



**Nyaoni v Mecha (Environment & Land Case 103 of 2021)
[2022] KEELC 14568 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 103 OF 2021
JM KAMAU, J
OCTOBER 26, 2022
(FORMERLY ELC NO. 235 OF 2016 – KISII)**

BETWEEN

ELIAS NYASIMI NYAONI PLAINTIFF

AND

JANE MECHA DEFENDANT

RULING

1. I have been called upon by Ms. Sagwe to consolidate this suit with Nyamira Chief Magistrate Civil Suit No. ELC 15 of 2019 which has now been placed before me. The Defendant made the Application orally in Court. In Nyamira ELC Case No. 103 of 2021 first filed as ELC Case No. 320 of 2016 at Kisii registry before it was transferred to this station, the suit was filed on a date I cannot tell because some of the originating documents lack the rubber stamp of this Court as evidence of having been received by the court, a practice that is now gaining momentum in this court and which must be stopped. However, the Complaint is dated 7/10/2016.
2. On the body of the said Complaint, the Plaintiff, James Rosasi Nyambega claims to be the sole registered proprietor of L.R. No. North Mugirango/bokeira1/2965 measuring approximately 0.037 Hectares. He avers that the Defendants Jane Kemuma Mecha and Edward Mecha who are mother and son respectively, wrongfully, unlawfully and without right or justifiable cause, descended upon the Plaintiff's aforementioned suit property and demolished a house thereat, damaged and carried away assorted items, destroyed building bricks worth Kshs. 5,000/= and crudely snapped out electricity supply to the property leaving power cables hanging dangerously. As a consequence thereof, the Plaintiff suffered special Damages amounting to Kshs. 298,750/=. He therefore sought an order of eviction and a permanent injunction against the Defendants, Special Damages as particularized in the Complaint and interest on the same from the date of the cause of action. He also sought any further orders that the Court may be pleased to award. He listed his witnesses as:



1. The Plaintiff Himself
2. Ombori Migiro
3. Edwin Sogota Nyamira
4. Janet Nyaboke Gichana
5. Rael Otundo, Valuer
6. Any other necessary witnesses.

He sought to rely on the following documents:

1. Demand Letter.
 2. Certificate of Search for LR. No. North Mugirango/bokeira 1/2965.
 3. Title Deed for LR. No. North Mugirango/bokeira1/2965.
 4. Mutation forms for LR. No. North Mugirango/bokeira 1/2904.
 5. Green Cards: -
 - i. For original LR. No. North Mugirango/bokeira1/31
 - ii. For subsequent LR. No. North Mugirango. Bokeira 1/29104.
 6. Ministry of Land's letter of 10/8/2016 to the 1st Defendant (through Area Chief).
 7. Abstract from Police for loss of power meter and cable.
 8. Geomatics services – Surveyor's Report of 30/8/2016 – confirming ground valuation.
 9. Report of Otundo & Associates – Valuers showing loss assessment.
 10. Receipts
 - (i) For Valuation
 - (ii) For Survey
 11. Certificate of Search for LR. No. North Mugirango/bokeira 1/2408 in the name of Robinson Mecha.
 12. Any other necessary and/or further document(s).
3. On 19/12/2016 he framed the following issues for determination: -
1. Whether the Defendants have trespassed onto the plaintiff's land parcel No. North Mugirango/bokeira 1/2965 or any part thereof.
 2. Whether the Plaintiff is entitled to any damages of Kshs. 208,750/= with interest as claimed or at all; and mesne profits for the defendants for wrongful possession and the plaintiff's loss of user thereof.
 3. Whether an order should issue against the defendants, their assigns agents and/or servants jointly and severally evicting them from the plaintiff's land parcel No. North Mugirango/bokeira 1/2965.



4. Whether the defendants, their assigns, agents and/or servants should permanently be restrained from trespassing onto and/or working upon the plaintiff's land Parcel No. North Mugirango/bokeira 1/2965.
4. On 14/2/2018 and on his own volition, Justice Mutungi ordered the case to be transferred to the Chief Magistrate's Court, Kisii and the same was given serial number Kisii ELC No. 32 of 2018. Then on 1/10/2018 the Plaintiff sought for an order of the court to have the said case "withdrawn from Kisii Magistrate's court and transferred to Nyamira Chief Magistrate's Court for hearing and "disposal".
5. On 1/4/2019, this case was forwarded to Nyamira Chief Magistrates' Court and given serial number ELC 15 of 2019 on 3/4/2019 when it was received. It is while the case had been transferred to Nyamira that the Defendants filed their joint Defence denying that they occupy North Mugirango/Bokeira1/2965 but that they occupied the adjoining Parcel Number North Mugirango1/2408 which the Plaintiff wrongly purports to be North Mugirango/ Bokeira1/ 2965 and also that it is the Plaintiff who had been evicted by a court order (Kisii Court) dated 13/6/2016 from Land Parcel North Mugirango/bokeira 1/2408. They concluded by averring that this dispute was resolved and determined by a court of competent jurisdiction in Kisii Chief Magistrate's Civil Suit Number 408 of 2008 where the Plaintiff herein James Rosasi is the Nephew to Alfred Rosasi who was the Defendant. They therefore sought that the suit be dismissed for being Res Judicata and for not disclosing any cause of action. The Defendants also did produce subsequent grounds of opposition as proof of the case they referred to but without pleadings.
6. In the current suit which was commenced in Kisii as case number ELC 235 of 2016 the parties are Elias Nyasimi Nyaonialias Tutias Plaintiff and Jane Mechaas the Defendant, Elias Nyasima Nyaoni is the 2nd Plaintiff in Nyamira CMCC No. E.L. C 15 of 2019 while Jane Mecha is the Defendant and she is described in this suit as the Legal Representative and wife of Robinson Mocha Mabuka who is the registered proprietor of L.R. No. North Mugirango/bokeira 1/408. The Plaintiff says that he is the sole registered proprietor of North Mugirango/bokeira 1/2966 measuring 0.035 Hectares. He avers that the 2 parcels of land share a common boundary. The 2 parcels of land were sub-divisions of North Migirango/bokeira 1/31 and 32 respectively. Reference is made of Kisii CMCC No. 408 of 2008 between the husband to the Defendant against the Plaintiff where eviction orders were made but that in carrying out the eviction orders on L.R. No. North Mugirango/bokeira 1/2408 the Defendants proceeded to the Plaintiff's L.R. No. North Mugirango/bokeira 1/2966 and destroyed a permanent house and other properties thereat without confirming that the eviction orders were carried out on the rightful parcel of land. This was on 6/7/2016 and the eviction order was issued on 13/6/2011. The Plaintiff herein then sought the following prayers:
 - (a) An order evicting the defendants, their assigns, agents and/or servants from the plaintiff's land L.R. No. North Mugirango/bokeira 1/2965.
 - (b) A permanent injunction restraining the defendants jointly and/or severally from by themselves, their assigns, heirs, agents and/or servants trespassing and/or working upon suit land in perpetuity, specials and mesne profits for defendants' wrongful possession and plaintiff's loss of user.
 - (c) Kshs. 208,750/= with interest from date of cause of action.
 - (d) Any such further or other orders as the court may deem fit granting.
7. On 19/11/2018, the Defendant filed a Notice of Preliminary Objection on the following grounds:



1. That the subject matter herein has already been adjudicated upon the Honorable Court vide Kisii CMCC NO. 408 of 2008 *Robinson Mecha Mabuka v Alfred Momanyi Rosasi & 2 Others* hence the same issues cannot be placed before this Honorable Court for determination.
 2. That due to the above facts clearly depict Res Judicata contrary to Section 7 of the *Civil Procedure Act* CAP 21 of the Laws of Kenya since the Defendant herein Jane Mecha is a legal representative of the Estate of Robinson Mecha Mabuka, the decree holder in Kisii CMCC NO. 408 of 2008.
 3. That on the basis of the foregoing grounds, we pray that the instant suit be dismissed with costs to the Defendant.
8. She prayed that the initial suit be dismissed with costs to the Defendant for being Res Judicata contrary to Section 7 of the *Civil Procedure Act*. On 20/3/2019 Justice Mutungi ruled that the issues in this suit are not the same and/or similar to those raised in Kisii CMCC No. 408 of 2008.
 9. Now there is another suit in the lower court that I am called upon to consolidate with the instant suit. The current suit arises from unlawful destruction of buildings on the parcel of land L.R. No. North Mugirango Bosaire 1/2966 and there is a prayer for a Declaration that the land is the property of the Plaintiff. There is also a prayer for Damages. The prayers in the lower court that is sought to be consolidated with the instant suit are for the eviction of the Defendant therein who is also one of the Defendants herein from the Parcel of land L.R. No. North Mugirango/boisare1/2965, a permanent injunction against trespass and Special Damages of Kshs. 208,750/= for destructions that were perpetrated on 7/8/2016. The dates are different and the suit properties are different. The circumstances are also dissimilar.
 10. In my view, an Application to consolidate suits could be made either orally or by a formal Application.
 11. Of course, the *Civil Procedure Act* does not purport to be exhaustive, save on the matters specifically dealt with by it. Section 3 of the Act provides that in the absence of any specific provision to the contrary, nothing in the Act shall be deemed to limit or otherwise affect any special jurisdiction or power conferred or any special procedure prescribed by or under any other law for the time being in force. Therefore, the absence of any provisions on any particular matter does not mean that the court has no power to act in regard to the matter. In this instant circumstance, I am of the view that parties will have to resort to the assistance of section 3A of the *Civil Procedure Act* which reads:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
 12. It is therefore clear that an Application can be made to the court by invoking the exercise of its inherent powers under S.3A if no other remedy is available.
 13. Coming to the Application, first, the issues raised by the applications should be precisely or nearly similar.
 14. From case law and the civil Procedure Rules cited above, the following principles need to be considered when handling consolidation of cases:
 - (i) that the suits should have common questions of law and facts;
 - (ii) the reliefs sought in both cases arise from the same transaction or a series of transactions;



- (iii) whether any party will be disadvantaged or prejudiced or whether consolidation will confer any undue advantage to the other party.
15. In the case of *Korean United Church of Kenya & 3 others v Seng Ha Sang* [2014] eKLR H. I. ONG’UDI J. held:
- “Consolidation of suits is done for the purposes of achieving the overriding objective of the *Civil Procedure Act* that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”
16. In *Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others* [2018] eKLR Nairobi Commercial And Admiralty Division Civil Suit No.547 of 2013 G.L. Nzioka J. quoting the Petition No. 14 of 2013 *Law Society of Kenya v Center for Human Rights and Democracy and 12 Others* [2014] eKLR, the Supreme Court observed as follows: -
- “the essence of consolidation of suits 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 it intended to occasion any disadvantage towards the party that opposes it.”
17. In *Stumberg and Another v Potgeiter* 1970 E.A. 323 the Court stated: -
- “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.”
18. In *Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others* (2014) eKLR it was held that: -
- “...in the circumstances, would it serve the interests of justice to consolidate the appeals in which the parties are the same, and the central issue is the same even if worded differently? The irresistible conclusion is in the affirmative.....”
19. But I feel that the most important test in consolidating 2 suits is the Question as to whether if the two suits were to be tried separately there is a likelihood that the 2 different courts may reach 2 different and embarrassing conclusions.
20. I therefore find that the two suits have common questions of law but the facts are not derived from the same set of circumstances and I decline to consolidate them.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 26TH DAY OF OCTOBER 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Plaintiff: Present in person



Defendant: Present in person

