together with the Supporting Affidavit of Mehboob Hasham Ahmed a member and director of the Applicant who deponed that on or about 31st July 1998, the Applicant as a bonafide purchaser for value without notice purchased Title Number Chembe/Kibabamshe/583, 584,585,586,587,588 and 589 from Jodarnvalle (K) Ltd each at a consideration of Kshs. 714,000/- and a title deed in respect of these properties dated 15th September 1998 was issued.
4. The Applicant deponed that it is the registered proprietor of freehold interests in the suit properties and at the time of purchase the suit properties had no caveats or caution and that to as Title Number Chembe/Kibabamshe/356 whose Title Deed is dated 27th November 1966 does not exist as the same was sub divided into twelve portions on 27th November 1996.
5. The Applicant stated that ever since the purchase of the suit properties, it has been in quiet occupation and possession of the same without any interference from the Defendants herein or any other persons and has been paying land rates.
6. The Applicant further stated that on or about 31st October 2014, the Chief Land Registration Officer, Kilifi, the 6th Defendant issued a title deed in respect of the suit property to the Settlement Fund Trustees, the 5th Defendant which allocation was illegal as the suit property was privately owned and not government land.
7. It was the Applicant case the it filed a plaint dated 24th March 2021 being Civil Suit No. E018 of 2021 at the Environment and Land Court at Malindi seeking orders against the Plaintiff, the Director of Adjudication and Settlement, the Hon. Attorney General, the Chief Land Registrar and the Chief Land Registration Officer, Kilifi jointly and severally for the cancellation of the Title Deed in respect of the suit property and that the orders sought by the Plaintiff in this suit shall directly and legally affect the Applicant since the Applicant has a legitimate interest in these proceedings.
8. Counsel for the Applicant submitted that on the 31st March, 2021, Hon. Justice Yano issued the following orders in Malindi E & LC Suit No. E018 of 2021: -
 - a. That the Notice of Motion dated 22.3.2021 be and is hereby certified urgent and admitted for hearing during the current Court recess.
 - b. That an interim inhibition order be and is hereby issued registration of any dealings on Title No. Chembe/Kibabamshe/356 as issued by the Chief Land Registration Officer, Kilifi, 5th Defendant herein, to Azzuri Limited, the 1st Defendant herein, on the 31st day of October, 2014 pending the hearing of the application inter-partes.



- c. That further to prayers 2 above, an interim injunction be and is hereby issued restraining the 1st Defendant, its servants and/or agents from transferring, occupying, alienating, disposing, charging or engaging in any development whatsoever or in any way dealing with Title Nos. 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593 and 594 situate in Chembe/Kibabamshe (hereinafter referred to as “the suit properties”) pending the hearing of the application inter-partes.
 - d. That the Applicant is directed to fix the application for inter partes hearing on a date to be given from the registry on priority basis.
9. Counsel submitted that the above interim orders have been extended severally pending the delivery of the ruling by the Hon. Justice J. O. Olola.
 10. Mr. Binyenya framed two issues for determination by the court as to whether the Applicant has satisfied the conditions for joinder and whether the Applicant has satisfied the conditions for consolidation of the instant suit and Malindi ELC Suit No. E018 of 2021.
 11. On the first issue on joinder counsel relied on Order 1 Rules 3 & 10 (2) of the Civil Procedure Rules, 2010 and submitted that the test in applications for joinder is firstly, whether an Applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the Applicant is a necessary party whose presence is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit of which counsel stated that the Applicant has met all the conditions for joinder.
 12. On the second issue as to whether the Applicant has satisfied the conditions for consolidation of the instant suit and Malindi ELC Suit No. E018 of 2021 Mr. Binyenya submitted that there are common questions of law as the question for determination is the ownership and/or proprietorship of Title Number Chembe/Kibabamshe/356.
 13. Counsel relied on the case of *Benson G. Mutabi v Raphael Gichovi Munene Kabutu & 4 others* [2014] eKLR, and stated that consolidation can be done at any time and urged the court to allow the application as prayed.

1st to 4th Defendant/Respondents

14. Counsel for the 1st and 4th Defendants filed grounds of opposition and submitted that there is no evidence to show whether Jordanville (K) Limited is still a juristic person, or if it has ceased to have juristic existence in which case it cannot be sued in Kenya, hence the Applicants’ remedy for the transactions reportedly done with the said company would have to be directed elsewhere.
15. Counsel further submitted that the Applicant has not shown any evidence of the nexus between his purported parcels and that of the 4th Defendant who is a purchaser for value without notice of any defect in title from the original allottee, one Mr. Lawrence Kadenge Ziro, since deceased.
16. Mr. Kimani submitted that Jordanville (K) limited is not named as a party in these proceedings, and its directors have not sworn any affidavit to explain that they were owners or allottees of Chembe/Kibabamshe/356 at any time, or that they dealt with it as alleged by the deponent of the affidavit sworn in support of the present motion. Further that a limited liability company could not have been allocated land in a squatter settlement scheme.



17. It was counsel's submission that no mutation forms creating the alleged 12 sub-divisions, deed of partition, or amended RIM is exhibited by the Applicant to demonstrate that the alleged sub-division process was genuine.
18. Mr. Kimani submitted that allowing the application will prolong the hearing of this case which is at the defence stage and has been in court for more than 7 years and urged the court to dismiss the application.
19. Counsel for the 2nd Defendant filed its grounds of opposition and submitted that the Applicant has not established any stake or interest in the suit and the prejudice that it will suffer if they are not joined in the suit. Counsel further submitted that the Applicant's claim is time barred by Limitation of Actions Act.

Plaintiff's Submissions

20. The Plaintiff filed a Replying affidavit dated 7th December 2021 sworn by Mr. Anthony Safari Kitsao the Plaintiff's Managing Director who deponed that the cause of action in *ELC No. 18 of 2021* is in respect of Title Nos. Chembe/Kibabamshe/ 583,584,585,586,587,588,589,590, 591,592,593 and not 356 which is the subject of the suit herein thus the suits should not be consolidated.
21. Counsel submitted that the Applicant is guilty of laches having had actual/constructive knowledge of the existence of this suit as far back as 2015 when the suit property was subject of the National Land Commission Inquiry whereby the suit was cited in the NLC determination contained in Kenya Gazette Volume No. CX1X NO. 97
22. Mr. Mwadilo further submitted that the Applicant's suit *No. ELC 18 of 2021* is pending a ruling on a Preliminary Objection dated 6th May 2001 seeking that the suit be struck out.

Analysis and Determination

23. The issues for determination are whether the applicant has met the threshold for joinder into this suit as a defendant and whether this suit can be consolidated with ELC No. 18 of 2021.
24. Order 1 Rule 3 states who may be joined as a defendant in a suit: -

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."
25. Further Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows: -

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".
26. The Applicant has given a background to the case and urged the court to make an order of joinder to the suit and consolidation of ELC No 18 of 2021 to this suit. The applicant claims that the suit land Chembe/Kibabamshe/356 does not exist as a subdivision was done whereby 11 plots were created namely Title Nos. Chembe/Kibabamshe/ 583,584,585,586,587,588,589,590, 591,592,593. The applicant has filed an application with 47 grounds with a supporting affidavit of 50 paragraphs



but I notice that the facts are not supported by any annexure of what the Applicant claims to be the position. The only annexure is a plaint ELC No 18 of 2021.

27. The court has the discretion to join parties at any time if such parties are necessary parties that will help in the effectual adjudication of the suit and the court is also cognizant of the fact that joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action together with the party being joined and further that it might prove unnecessary or will occasion unnecessary delay or costs on the parties in the suit.
28. In the case of *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another* [2015] eKLR the Court stated as follows when considering whether to grant leave to join a party: -

"Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties."

29. As stated above the Applicant has not established any stake that it has in this case, what has been presented in the affidavit without documentation of the alleged subdivisions, the titles, the allegation that the suit land is nonexistent is not sufficient hence not tenable. The court cannot guess without proof of the allegations.
30. Further this is a very old case which has been in court since 2014 and is at the defence stage. This does not mean that the court cannot join a party as the court has discretion even without a formal application to join a party at any stage if it is of the view that such party is a necessary party who has a stake and will help the court in effectually adjudicating the matter.
31. Parties should also not ride on other parties' claims to cause confusion and complicate matters especially when they want to sanitize their claims which may otherwise fall on the wayside due to Limitation of Actions.
32. The court has looked at the supporting affidavit of the 4th Defendant who annexed the affidavit of the Land Registrar Felix Nyakundi in Misc. Application No. 56 of 2015 where he gave a detailed background of the records of the suit parcel of land. The applicant has not met the threshold for joinder of parties hence the application is unmeritorious. The Applicant has the option of proceeding with its case as filed if it survives the Preliminary Objection raised.
33. On the issue whether the two suits should be consolidated, having found that the application for joinder is unmeritorious, there would be no need to deal with the application for consolidation of the two suits.



34. In the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR the court held as follows: -

"The principles of consolidation of suits are settled. They were best explained in Stumberg and another v Potgeiter as follow: - "Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered." The Supreme Court Case of India in Prem Lala Nahata & v Chandi Prasad Sikaria stated: "...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions, or that for some other reason it is desirable to make an order consolidating the suits"

35. The principles of consolidation of suits were further elaborated in the case of Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR, which was cited with approval in the case of Municipal Council of Mombasa vs - Municipal Council of Mombasa[2004] eKLR wherein the factors were enumerated as follows:-

"the situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -

1. Some common question of law or fact arises in both or all of them; or
2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. For some other reason it is desirable to make an order for consolidating them."

36. The Applicant must establish that there is a common question of law or facts arising in both suits and that the rights claimed arises from the same transaction or a series of transactions. The Applicant has not established that the claim arises from the same transactions as the Applicant failed to produce documentation to support its claim.

37. The court has discretionary power to allow consolidation of suits and in this regard, the court finds that in the interest of justice and due to the complexity of the issues to be determined and further taking into account that the suit was filed 7 years ago which is also at defence stage, this application lacks merit and is dismissed with costs. Parties to fast-track the matter and take a date for defence hearing.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF AUGUST, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

