



**Kituku v Munyi (Environment & Land Case E005 of 2022)
[2022] KEELC 14602 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14602 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E005 OF 2022
A KANIARU, J
OCTOBER 6, 2022**

BETWEEN

ALBANUS MUTUNGA KITUKU APPLICANT

AND

MARCLUS NJUKI MUNYI RESPONDENT

RULING

1. I am called upon to make a determination on a notice of motion dated February 21, 2022 and filed on February 22, 2022. The motion is expressed to be brought under Sections 3A and 18 of the [Civil Procedure Act](#) (Cap 21, laws of Kenya) and all other enabling provisions of the Law.

Application

2. The parties in the application are Albanus Mutunga Kituku, the applicant while Marclus Njuki Munyi is the respondent. The parties appear in the same way or manner in the originating summons.
3. The motion came with three (3) prayers but prayer 1 is now moot. The prayers therefore for determination are as follows:-

Prayer 2: That the Honourable court be pleased to stay the proceedings in Siakago Magistrate Court ELC Misc No. 26 of 2021 Marclus Njuki Munyi Vs Albanus Mutunga Kituku until hearing and determination of this suit or in the alternative.

Prayer 3: Order that Siakago Misc ELC 26 of 2021 be transferred to this court and be consolidated with this case.

4. The application is premised on grounds that the respondent has sued the applicant in a suit in Siakago ELC No. 26 of 2021 to have him compelled to remove a caution over L.R No. Mbeere/Kiambere/4132. The applicant deposes that he placed a caution in order to protect his interest as an



adverse possessor. It was contended that having the two suits running parallel to each other would not be just and fair to the parties. It was contended also that the lower court suit had been filed to frustrate the present suit. The applicant argued he had only been served recently with the pleadings. The suit is accompanied by a supporting affidavit sworn by the applicant, which basically reiterates the grounds in the application.

5. The suit is opposed by the respondent by way of replying affidavit, sworn by him and filed on April 1, 2022. He deposed that he was the registered owner of suit parcel of land Mbeere/Kiambere/4132. He further deposed that he had entered into a sale agreement with the respondent for purchase of his land at a consideration of Kshs. 530,000/= and the applicant was said to have paid Kshs. 55,000/= leaving a balance of Kshs. 475,000/=. The applicant was accused of being in breach of the contract for having failed to pay the balance thus prompting the respondent to file the suit in Siakago to withdraw the caution placed by the applicant on the land.
6. According to the respondent, the applicant had no right to use or claim the suit land as he was in breach of the agreement. With regard to the present suit filed by the applicant on adverse possession, the respondent was of the view that it cannot succeed for the reason that the applicant had entered the land with the consent of the purchaser. This suit has been termed an afterthought, an abuse of the court process, and one that is a waste of judicial time. It was stated that the Siakago suit had been active and it would be prejudicial to halt it.
7. The suit was canvassed by way of written submissions. The applicant filed his submissions on May 6, 2022. Basically, he urged the court to either stay the proceedings in Siakago Misc ELC No. 26 of 2021 or transfer the case and consolidate it with the one presently before the court. He called upon the court to take judicial notice of the fact that the subject matter in the Siakago suit was similar to the one he was claiming as an adverse possessor; that the parties in both suits were the same; that this court had jurisdiction to determine matters on adverse possession and that the Siakago one did not and finally; that both suits were yet to be determined.
8. The applicant relied on the case of *Oceanic Towers Limited vs Hussein Builders* (2021) eKLR which cited with approval the case of *David Kabungu vs Zikarenga & 4 others* Kampala High Court HCC No. 36 of 1995 where it was stated that in the nature of such applications, courts should take into consideration the balance of convenience, the question of expenses, interests of justice, the possibility of hardship, and if in doubt, order a transfer. The court was also urged in its determination to take into account the principles of the overriding objective.
9. The respondent filed his submissions on June 28, 2022. He gave a brief background of the case. He opposed the consolidation of the suit on grounds that the two suits sought different orders to wit; one was for adverse possession and the other for removal of caution. According to him, consolidation of the two suits would greatly prejudice him and would equally amount to an abuse of the court process as the Siakago suit had been active from the year 2021 while the applicant had filed the present suit a whole one year after the Siakago one had been filed. In the circumstances the applicant was termed as a forum shopper.
10. It was argued that the onus was on the applicant to make out a good case to warrant transfer of the suit and the respondent cited Section 18(1) of the *Civil Procedure Rules* to buttress this point. According to the respondent the applicant had not shown the injustice he is likely to suffer to warrant transfer of the Siakago suit before this court. It was further submitted that the applicant had no basis to pursue a suit on adverse possession as he had entered the suit land pursuant to the consent of the respondent but had breached the terms of the agreement. Ultimately the court was urged not to allow the application since



it would confer undue advantage to the applicant. Also, it was said that the suit was an afterthought with an intention of delaying justice.

Analysis and Determination

11. I have considered the application before me, the response by the respondent, and the rival submissions by the parties. From the pleadings by the parties, it is not in dispute that there exists another suit filed by the respondent against the applicant in Siakago Misc ELC No. 26 of 2021. The applicant herein has sought stay of proceedings of that suit or transfer of the suit to this court for purposes of consolidation of the two suits.
12. The undisputed facts in the suit are that the applicant entered into an agreement for purchase of suit parcel of land Mbeere/Kiambere/4132 and the respondent failed to transfer the land to the applicant. It is then that the applicant placed a caution on the land to secure what he terms as his beneficial interest. The respondent on the other hand filed an application by way of notice of motion seeking to have the applicant compelled to remove the caution. That application was filed on April 8, 2021. It is this application that the applicant herein seeks to have stayed pending determination of the present suit or in the alternative, the court to order a transfer or consolidation of the two suits. The suit before me is one for adverse possession by the applicant against the respondent.
13. The first prayer sought is that of stay of proceedings. The essence of the prayer is to temporarily stop the proceedings in the Siakago case pending determination of the suit before me. If the said prayer is allowed it would interrupt the respondent's right to have his case heard. Such an order is only sparingly granted particularly where the applicant can show that the proceedings are frivolous and vexatious or where the respondent cannot possibly succeed in his claim. In *Halsbury's Laws of England*, 4th Edition Vol. 37 page 330 and 332, with regard to stay of proceedings, it states that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

It continues:

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The application for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

14. I have carefully gone through the grounds in support of the application. There is no specific issue raised to warrant this court to find that the suit in Siakago is frivolous, vexatious or hopeless. The applicant has only stated that the suit by the respondent had been filed to frustrate the present suit arguing that he had only been served recently with the pleadings. He also urged the court to take note that the subject matter in both suits was similar and that it involved the same parties as the one in this suit. His other argument is that the court in Siakago had no jurisdiction to entertain a claim on adverse possession while this court had such jurisdiction.



15. I find that the arguments by the applicant are not cogent. To begin with, the application in Siakago was filed on April 8, 2021 while this suit was filed on February 24, 2022. It is evidently clear that the Siakago suit was filed first and the applicant cannot therefore be heard to state that the suit in Siakago was filed to frustrate his suit. The Siakago suit came first. How can it frustrate a suit (this suit) which had not yet been filed?
16. Secondly the applicant has argued that the court in Siakago has no jurisdiction to determine a suit on adverse possession. I wish to state, that the applicant may not entirely be correct in his assertion that the magistrate court does not have jurisdiction to entertain a claim on adverse possession.
17. The law under Section 9 of the *Magistrate's court Act*, confers the magistrates' courts with the requisite jurisdiction to hear and determine land matters that fall within their pecuniary jurisdiction provided the suits are placed before magistrates appointed by the Chief Justice subject to Section 26 of the *Environment and Land Court Act*. This position was well clarified in the case of Patrick Ndegwa Muniyua v Benjamin Kiiru Mwangi & another [2020] eKLR

“The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land.” Let me hasten to add that there is as yet no unanimous jurisdictional position on this issue but the case cited seems to suggest that the lower courts have jurisdiction.

18. There is however the other argument advanced that the parties in both suits are similar and the subject matter is the same. A careful look at both suits shows that the suits though looking different are somewhat intertwined. The first suit instituted by the respondent seeking to lift a caution placed by the applicant over suit parcel of land Mbeere/Kiambere/4132 while in the second suit, the applicant seeks to be recognized as owner of the same suit parcel of land by way of adverse possession.
19. Assuming the first suit is determined in the respondent's favour and the caution is lifted, there is a possibility of the suit land being transferred to a third party. Though the interest acquired by the third party would be subject to any overriding interests acquired by the applicant, there is still the danger of the applicant being evicted from the suit land before his suit on adverse possession is determined. Even then, I think an order for stay of proceedings would not be tenable in the circumstances as both parties have a right to have their matter determined without interruption. I have already stated that the applicant has not met the threshold for stay of proceedings.
20. I now consider the alternative prayer for transfer and consolidation of the suit. Consolidation of suits is considered where the parties in the suit are the same, the witnesses are likely to be the same, the representation by advocates is the same, and the issues arise from the same transaction.
21. The purpose of consolidating suits was discussed in the case of *Arnold Kipkirui Langat v Atticon Limited & 7 others* [2021] eKLR which cited with approval the case of *Prem Lala Nahata & Anor vs Chandi Prasad Sikaria* [2007] 2 Supreme Court Cases 551, where the Indian Supreme Court stated as follows:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases....
The main purposes 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 or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

22. Equally, the court in the case of *Korean United Church of Kenya & 3 others -v- Seng Ha Sand* (2014) eKLR observed as follows:-

“Consolidation of suits is done for 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 of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

23. The two suits referred to in the pleadings are between the applicant and the respondent. The suit is in relation to the same subject parcel of land. The respondent in filing the Siakago suit seeks to assert his ownership over the land while the applicant herein also seeks ownership over the land by way of adverse possession. I find that the two suits ought to be consolidated to ensure the issues by the parties are determined to finality. This will in save the court’s it’s precious time, save the parties time and expenses in defending the separate suits and eventually determine the matter to finality being that it arises from the same transaction.
24. I hereby make a finding that the application has partly succeeded in terms of prayer 3 of the application. The suit in Siakago Misc Application 26 of 2021 be transferred to this court and it be consolidated with the suit herein. The lead file shall be the Embu ELC No. E005 of 2022 which is the present suit. With regard to costs of suit, I find that the applicant has not prayed for the same and I therefore make no orders as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF OCTOBER, 2022.

A.K. KANIARU

JUDGE

06.10.2022

